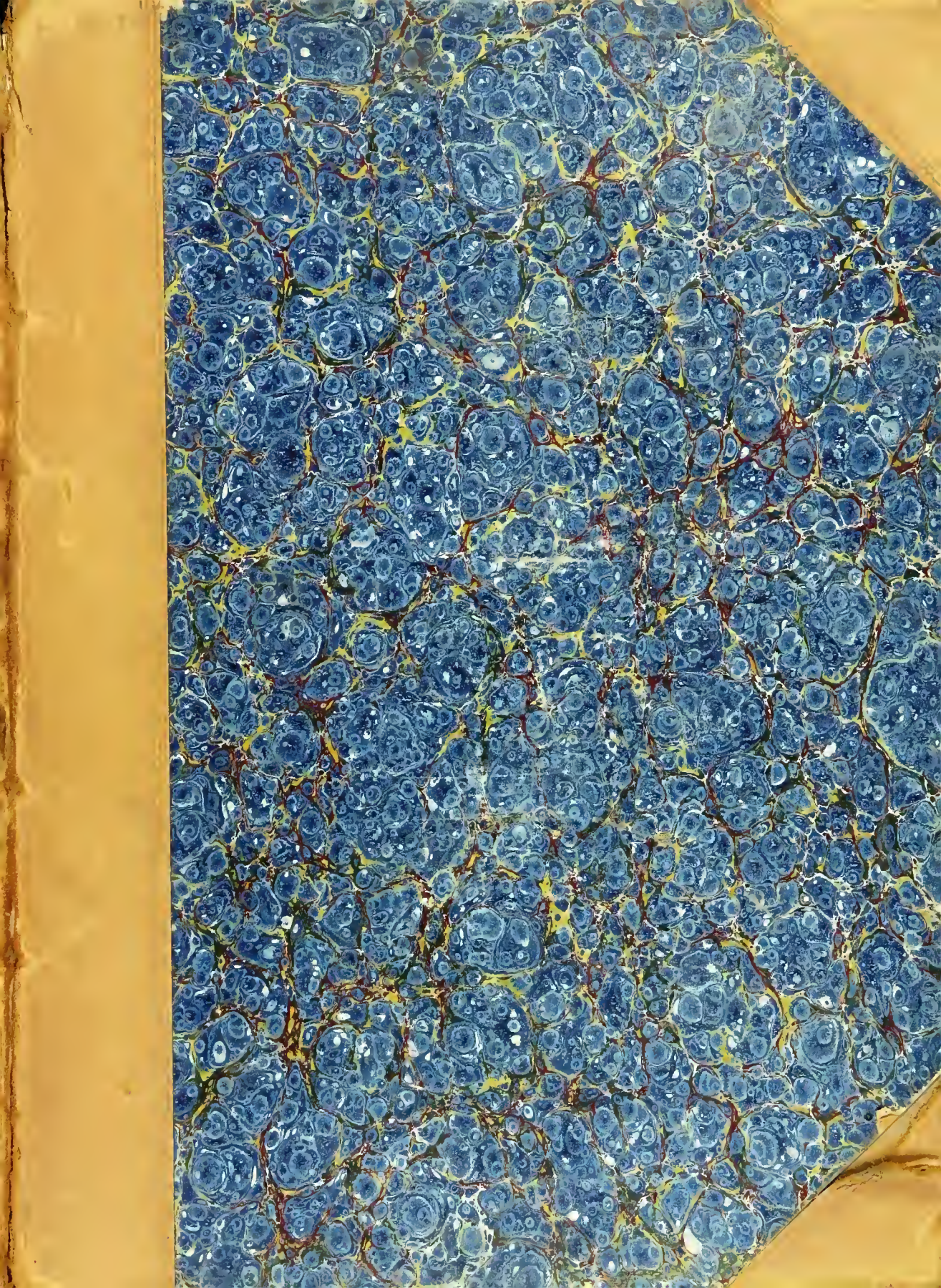

N. C Moak

AN

# ANALYTICAL DIGEST

OF THE CASES PUBLISHED IN THE

**NEW SERIES OF THE**

# LAW JOURNAL REPORTS

AND

## Other Reports

IN THE

COURTS OF COMMON LAW AND EQUITY,
AND APPEAL IN BANKRUPTCY,

IN THE HOUSE OF LORDS,
IN THE COURT OF PROBATE,
THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES,
AND IN THE HIGH COURT OF ADMIRALTY,

FROM MICHAELMAS TERM 1860 TO TRINITY TERM 1865
INCLUSIVE.

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BY FRANCIS TOWERS STREETEN, ESQ.
AND
EDWARD ALFRED HADLEY, ESQ.
BARRISTERS-AT-LAW.

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# LIST OF THE ABBREVIATIONS

## IN THIS DIGEST.

| *Abbreviations.* | *Reports.* | *Courts.* |
|---|---|---|
| Beav. | Beavan's Reports | Chancery. |
| Bell C.C. | Bell's Crown Cases | Crown Cases Reserved. |
| Best & S. | Best and Smith | Queen's Bench. |
| Com. B. Rep. N.S. | Common Bench Reports, New Series | Common Pleas. |
| De Gex, F. & J. | De Gex, Fisher and Jones | Chancery. |
| De Gex, J. & S. | De Gex, Jones and Smith | Chancery. |
| Dr. & Sm. | Drewry and Smale | Chancery. |
| E. & E. | Ellis and Ellis | Queen's Bench. |
| Giff. | Giffard | Chancery. |
| Hem. & M. | Hemming and Miller | Chancery. |
| H.L. Cas. | House of Lords Cases | House of Lords. |
| Hurls. & C. | Hurlston and Coltman | Exchequer. |
| Hurls. & N. | Hurlston and Norman | Exchequer. |
| Jo. & H. | Johnson and Hemming | Chancery. |
| Law J. Dig. | Law Journal Digest. | |
| Law J. Rep. (N.S.) Chanc. | Law Journal Reports, New Series. | Chancery. |
| Law J. Rep. (N.S.) Prob. & M. | ——— —— | Probate and Divorce. |
| Law J. Rep. (N.S.) Prob. M. & A. | ——— —— | Probate, Divorce and Admiralty. |
| Law J. Rep. (N.S.) Bankr. | ——— —— | Bankruptcy. |
| Law J. Rep. (N.S.) Q.B. | ——— —— | Queen's Bench. |
| Law J. Rep. (N.S.) C.P. | ——— —— | Common Pleas. |
| Law J. Rep. (N.S.) Exch. | ——— —— | Exchequer. |
| Law J. Rep. (N.S.) M.C. | ——— —— Magistrates' Cases. | Queen's Bench, Common Pleas and Exchequer. |
| Law J. Stat. | Law Journal Statutes | Statutes of the Realm. |
| L. & C. | Leigh and Cave | Crown Cases Reserved. |
| Lush. Adm. Rep. | Lushington | Admiralty. |
| Swab. & T. | Swabey and Tristram | Probate and Divorce. |

# TABLE OF TITLES.

*ADDENDA.*

AN

# ANALYTICAL DIGEST

OF THE

## CASES REPORTED AND PUBLISHED

## From Trinity Term 1860 to Michaelmas Term 1865,

AND CONTAINED IN

## THE LAW JOURNAL REPORTS,

## And other Contemporary Reports;

WITH

REFERENCES TO STATUTES PASSED WITHIN THE SAME PERIOD.

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### ABDUCTION.

What constitutes the Crime.

*Girl under sixteen: see* 24 & 25 *Vict. c.* 100. *s.* 55.

The prisoner induced an unmarried girl under sixteen years old to leave her father's house, and meet him by appointment, without her father's consent. The prisoner and the girl cohabited three days and nights, and then parted by consent, and the girl returned home. The jury found the prisoner guilty, and that he took the girl away with him in order to gratify his passions, and then to allow her to return home, but not with the view of keeping her from her home permanently:—Held, that there was sufficient evidence for the jury to warrant the conviction. *R.* v. *Timmins,* 30 Law J. Rep. (N.S.) M.C. 45; Bell's C.C. 276.

*Of a woman on account of her fortune: see* 24 & 25 *Vict. c.* 100. *s.* 53.

A girl between the ages of sixteen and twenty-one years, entitled to a present interest in landed property, was sent to school by her surviving parent, her mother, who had married again. On returning from school for her Christmas holidays, the girl wished to remain at her mother's and step-father's, but her mother insisted on the girl abiding by an agreement she had made previously, that when she came back at Christmas she should reside at her grandmother's, who lived in the same town with the mother. The mother in consequence refused to allow the girl to stay with her. The girl on this, instead of going to her grandmother's, went to the house of H R B, an uncle, and remained with him thence until the 19th of the following January, visiting her mother daily. The latter, when she discovered where her daughter was residing, desired her to come back to her house; but the girl did not go back. On the 19th of January above mentioned, F B, another uncle of the girl, allured her and took her away with intent to marry her, aided by H R B, and in fact F B actually married her. F B was indicted for fraudulently alluring, taking away, and detaining the girl out of the possession of her mother with intent to marry her, and H R B was indicted for aiding F B in committing the felony. It was alleged on the part of the prosecution, but denied by the prisoners, that on these facts there was sufficient evidence that F B fraudulently allured and took and detained the girl, and that F B took her out of the possession of her mother:—Held (the Court intimating that there was no difference of opinion on any question of law), by the majority of the Judges, that the circumstances proved were not in point of fact sufficient to establish that the accused had committed the crime charged in the indictment. *R.* v. *Burrell,* 33 Law J. Rep. (N.S.) M.C. 54; 1 L. & C. 354.

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### ABORTION.

Supplying Drugs to procure.

[See 24 & 25 Vict. c. 100. s. 59.]

(*a*) *Indictment for Murder.*
(*b*) *Drug must be of a Noxious Character.*
(*c*) *Where the Woman does not intend to use the Drug.*

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(*a*) *Indictment for Murder.*

The prisoner, at the request of a pregnant woman, who wished to procure abortion, obtained for her a

poisonous drug. He knew the purpose for which she wanted it, but though he gave it to her for that purpose, he was unwilling that she should use it, and he did not administer it to her, or cause her to take it. She, however, took it for the purpose assigned, and died in consequence:—Held, that the prisoner was not liable to be convicted on an indictment charging him with the murder of the woman. *R.* v. *Fretwell*, 31 Law J. Rep. (N.S.) M.C. 145; 1 L. & C. 161.

(*b*) *Drug must be of a Noxious Character.*

To justify a conviction of a person charged by an indictment under the statute 24 & 25 Vict. c. 100. s. 59. for supplying a noxious thing knowing that the same was intended to be used with intent to procure a miscarriage, the drug supplied must be of a noxious character. It is not sufficient that, though harmless in itself, it might, if taken under a belief that it would procure miscarriage, by acting on the imagination produce that result. *R.* v. *Isaacs*, 32 Law J. Rep. (N.S.) M.C. 52; 1 L. & C. 220.

(*c*) *Where the Woman does not intend to use the Drug.*

If a person procure or supply any poison or other noxious thing with intent to procure the miscarriage of any woman, it is not necessary to constitute an offence under the 24 & 25 Vict. c. 100. s. 59. that the woman herself should intend to use the drug, or that any other person than the one who procured it should intend that it should be used for the purpose of causing a miscarriage. *R.* v. *Hillman*, 33 Law J. Rep. (N.S.) M.C. 60; 1 L. & C. 343.

## ACCESSORY.

The law relating to accessories and abettors of indictable offences consolidated and amended by 24 & 25 Vict. c. 94.

[See LARCENY.]

## ACCORD AND SATISFACTION.

[See LIBEL.]

## ACCOUNT.

[See TRADE MARK.]

(A) WHEN AN ACCOUNT WILL BE DECREED IN EQUITY.
(B) TAKEN IN EQUITY—SETTLED ACCOUNTS.

### (A) WHEN AN ACCOUNT WILL BE DECREED IN EQUITY.

A purchase being set aside, subject to the usual accounts of purchase-money and rents and profits, the Lords Justices considered that, on the balance of authority, the purchaser must be ordered to account for such sums as, but for his wilful default, he might have received, though the bill neither charged wilful default nor prayed relief in respect of the same. *Adams* v. *Sworder*, 33 Law J. Rep. (N.S.) Chanc. 318; 2 De Gex, J. & S. 44.

There is no rule that an author may not file a bill for an account against his publisher; but in simple cases, which can be dealt with by a Court of law, this Court will not assume jurisdiction, or interfere with an action to recover a balance of account. *Barry* v. *Stevens*, 31 Law J. Rep. (N.S.) Chanc. 785; 31 Beav. 258.

Where, therefore, an author filed his bill to restrain an action brought by his publishers to recover the balance of account, including the cost of printing and paper, a demurrer for want of equity was allowed. Ibid.

Demurrer to a bill, alleging that the defendants had received moneys on behalf of the plaintiff, of which he could obtain no account without discovery, allowed with costs. *Hemings* v. *Pugh*, 4 Giff. 456.

Where the relation between a principal and agent partakes of a fiduciary character, this Court has jurisdiction, and will direct an account, though the receipts and payments are all on one side. Ibid.

Demurrer to a bill seeking a discovery, and an account of goods sold by the defendant, on the price of which the plaintiff was entitled to a commission, overruled with costs. *Shepard* v. *Brown*, 4 Giff. 208.

As a general rule a bill for an account lies in equity by a principal against his agent, the fiduciary character of the relation between the parties being sufficient to support the bill. *Makepeace* v. *Rogers*, 34 Law J. Rep. (N.S.) Chanc. 396.

A bill by a landowner and principal against his receiver and agent, alleged the receipt by the latter of rents, purchase-moneys of real estates, and dividends on stock and shares, and charged possession of documents belonging to the principal. An account and delivery of the documents were prayed. Demurrer to the bill overruled, both by the *Vice Chancellor Stuart*, and, on appeal, by the *Lords Justices*, with costs. Ibid.

Per the *Lords Justices*—The prayer for the delivery of documents would of itself have been sufficient to sustain the bill. Ibid.

*Phillips* v. *Phillips* (9 Hare, 471; s. c. 2 Law J. Rep. (N.S.) Chanc. 141) explained. Ibid.

The plaintiffs, in 1855, engaged the defendant as their traveller to obtain orders and collect moneys at a salary, the plaintiffs paying all travelling expenses. After each journey the defendant rendered an account and paid over the balance appearing to be due from him. The travelling expenses were charged in the accounts as so many days' travelling expenses, without giving any particulars. No objection was made to the accounts, and they were entered in the plaintiffs' books. This went on till April, 1861, when the defendant gave the plaintiffs six months' notice of his intention to leave their service. The plaintiffs, in July, 1861, gave him notice to keep a detailed account of his travelling expenses; but, notwithstanding this, his subsequent accounts were prepared on the same footing as the former ones, and were dealt with in the same way down to October, 1861, when he left the plaintiffs' service. The defendant having sent in a claim for salary, the plaintiffs served him with a counter claim, which, however, did not raise any questions as to his accounts:—Held, that a bill by the plaintiffs against the defendant for an account could not be maintained. *Hunter* v. *Belcher*, 2 De Gex, J. & S. 195.

Per the *Lord Justice Turner*—Where accounts

have been rendered, the balances appearing due upon them paid, and the accounts entered in the books of the persons to whom they have been delivered, and a subsequent account has been rendered by those persons raising no question as to the accounts which have been delivered, those accounts must be treated as settled. Ibid.

Per the *Lord Justice Turner*—From the course of dealing between the parties, an agreement that the travelling expenses should be charged in a gross sum, without giving particulars, was to be implied, which agreement the plaintiffs could not determine by their notice of July, 1861. Ibid.

An agreement was entered into between K and P that K should take out a patent for purifying paraffine and assign it to P; that P thereupon should work it for fourteen years, if it could be so long worked at a profit, should not purify paraffine by any other process, and would pay to K a royalty upon all purified paraffine sold. That P should keep accurate accounts of all paraffine purified according to the patent, render them half-yearly and verify them, and that the provisions of this agreement and all other provisions usual and proper in such deeds should be incorporated in the deed of assignment of the patent, such deed to be prepared by counsel to be agreed on by the solicitors of the parties. The patent was taken out, and P commenced working under it, but shortly afterwards abandoned the use of the process, alleging that it could not be worked at a profit, and refused to pay any royalty. K thereupon brought an action at law for royalties, and recovered judgment. Pending this action, P gave notice to determine the agreement, because the invention could not be worked at a profit. K, after obtaining judgment, filed his bill, asking for an account of subsequent royalties, an injunction to restrain the defendant from purifying paraffine under any other process, and for a reference to chambers to settle a proper deed of assignment; or if the Court should hold the agreement to have been determined, then for relief against the defendant as an infringer of the patent:—Held, by the *Lord Justice Turner*, that in a case of this nature it was in the discretion of the Court, whether it would direct an account or leave the parties to their remedy at law, and that, in the present case, the account being only a part of an agreement which the Court could not wholly enforce, the plaintiff ought to be left to his remedy at law; and that, for the same reason, the execution of the assignment ought not to be decreed. *Kernot* v. *Potter*, 3 De Gex, F. & J. 447.

The defendants, a mercantile firm, employed the plaintiff as their traveller and agent, under an agreement that he should receive a commission of 7*l.* 10*s.* per cent., and an allowance of 3*l.* 10*s.* per cent. on all orders received from his friends, first introduced by him. Disputes having arisen between the parties, the plaintiff filed his bill, praying for an account of this commission and allowance; but not even alleging any mutuality or complexity of accounts:—Held (reversing a decision of one of the Vice Chancellors), that as the case presented was merely one of contract on the part of the defendants to pay a certain commission, the proper remedy of the plaintiff was by an action at law, and that the bill must be dismissed, with costs. *Smith* v. *Leveaux*, 33 Law J. Rep. (N.S.) Chanc. 167; 2 De Gex, J. & S. 1.

(B) TAKEN IN EQUITY—SETTLED ACCOUNTS.

H & Co. were in the receipt of the rents of leasehold property as agents of P. In 1834 P died intestate. In 1838 H & Co. rendered to his daughter an account to which some objections were taken by her, which were answered, and no replies made to the answers. In 1845 the daughter took out administration to P, and, in 1852, filed a bill against H & Co. for an account:—Held, that the account must be treated as a settled account, and that the bill could not be sustained. *Parkinson* v. *Hanbury*, 2 De Gex, J. & S. 450.

Property being put up for sale by a first mortgagee, was bought by a second incumbrancer, to whom the equity of redemption had been conveyed on trust for sale, on default in payment of his debt. This sale having been set aside at the suit of the representative of the mortgagor,—Held, that the possession of the purchaser was to be referred to the character of trustee, and that the account of the rents received by him was not, of course, to be on the footing of wilful default. Ibid.

The usual accounts of personal estate not specifically bequeathed had been directed in an administration suit. Ultimately the costs of all parties, as between solicitor and client, were paid out of a specific legacy, in the absence of the specific legatee. In a subsequent suit instituted by the specific legatee for her legacy, liberty was given to her to surcharge and falsify the accounts, and the plaintiff's costs were directed to be allowed, as between party and party. *Walrond* v. *Walrond*, 29 Beav. 586.

## ACCOUNT STATED.

An I O U, not given in acknowledgment of a debt due, nor as the result of an account stated between the parties, is not evidence under a count on an account stated. *Lemere* v. *Elliott*, 30 Law J. Rep. (N.S.) Exch. 350; 6 Hurls. & N. 656.

It was verbally agreed that the plaintiff should sell and the defendant buy the plaintiff's business, lease, stock-in-trade and fixtures, the plaintiff to introduce the defendant to his customers, and instruct him in his business, the defendant giving his I O U for 25*l.* to the plaintiff on account. The plaintiff, in pursuance of this agreement, did afterwards introduce the defendant to his customers and instruct him in his business, but the defendant refused to complete the purchase:—Held, in an action to recover the 25*l.* for which the I O U was given, the declaration being a count on an account stated, and plea, the general issue, that on these facts the plaintiff was rightly nonsuited. Ibid.

The plaintiff, who owed money to the defendants, gave them an equitable mortgage upon certain land which he had purchased, and which he had partially paid for. He entered into other contracts to do work for the defendants, and W was employed by both parties to value the work done. At a meeting of the plaintiff, the defendants and W, it was agreed that the plaintiff owed the defendants 111*l.*, while the defendants owed him 67*l.* The value of the plaintiff's interest in the land being 70*l.*, the defendants agreed to take such interest at that sum, and in the result it was agreed that the balance due to the

plaintiff would be 22*l.* There was no memorandum in writing as to the purchase of the plaintiff's interest, nor as to the payment of the balance of 22*l.*; but the defendants sold the land:—Held, that the arrangement between the parties amounted to the statement of an account, and that the plaintiff was entitled to recover the balance of 22*l.* in an action upon an account stated. *Laycock* v. *Pickles*, 33 Law J. Rep. (N.S.) Q.B. 43; 4 Best & S. 497.

## ACKNOWLEDGMENT.

[Of Deeds by Married Women—See FINES AND RECOVERIES ACT. And see LIMITATIONS, STATUTE OF.]

## ACQUIESCENCE.

A B and C D occupied adjoining houses, and C D, intending to erect a glass-room as a photographic studio on a portion of his premises, called on A B and informed him of his intention, pointing out the situation, &c., but this was done after dark on a spring evening. He also said he had a plan of the erections and a contract for their performance. A B made no objection, being, as he alleged, under the impression that the new buildings were to be in a different situation, but never made further inquiries, nor asked to see the plan. C D commenced his preparations eleven days afterwards, and about a week later commenced the actual building. About a week after this A B discovered his mistake as to the position of the new buildings, and four days later wrote to C D to desist, and threatened proceedings in the Court of Chancery if compliance were refused. Eight days afterwards, and when the buildings were nearly complete, A B filed a bill against C D:—Held, on appeal, by the *Lords Justices* (dissenting from *Wood, V.C.*), that there was no such acquiescence as would deprive A B of his right to relief. *Johnson* v. *Wyatt*, 33 Law J. Rep. (N.S.) Chanc. 394; 2 De Gex, J. & S. 18.

*Semble*—A stronger case of acquiescence is requisite to debar a plaintiff from relief at the hearing of a cause than to disentitle him to an interlocutory injunction. Ibid.

O, a builder, contracted to build a house within a given time, under certain conditions, one of which was, that if the building did not progress as the architect might consider necessary, he, the architect, might purchase such materials and employ such workmanship as he might consider necessary, and deduct the costs of the same from any moneys due to the contractor on account of the works. After a portion of the work had been done and paid for, the architect refused to certify for further payments, on the ground of delay and the want of supply of proper materials. The builder's workmen not being paid, they became clamorous, and accompanied O to the architect's office, and O then, after remonstrating, signed an agreement giving up the contract, in consideration of 50*l.* then paid to him, and stipulating that the works should be paid for according to the valuation of an arbitrator named in the agreement. The arbitrator proceeded with the valuation, and was attended by O; but after the valuation was made, awarding O a less sum than he alleged to be proper, O filed his bill to set aside the agreement, as having been obtained by undue pressure. One of the Vice Chancellors made a decree in the plaintiff's favour; but, upon appeal, this decision was reversed, on the ground that O had confirmed the agreement by acting upon it, and was therefore not entitled to relief. *Ormes* v. *Beadel*, 30 Law J. Rep. (N.S.) Chanc. 1.

If a voidable contract is voluntarily acted upon by a party to it, with a knowledge of all the facts, he cannot avoid it when the result has turned out to his disadvantage. Ibid.

Acquiescence without full and sufficient knowledge and understanding of the circumstances of the case, in respect of which such acquiescence is alleged to be a bar, cannot be of any avail. *Prideaux* v. *Lonsdale*, 32 Law J. Rep. (N.S.) Chanc. 317; 1 De Gex, J. & S. 433.

## ACTION.

[See ESTOPPEL—MASTER AND SERVANT—NEGLIGENCE—PARTIES—PRACTICE, AT LAW.]

(A) WHEN MAINTAINABLE.
- (*a*) *For Injuries the Subject of Foreign Penal Laws.*
- (*b*) *Against a Foreigner.*
- (*c*) *For Assault committed in Foreign Country.*
- (*d*) *On a Foreign Judgment.*
- (*e*) *Against Public Commissioners for Negligence.*
- (*f*) *Against Directors of a Company on Implied Warranty of Authority to sell.*
- (*g*) *Against Trustees of Turnpike-Road for Negligent Execution of Works under Turnpike Act.*
- (*h*) *Against Process-Server for not indorsing Day of Service on Writ.*
- (*i*) *By a Physician for his Fees.*
- (*k*) *Against Surveyor of Highways for Neglect to repair Highway.*
- (*l*) *By Holder of Negotiable Instrument.*
- (*m*) *For using Trade Mark.*
- (*n*) *For keeping Diseased Sheep.*
- (*o*) *By Reversioner of Chattel.*
- (*p*) *Exclusive Right of letting Pleasure-Boats.*

(B) NOTICE OF ACTION.
- (*a*) *Form and Sufficiency of.*
- (*b*) *Who entitled to.*
- (*c*) *Thing done in Pursuance of Act of Parliament.*

(C) FORM OF ACTION [See MONEY COUNTS].

### (A) WHEN MAINTAINABLE.

[See LANDS CLAUSES CONSOLIDATION ACT.]

(*a*) *For Injuries the Subject of Foreign Penal Laws.*

If by the laws of a foreign State there be a civil remedy for a wrong done there, the fact, that by those laws criminal proceedings must precede the civil remedy there, constitutes no bar or defence to an action in this country. *Scott* v. *Seymour*, 31 Law J. Rep. (N.S.) Exch. 457; 1 Hurls. & C. 219.

To an action for assault and false imprisonment the defendant pleaded, except as to the imprisonment, that the trespasses were committed out of the jurisdiction of the Court, to wit, at Naples, that the plaintiff and the defendant resided there, and while there, proceedings were taken by the plaintiff in the Court of the circuit of the Chiaja in Naples, according to the articles of the penal procedure laws of that country; and that according to the laws of that country the defendant was not liable to be sued by the plaintiff in any civil action, or other proceedings, to recover damages for the alleged trespasses, nor liable to any other proceedings in respect of the trespasses, except those taken and instituted under the laws aforesaid, and which were still pending and undetermined in the said Court at Naples. The defendant also pleaded, secondly, except as to the imprisonment, a similar plea of proceedings in the Court of the circuit of the Chiaja, and that according to the laws of the country the defendant was not liable to be sued by the plaintiff, and that he could not recover any damages in a civil action or other proceeding for the trespasses until the defendant had been condemned and found guilty of those trespasses or some part thereof, and which said proceedings were still pending and undetermined; and, thirdly, to the imprisonment, alleging that by the laws of the country the defendant was liable to certain penal proceedings for the imprisonment if not authorized by the law of the country; and that by the law of that country no civil action or other proceedings could be maintained to recover damages until after the defendant had been condemned and found guilty in such penal proceedings, and that no such proceedings had been instituted:—Held, on demurrer, that neither plea afforded any answer to the action; for that it was consistent with the first plea that by the proceedings there mentioned a compensation in damages was recoverable, and that the pendency of such civil proceedings would not afford any bar to the action in this country; and that the other pleas did not afford any answer, because they admitted that a civil remedy did exist, and the necessity for taking previous criminal proceedings was a matter of procedure only. Ibid.

*(b) Against a Foreigner.*

The defendant, a merchant resident in Norway, and not a British subject, drew in Norway his bill of exchange at four months on E in this country, and after indorsing it to the order of D, sent it by post to D in London, who indorsed it to the plaintiff in London:—Held, that there was not a cause of action which arose in this country nor a breach of a contract made within it, and that therefore the plaintiff could not sue the defendant in this country on the bill under sections 18. and 19. of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. *Sichel* v. *Borch*, 33 Law J. Rep. (N.S.) Exch. 179; 2 Hurls. & C. 954.

*(c) For Assault committed in Foreign Country.*

It is no bar to an action in this country for an assault and false imprisonment committed by one Englishman upon another at Naples that, by the law of Naples, no proceeding to recover damages for the trespasses could be maintained by the plaintiff, until after the defendant had been found guilty and condemned by the criminal tribunal at Naples, before which he had been arraigned, in respect thereof; nor is it any bar to such action for the assault that, by the law of Naples, damages in respect of it could only be recovered in one particular form of proceeding, which had been commenced and was still pending. *Scott* v. *Seymour* (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 61; 1 Hurls. & C. 219.

*Quære*—Whether, if by the Neapolitan law no damages were recoverable at all for such trespasses, that law could be pleaded as a defence to the action here?—Per *Wightman, J.*, that it could not. Ibid.

*(d) On a Foreign Judgment.*

To an action on a foreign judgment, it is no answer that the defendant became a party to it merely to prevent his property being seized, and that the judgment is erroneous in fact and in law on the merits, whether the plea alleges that the error does or does not appear on the face of the judgment; nor can the defendant plead that the enforcement of the judgment in England is contrary to natural justice, on the ground that the defendants had discovered fresh evidence shewing that the judgment is erroneous in fact and law on the merits, or that evidence was improperly admitted. *De Cosse Brissac* v. *Rathbone*, 30 Law J. Rep. (N.S.) Exch. 238; 6 Hurls. & N. 301.

*(e) Against Public Commissioners for Negligence.*

Commissioners under the "Towns Improvement Clauses Act, 1847," are liable to an action, in their corporate capacity, at the suit of a person who has suffered damage from a highway, within the limits of the defendants' special act, being allowed by them to remain in a dangerous condition. *Hartnall* v. *the Ryde Commissioners*, 33 Law J. Rep. (N.S.) Q.B. 39; 4 Best & S. 361.

Section 52. of the "Towns Improvement Clauses Act, 1847," imposes on the commissioners elected under the act the duty of fencing footpaths, if needed for the protection of passengers, and leaves them no discretion:—Held, that such commissioners are therefore liable, in their corporate capacity, to an action at the suit of a person injured by their negligent omission to fence a footpath; and the commissioners are liable in such a case, without it being shewn affirmatively that they have funds, or the means of raising funds, wherewith to pay damages. *Ohrby* v. *the Ryde Commissioners*, 33 Law J. Rep. (N.S.) Q.B. 296; 5 Best & S. 743.

By an act of parliament drainage commissioners were to make and maintain a sluice for the discharge of the drainage waters, and owing to the negligence of the persons employed by the commissioners for the purpose, being apparently competent, the sluice burst, and damage was caused to the neighbouring land:—Held, by *Cockburn, C.J.* and *Mellor, J.*, that the commissioners were not liable to an action in their corporate capacity, inasmuch as they were persons intrusted with a public duty and discharged it gratuitously, and took themselves no part in the actual performance of it, and had been guilty of no personal negligence, and had no funds at their disposal out of which the damages could be paid. By *Blackburn, J.*, that, there being an absolute duty cast upon the commissioners of maintaining the

sluice, they were liable for the damage caused by the negligent performance of that duty. *Coe* v. *Wise*, 33 Law J. Rep. (N.S.) Q.B. 281; 5 Best & S. 440.

(*f*) *Against Directors of a Company on Implied Warranty of Authority to sell.*

The deed of settlement of a joint-stock company declared its business to be "to build or purchase, and own or hire, iron steam-vessels, and to use or let upon hire the same for the purpose of transport of coals or other merchandise from any port or ports of the United Kingdom or elsewhere, to any other port or ports of the United Kingdom or elsewhere"; and the powers of the directors were defined to be, amongst other things, "the building or purchasing or hiring of such steam-vessels as they should see fit," "the selling and letting to hire and chartering of the vessels," "the general conduct and management of the business of the company," and "the controlling, managing and regulating in all other respects, except as by those presents otherwise provided, of all matters relating to the company and the affairs thereof." The directors, thinking it expedient to sell all the company's vessels, employed the plaintiffs, shipbrokers, to procure a purchaser. The plaintiffs accordingly negotiated with C for a sale upon the terms fixed by the directors. The negotiation, however, went off, upon an objection urged by C's solicitor that the directors had no power to sell the whole of the vessels, except in the event of the winding up of the company with the consent of the shareholders, which had not been obtained:—Held, that the plaintiffs were not entitled to maintain an action against the directors upon an implied warranty that they had authority to sell, which, in point of fact, they had not. *Wilson* v. *Miers*, 10 Com. B. Rep. N.S. 348.

*Quære*—as to measure of damages in such a case, if the action had been maintainable? Ibid.

(*g*) *Against Trustees of Turnpike-Road for Negligent Execution of Works under Turnpike Act.*

The trustees of a turnpike-road converted an open ditch, which used to carry off the water from the road, into a covered drain, placing catchpits with gratings thereon to enable the water to enter the drain. Owing to the insufficiency of such gratings and catchpits, the water, in very wet seasons, instead of running down the ditch as it formerly did before the alterations by the trustees, overflowed the road, and made its way into the adjoining land, and injured the colliery of the plaintiff:—Held, that the trustees were liable for such injury, if they were guilty of negligence in respect of such gratings and catchpits. *Whitehouse* v. *Fellowes*, 30 Law J. Rep. (N.S.) C.P. 305; 10 Com. B. Rep. N.S. 765.

Held, also, that a fresh damage to the plaintiff's colliery occasioned by the trustees continuing such insufficient gratings and catchpits was a distinct cause of action; and that, therefore, an action brought in respect of it within three months from the time of such fresh damage, although after more than three months from the first damage, was not defeated by the General Turnpike Act, 3 Geo. 4. c. 126. s. 147, which limits the action against such trustees to "three months after the fact committed." Ibid.

(*h*) *Against Process-Server for not indorsing Day of Service on Writ.*

There is no absolute duty on the part of a process-server, arising from the mere delivery of a writ of summons for service, to indorse on the writ the day of service, as required by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 15. To render the server liable to an action for omitting to make such indorsement, there must have been some request expressed or implied to him to make the indorsement. *Curlewis* v. *Broad*, 31 Law J. Rep. (N.S.) Exch. 473; 1 Hurls. & C. 322.

The declaration alleged that the defendant was a process-server, and that the plaintiff issued a writ of summons against W, and retained and employed the defendant, as such process-server, to serve the writ according to the provisions of the Common Law Procedure Act, 1852, for reward, and delivered the writ and copy to him for that purpose; and the defendant, as such process-server, accepted such retainer and employment, and received the writ for the purpose aforesaid; and thereupon the defendant, as such process-server, in consideration of the premises, promised the plaintiff, that in case he should serve the writ, he would perform his duty in that behalf. Averment of service and of conditions precedent to entitle the plaintiff to have the defendant to do and perform his duty. Breach, that the defendant did not do or perform his duty in this, that he did not, nor would within three days after service of the writ, indorse thereon the day of the month and week of such service, as required by the act, and as he ought to have done, by reason whereof the plaintiff was prevented from signing final judgment, and the proceedings in the action became futile and unavailing. Plea, that the defendant, before and at the time of the alleged employment, was not retained, or employed, or instructed in any way to indorse on such writ of summons the time of service thereof, as required by the 15th section of the Common Law Procedure Act, 1852; and that he never was at any time retained or employed by the plaintiff, or any other person for him, to do more than serve the writ, and was not at any time requested or directed to make such indorsement:—Held, on demurrer, that the plea answered the declaration. Ibid.

(*i*) *By a Physician for his Fees.*

"The Medical Act" (21 & 22 Vict. c. 90.) gives a physician who is registered under the act a legal right to recover fees without a special agreement for remuneration. *Gibbon* v. *Budd*, 32 Law J. Rep. (N.S.) Exch. 182; 2 Hurls. & C. 92.

(*k*) *Against Surveyor of Highways for Neglect to repair Highway.*

No action lies against a surveyor of highways, appointed under the 5 & 6 Will. 4. c. 50, for damage resulting from an accident caused by his neglect to repair the highway. So held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer (31 Law J. Rep. (N.S.) Exch. 250; 7 Hurls. & N. 760). *Young* v. *Davis*, 2 Hurls. & C. 197.

(*l*) *By Holder of Negotiable Instrument.*

An action may be maintained by a person as

the holder of a negotiable instrument, notwithstanding he has no real interest in it, and never was the actual holder. If it has been indorsed and delivered to some person professing to act as his agent, although without his knowledge, and he subsequently adopts the acts of the assumed agent, that is sufficient title, although such adoption is after action brought in his name without his knowledge. *Ancona* v. *Marks*, 31 Law J. Rep. (N.S.) Exch. 163; 7 Hurls. & N. 686.

W, the holder of three negotiable instruments to which the defendant was a party, indorsed them to the plaintiff and delivered them to G & T, a firm of attorneys, with instructions to sue the defendant on them in the name of the plaintiff, which G & T, assuming to act for the plaintiff, accordingly did. The plaintiff knew nothing of these proceedings until after action brought, when he adopted and ratified them. The defendant pleaded to the action that the plaintiff was not the lawful holder of the instruments at the commencement of the suit:—Held, that the action was well brought in the plaintiff's name. Ibid.

(*m*) *For using Trade Mark.*

Declaration, that the plaintiff had agreed with the defendant to manufacture for him bricks, according to the defendant's directions; that the defendant directed the plaintiff to mark them in a way which, to the defendant's knowledge, amounted to a piracy of R's trade mark; that the plaintiff, being ignorant of R's rights, marked the bricks as directed, and delivered them to the defendant; that R thereupon filed a bill in Chancery, for an injunction and account, against the plaintiff, which he compromised on the payment of costs:—Held, that this disclosed a good cause of action, as equity would grant an injunction against a person who innocently uses another's trade mark. *Dixon* v. *Fawcus*, 30 Law J. Rep. (N.S.) Q.B. 137; 3 E. & E. 537.

*Semble*—That, the natural consequence of the defendant's acts being to involve the plaintiff in a Chancery suit, an action would lie, even if the plaintiff's ignorance would have entitled him to succeed in the suit. Ibid.

(*n*) *For keeping Diseased Sheep.*

Sheep of the defendant having a contagious disease were found in the plaintiff's field with his sheep, and the disease was communicated to them. The defendant occupied land near the plaintiff's, but there was no evidence as to how the defendant's sheep got into the plaintiff's field. Four days afterwards, the defendant on being told that his sheep were diseased said, "I could not help it; I had the sheep at tack at P's; they caught it from Mr. B's sheep":—Held, that these facts did not shew any right of action, for there was no evidence of any knowledge by the defendant at the time the disease was communicated that his sheep were diseased. *Cooke* v. *Waring*, 32 Law J. Rep. (N.S.) Exch. 262; 2 Hurls. & C. 332.

(o) *By Reversioner of Chattel.*

The owner of a chattel let to hire can sue for a permanent injury to his reversionary interest therein. *Mears* v. *the London and South-Western Rail. Co.*, 31 Law J. Rep. (N.S.) C.P. 220; 11 Com. B. Rep. N.S. 850.

(*p*) *Exclusive Right of letting Pleasure-Boats.*

The proprietors of a canal by deed granted to the plaintiff the sole and exclusive right of putting or using pleasure-boats for hire on the canal:—Held, that this did not confer such an interest in the plaintiff as to give him a right of action against another person for using pleasure-boats for hire on the canal. *Hill* v. *Tupper*, 32 Law J. Rep. (N.S.) Exch. 217; 2 Hurls. & C. 121.

(B) NOTICE OF ACTION.

(*a*) *Form and Sufficiency of.*

The notice of action signed by B, the plaintiff, under the 9 & 10 Vict. c. 95. s. 138, was: "It is my intention at the end of one calendar month from the date hereof to commence an action against you" (the high bailiff) "in the Court of Queen's Bench, to recover compensation in damages for a trespass and excessive levy committed by you and your officers on the 3rd of December, 1863, by selling and disposing of certain goods upon the premises, No. 80, Derbyshire Street, &c., to satisfy debt and expenses under an order recovered against me in the S county court:"—Held, sufficient. *Burton* v. *Le Gros*, 34 Law J. Rep. (N.S.) Q.B. 91.

(*b*) *Who entitled to.*

[*Mason* v. *the Birkenhead Improvement Commissioners*, 8 Law J. Dig. 7; 6 Hurls. & N. 72.]

(*c*) *Thing done in Pursuance of Act of Parliament.*

[See 24 & 25 Vict. c. 96. s. 103.]

In pursuance of a resolution at a parish vestry that it would be advantageous if a weighing-machine were erected to check the weight of materials purchased for the highways, the surveyors appointed under the Highway Act, 5 & 6 Will. 4. c. 50, caused a machine to be placed in the highway:—Held, that although the statute gave no express power to erect weighing-machines, the surveyors were acting in pursuance of the act, so as to entitle them, under section 109, to notice of an action brought for injuries sustained in driving over a heap of earth excavated for the weighing-machine. *Hardwick* v. *Moss*, 31 Law J. Rep. (N.S.) Exch. 205; 7 Hurls. & N. 136.

The defendant, who kept a draper's shop, gave a marked florin to his cashier. The plaintiff, one of the defendant's shopmen, was found by the defendant in the course of the day with that florin in his possession, the defendant having asked him to shew the money in his pockets. The defendant immediately gave the plaintiff into custody on the charge of stealing the florin. The plaintiff explained the possession of it by saying that he had previously received it in change from the cashier. The plaintiff brought an action for false imprisonment against the defendant without giving him any previous notice of action. The defendant pleaded not guilty by statute. By the statute 24 & 25 Vict. c. 96. s. 103, "any person found committing any offence," &c. punishable under the act (which includes larceny and embezzlement), may be immediately apprehended without warrant by any person; and by section 113, before the commencement of any action for anything done pursuant to the act, one month's notice in writing of the action and of the cause of action is to be given to the defendant. The Judge who tried the cause told the jury that the

want of notice of action was, on the evidence, no defence. The defendant's counsel thereupon excepted, that the Judge ought to have directed the jury that the question for them was, whether the defendant honestly believed that the plaintiff had wrongfully taken the florin, and that in giving the plaintiff into custody he, the defendant, was exercising a legal power; and that if they so found, the defendant was entitled to the verdict, for want of notice of action:—Held, on a bill of exceptions, that when the question is whether a defendant is entitled to notice of action in respect of a thing done pursuant to a statute, the true rule is, whether the defendant honestly believed in the existence of such a state of facts as would, if it had existed, have afforded a justification for the arrest under the statute; and that applying that rule to the present statute the exception was insufficient, as the defendant's counsel asked the Judge to leave to the jury a question which could not have decided the point whether the defendant was entitled to notice of action, since the defendant could not have been entitled to notice unless he believed not only that the plaintiff had stolen the florin, but also that he had been found committing the offence, and the defendant's counsel did not ask the Judge to leave to the jury whether the defendant believed that the plaintiff had been found committing the theft. *Roberts* v. *Orchard* (Ex. Ch.), 33 Law J. Rep. (N.S.) Exch. 65; 2 Hurls. & C. 769.

(C) Form of Action.

[See Money Counts.]

## ADMINISTERING.

[See Abortion—Poison.]

## ADMINISTRATION.

[See Executor and Administrator.]

## ADMINISTRATION OF ESTATE IN CHANCERY.



### (A) What Debts may be claimed.

A testator's estate, consisting partly of a West India plantation, was administered under the Court, and a large balance was due to a deceased consignee, which was ordered to be paid by his successor. This failing, held, as against the testator's creditors, that the representatives of the deceased consignee were entitled to be paid out of the general assets of the testator. *Lyne* v. *Thompson*, 30 Beav. 543.

### (B) Creditor following Assets.

Under a decree for the administration of the estate of G, the plaintiff brought in his claim as a creditor, and a portion of his claim was disallowed; subsequently, after the distribution of the assets, the plaintiff paid other moneys on account of G's estate, and then filed a bill against the residuary legatees for an account of what was due to him in respect as well of the disallowed portion of his original claim as of the moneys subsequently paid:—Held, affirming the decision of one of the Vice Chancellors, that the plaintiff was entitled to have an account taken of what, if anything, was due to him. *Thomas* v. *Griffith*, 30 Law J. Rep. (N.S.) Chanc. 465.

In 1822 H demised a dwelling-house in Dublin to D for 9,000 years, at a rent of 53*l*. In 1828 D demised the house to B for 8,000 years, at the same rent. In 1846 D died. By his will, dated in 1829, B gave all his personal estate to a trustee for the benefit of B's daughter until twenty-one, and to assign the trust fund and accumulations to his daughter when she attained twenty-four or married under that age, with the trustee's consent. In 1848 the daughter, being under twenty-four, married, with the trustee's consent; and previous to the marriage a settlement was executed, vesting 12,500*l*. stock in trustees, upon trust for the husband for life, then for the wife for life, and afterwards for the children of the marriage; and a further sum of 6,457*l*. stock was vested in the same trustees, upon trust for the wife's separate use during the coverture, and afterwards for herself absolutely, or as she should appoint. In 1856 a claim was made by H upon D's representative for rent, and in respect of a breach of covenant to repair in the lease of 1822. D's representative filed a bill against the husband and wife and their trustees to enforce, as against B's assets included in the settlement, the claim for rent, and in respect of the breach of covenant to repair in the lease of 1828; but one of the Vice Chancellors dismissed the bill, with costs; and, upon appeal, this decision was affirmed. *Dilkes* v. *Broadmead*, 30 Law J. Rep. (N.S.) Chanc. 268.

### (C) Contingent Liabilities.

In an administration suit, instituted before Lord St. Leonards' Act passed, a fund was set apart as an indemnity to the executors in respect of any possible breaches of covenant by their testator in regard to his leasehold property. After the passing of the act the party entitled to the residuary estate petitioned for payment out of court of the indemnity fund under the act. The Court being of opinion that the act was not retrospective, that petition was dismissed. It being subsequently held that the act was retrospective, a petition of re-hearing was presented with the same object as the original petition:—Held, that the decree of the Court in an administration suit, where an executor acts *bona fide*, is a complete indemnity to him, and it is not necessary to set apart an indemnity fund, and an order was made according to the prayer. *Dodson* v. *Sammell*, 30 Law J. Rep. (N.S.) Chanc. 799; 1 Dr. & S. 575.

The case of an assignment of a leasehold to a residuary legatee is not within the meaning of the 27th section of Lord St. Leonards' Act. Ibid.

That section is retrospective in its operation. Ibid.

### (D) Marshalling Assets.

A testator directed payment of his debts, &c., and

gave all the residue of his real and personal estate to his wife and another person, appointing them executrix and executor, upon trust to pay the income to his wife for life, for her own use and the bringing up and educating his children; and after her decease he made certain specific gifts, one being to his daughter Fanny Charlotte of his messuage and premises situate No. 4, Turnham Green Terrace, held of the Prebend Manor. And there was also a general residuary gift to the wife. The wife borrowed 600*l.* in aid of the personalty and residuary realty, and therewith paid debts and died:—Held, that in marshalling the assets, the whole income received by the wife during her life, as well as the *corpus* of the first residuary gift to her, was liable for costs, before resorting to the specific gifts. *Hibon* v. *Hibon*, 32 Law J. Rep. (N.S.) Chanc. 374.

In 1775, A B became owner in fee of estates W and L. The W estate was subject to mortgages amounting to 5,344*l.*, and the L estate to a mortgage amounting to 2,200*l.*, all of which were created by A B's ancestor. In 1787, A B mortgaged the L estate for 8,000*l.*, reserving the equity of redemption to himself, and personally covenanting to pay the money. Out of this sum he paid off the three mortgages on the W estate. A B died in 1806:—Held, as between the representatives of A B, that the mortgage was primarily payable out of A B's personal estate. *Bagot* v. *Bagot*, 34 Beav. 134.

A testator devised his personalty and an estate K and other real estates, upon trust for payment of debts, and subject thereto, to certain devisees, and afterwards purchased the H estate, as to which he died intestate. The testator deposited the deeds of the H estate to secure 1,000*l.*, and was subsequently found lunatic. Under an order in lunacy a mortgage was made of the H & K estates, to raise a sum of money to pay off the 1,000*l.*, and other debts of the lunatic; and a proviso was inserted that, as between the lunatic's heirs and devisees, the H estate should be considered as the primary security for the mortgage debt. The lunatic having died,—Held, that, on the true construction of the proviso, it did not have the effect of exonerating the devised estates at the expense of the H estate, and the devised estates were ordered to be first applied in payment of the mortgage debt. *Freeman* v. *Ellis*, 1 Hem. & M. 758.

*Quære*—Whether a proviso having such an effect would have been within the jurisdiction of the Lords Justices. Ibid.

### (E) Payment of Debts.

Payment to a creditor who has proved his debt ought not to be suspended for the purpose of adjusting the equities between the parties jointly liable to him—per the *Lord Justice Turner*. *Micklethwait* v. *Winstanley*, 34 Law J. Rep. (N.S.) Chanc. 281.

The 23 & 24 Vict. c. 38. s. 3. is not restricted in its operation to the protection of heirs, executors and administrators against claims by unregistered judgment creditors, but absolutely deprives unregistered judgment debts of all priority in the administration of assets; and the act applies equally to judgments of County Courts as to other judgments. *In re Turner; Walter* v. *Turner*, 33 Law J. Rep. (N.S.) Chanc. 232.

Mode of distributing a deficient estate where there were life annuities and gross sums charged thereon. *Heath* v. *Nugent*, 29 Beav. 226.

### (F) Payment of Legacies.

Where, at the death of a mortgagor of leaseholds, the value of the mortgaged property exceeded the mortgage debt, and the mortgagee took no steps to realize his security for fourteen years after the death of the mortgagor, and in the mean time the mortgaged property became very much deteriorated in value, it was held, by one of the Vice Chancellors, and affirmed on appeal, that the mortgagee was not entitled to recover the deficiency arising on his mortgage security from those legatees of the mortgagor who had been paid. *Ridgway* v. *Newstead*, 30 Law J. Rep. (N.S.) Chanc. 889; 3 De Gex, F. & J. 474.

The right of a creditor to make legatees refund may be lost by laches, acquiescence, or such conduct as would make it highly inequitable for the Court to allow him to assert such right. Ibid.

The administrator of an intestate's estate paid to seven out of eight of the next-of-kin 1,250*l.* on account of each share, and made only small payments on account of the remaining share. In distributing the residue of the estate, after a lapse of thirty years, the persons claiming the last-mentioned share insisted that for the purposes of distribution a sum of 1,250*l.* ought to be treated as having been set apart on account of their share, and interest at 4*l.* per cent. to be allowed thereon, and that the small payments ought to be treated as having been made on account of the interest on that 1,250*l.*:—Held, that this would be conferring a benefit in the nature of compound interest on the claimants of the unpaid share, and that the only mode of equalization which the rules of the Court allowed was to charge each recipient with the amount paid to him, together with simple interest at 4*l.* per cent. from the date of payment. *Lambe* v. *Orton*, 33 Law J. Rep. (N.S.) Chanc. 81.

Where a testatrix directed her executors to continue the business of a public-house, and to employ W as manager at a salary, and at the expiration of the lease, goodwill, &c. &c. to be sold, the Court refused to accelerate the sale at the instance of the residuary legatee, a sale not being required for payment of debts. *Saunders* v. *Rotherham*, 3 Giff. 557.

A fund set apart in 1857 to answer liabilities of an intestate's estate in respect of leasehold covenants, was distributed in 1865 amongst the next-of-kin, it appearing that all the leases had either been sold or surrendered, and the statute 22 & 23 Vict. c. 35. s. 27. having passed in the mean time. *Reilly* v. *Reilly*, 34 Beav. 406.

### (G) Practice.

[See Costs, in Equity.]

If several suits are instituted for the administration of a testator's estate, they may be amalgamated in one decree, and the conduct of the cause will be given to a residuary legatee or other person having an interest in the residue, in preference to a creditor. *Penny* v. *Francis; Woodhatch* v. *Francis*, 30 Law J. Rep. (N.S.) Chanc. 185.

Upon motion, after a decree in administration suit, to restrain a creditor from prosecuting an action to recover a disputed debt,—Held, that payment of the

creditor's costs of the motion and action must be made dependent on his establishing his debt in the suit. *King* v. *King*, 34 Law J. Rep. (N.S.) Chanc. 195; 34 Beav. 10.

A manager was appointed to carry on an intestate's business, though there was no existing administration to his estate. *Steer* v. *Steer*, 2 Dr. & S. 311.

A large balance was found due from the legal personal representatives, but it appeared that the amount had been received under orders in another suit by the then solicitor, who retained it to satisfy large claims against his clients. The cause coming on for further consideration, and on a petition of the plaintiff, the solicitor was ordered to pay the money into Court. *Bibby* v. *Thompson* (No. 2), 32 Beav. 647.

Where an estate has been completely administered, the Court will, in general, order the funds to be paid out to the trustees, and will not interfere with their discretion, where they are agreed. *Butler* v. *Withers*, 1 Jo. & H. 332.

Liberty given in one suit to prove in another for an amount appearing due in the former, does not confer an absolute right of proof in the latter suit. It is the right and duty of the branch of the Court to which the latter suit is attached to see that the claim made is a valid subsisting claim. *Micklethwait* v. *Winstanley*, 34 Law J. Rep. (N.S.) Chanc. 281.

## ADMIRALTY.

[See SHIP AND SHIPPING.]

## ADVANCEMENT.

When a father purchases in the name of his child, his declarations of intention contemporaneous with the transaction itself are alone admissible to prove a trust. *Williams* v. *Williams*, 32 Beav. 370.

Parol evidence is admissible to prove that lands were purchased by a father in the name of his child, not as an advancement, but as a trustee. Ibid.

Purchases and mortgages were taken by a father in the name of his son. The father received the rents and interest and paid them into a bank, but he allowed his son to draw for the sums he required. The son died first:—Held, that the presumption of an advancement was not rebutted. Ibid.

A testator on the marriage of his daughter gave the husband 1,000*l.* jocularly in exchange for his snuff-box. By his will, the testator gave each of his daughters 1,000*l.*, but provided that, in case any daughter should have received from him any sum "by way of marriage portion or advancement," it should be deducted from the legacy:—Held, that, under the circumstances, the 1,000*l.* given to the husband of the daughter was not to be deducted. *M'Clure* v. *Evans*, 29 Beav. 422.

Where a father advanced money on mortgage of real estate, and, contrary to his solicitor's advice and without his son's knowledge, took the conveyance in his son's name, and subsequently told him it was a gift, but reserving the interest for the father's life; and added, "There are your deeds," which the son ultimately took and retained,—on a bill by the father against the son, the Court declared that the transaction was not an advancement, but made the father pay the costs of the suit. *Dumper* v. *Dumper*, 3 Giff. 583.

To rebut the presumption of advancement there must be evidence of facts contemporaneous with the act in question. Ibid.

W purchased copyholds for lives, and upon the dropping of a life, caused J, an illegitimate child of his daughter (the reputed father being still living) to be admitted in remainder after two of his (W's) children, and paid the admission fees. J always lived with W, and was sent to school by him, and received no assistance from his reputed father until after W's death:—Held, that J held the copyholds as a trustee only, since no presumption of an intention to advance him was raised by the above circumstances. *Tucker* v. *Burrow*, 34 Law J. Rep. (N.S.) Chanc. 478; 2 Hem. & M. 515.

*Semble*—A purchase will not be presumed to be an advancement, on the mere ground that the person purchasing has placed himself "*in loco parentis*" towards the person in whose names the purchase is made. Ibid.

In order that a purchase in the name of another may be an advancement, there must be a present intention, on the part of the person making the purchase, to confer at the time of the purchase a beneficial interest on the person in whose name the purchase is made. And it is not sufficient that the purchase should be made with some view to the ultimate benefit of the latter person. *Forrest* v. *Forrest*, 34 Law J. Rep. (N.S.) Chanc. 428.

Upon the question whether shares purchased by one brother in the name of another brother, to whom the former was alleged at the time of the purchase to have stood *in loco parentis*, were an advancement, the allegation by the latter brother of a subsequent gift of the shares to him by the former was treated as inconsistent with and as rebutting the presumption of the original purchase having been made by way of advancement. Ibid.

A married lady, living apart from her husband, purchased out of the savings of her separate estate stock in the names of her son and daughter. The lady died, appointing the daughter the executrix of her will. The son became lunatic. The daughter petitioned for a transfer of the stock to her as executrix. The Lords Justices ordered the transfer without requiring a bill to be filed. *In re De Visme, and In re the Trustee Act*, 1850, 33 Law J. Rep. (N.S.) Chanc. 332.

*Semble*— The doctrine that a purchase in the name of a child will, in the absence of evidence to the contrary, be presumed to be an advancement, does not apply where the purchase is made by a mother. Ibid.

T M contracted to purchase freeholds in the name of himself and wife, and died before the whole of the purchase-money was paid or a conveyance executed. His wife survived him:—Held, that the contract was in the nature of an advancement to the wife; and that inasmuch as the vendors were entitled to specific performance of the contract against T M's estate, and to be paid the remainder of the purchase-money out of his assets, the doctrine of advancement applied equally to the unpaid purchase-money, and that upon payment thereof the vendors would become trustees of the property for the widow. *Drew* v.

*Martin*, 33 Law J. Rep. (N.S.) Chanc. 367; 2 Hem. & M. 130.

## ALEHOUSE.

(A) LICENCE, GRANT OF.
- (*a*) *Discretion of Justices.*
- (*b*) *By Borough Justices.*
- (*c*) *When Excise Licence necessary.*
  - (1) *Sale of Beer under 1½d. a Quart.*
  - (2) *On or off the Premises.*
- (*d*) *Certificate of Character.*

(B) OFFENCES.
- (*a*) *Sale of Beer without a Licence.*
- (*b*) *Refusing to admit the Police.*
- (*c*) *Sunday Trading.*

(C) FORFEITURE OF LICENCE.

### (A) LICENCE, GRANT OF.

#### (*a*) *Discretion of Justices.*

Although, under the 9 Geo. 4. c. 61, Justices have a discretion as to whether they will grant licences to persons keeping or about to keep inns, alehouses and victualling-houses, to sell exciseable liquors, that discretion must be exercised in a reasonable manner; and therefore Justices cannot by a general resolution determine not to renew the licences of all such persons who shall not consent to take out an Excise licence for the sale of spirits in addition to the licence for the sale of beer. *R.* v. *Sylvester*, 31 Law J. Rep. (N.S.) M.C. 93; 2 Best & S. 322.

#### (*b*) *By Borough Justices.*

Borough Justices have no jurisdiction to grant licences for inns and alehouses under the 9 Geo. 4. c. 61, except in such boroughs as have separate Courts of Quarter Sessions. *Candlish* v. *Simpson*, 30 Law J. Rep. (N.S.) M.C. 178; 1 Best & S. 357.

#### (*c*) *When Excise Licence necessary.*

##### (1) *Sale of Beer under 1½d. a Quart.*

The 3 & 4 Vict. c. 61. s. 13. makes an Excise licence necessary for the sale of beer of any description; and, therefore, the sale of beer at and under 1½*d.* a quart requires such a licence, notwithstanding the provisions of the 42 Geo. 3. c. 38. s. 18. and the 3 & 4 Vict. c. 12, in respect of beer at that price. *Read* v. *Storey*, 30 Law J. Rep. (N.S.) M.C. 110; 6 Hurls. & N. 423.

##### (2) *On or off the Premises.*

A person licensed to sell beer by retail, "to be drunk or consumed *off the premises*," supplied a pint of beer to a traveller, who sat upon a bench placed and fastened against the wall of the house, returning the mug in which he was served:—Held, that the beershop keeper was properly convicted of the offence of selling beer to be drunk *on the premises*, within the 4 & 5 Will. 4. c. 88. s. 17. *Cross* v. *Watts*, 32 Law J. Rep. (N.S.) M.C. 73; 13 Com. B. Rep. N.S. 239.

#### (*d*) *Certificate of Character.*

The appellant having obtained a certificate of character from six of his neighbours, presented it to the officer of Excise for the purpose of obtaining a licence for the sale of beer. It was proved that the defendant had for some years previously cohabited with a woman without having gone through the ceremony of marriage; but no act of indecency of any kind was proved against him:—Held, that the Justices were not, on this evidence, bound to convict the appellant on an information under the 4 & 5 Will. 4. c. 85. s. 2, charging him with unlawfully making use of the certificate, knowing the same to be false. *Leader* v. *Yell*, 33 Law J. Rep. (N.S.) M.C. 231; 16 Com. B. Rep. N.S. 584.

### (B) OFFENCES.

#### (*a*) *Sale of Beer without a Licence.*

Section 12. of the 25 & 26 Vict. c. 22. repeals section 29. of the 11 Geo. 4. & 1 Will. 4. c. 64, and takes away any right, privilege, permission or exemption from prohibition that may have previously existed to sell beer by retail at fairs without a licence. *Huxham* v. *Wheeler*, 33 Law J. Rep. (N.S.) M.C. 153; 3 Hurls. & C. 75.

#### (*b*) *Refusing to admit the Police.*

An alehouse keeper licensed, under the 4 & 5 Will. 4. c. 85, to sell beer to be drunk in his house, and on the premises thereunto belonging, is liable to a penalty, under section 7. of the same act, if he refuse to admit a police officer to an outhouse in the yard belonging to the house, though only used as a cellar. *R.* v. *Tott*, 30 Law J. Rep. (N.S.) M.C. 177.

For a second offence of refusing to admit the police, a beerhouse keeper is liable only to the punishment of disqualification from selling beer for two years, and not to a fine as well as disqualification. Ibid.

#### (*c*) *Sunday Trading.*

The 11 & 12 Vict. c. 49, which regulates the hours for closing beer-houses, &c. during Sunday morning, is not repealed by the 17 & 18 Vict. c. 79. and 18 & 19 Vict. c. 118, which apply only to Sunday afternoon. *Whiteley* v. *Heaton* commented upon. *Harris* v. *Jenns*, 30 Law J. Rep. (N.S.) M.C. 183; 9 Com. B. Rep. N.S. 152.

The 11 & 12 Vict. c. 49. applies to persons other than licensed victuallers or persons licensed to sell beer, &c., and to fermented and distilled liquors other than exciseable liquors. Ibid.

Three persons having walked, on a Sunday, a distance of four miles from the town of B. for amusement or exercise, called at an inn, in which they were admitted and served with liquor between the hours of three and five of the afternoon. They afterwards returned to the town of B, two by an omnibus, and the third on foot:—Held, in accordance with the case of *Atkinson* v. *Sellers*, that they were travellers within the meaning of the 18 & 19 Vict. c. 118. s. 2; and that, therefore, the innkeeper ought not to be convicted for opening his house to them for the sale of liquor contrary to that act. *Taylor* v. *Humphreys*, 30 Law J. Rep. (N.S.) M.C. 242; 10 Com. B. Rep. N.S. 429.

It is an offence to open a public-house for the sale of beer before half-past twelve in the afternoon on Sunday to any person not being a traveller. The statute 11 & 12 Vict. c. 49. is not repealed. *R.* v.

*Senior*, 33 Law J. Rep. (N.S.) M.C. 125; 1 L. & C. 401.

The word "travellers" in the 11 & 12 Vict. c. 49, which prohibits the sale of refreshment on Sunday by persons licensed to sell beer or other fermented liquors "except to travellers," includes any persons who go abroad for purposes of business or pleasure, and who need refreshment. *Taylor* v. *Humphries*, 34 Law J. Rep. (N.S.) M.C. 1; 17 Com. B. Rep. N.S. 539.

As the exception is contained within the section of the act which creates the offence, the onus of shewing that the persons supplied with refreshment are not within it is on the informer. Ibid.

A person who has taken a ticket at a railway station and is about to start by a train from that station is a "traveller" within the exception in the 42nd section of the 2 & 3 Vict. c. 47; and the keeper of a refreshment-room at the station is not liable to be convicted, under that section, for opening his house for the sale of beer, fermented liquor, &c., before one P.M. on Sunday, by reason of having supplied fermented liquor to such person. *Fisher* v. *Howard*, 34 Law J. Rep. (N.S.) M.C. 42.

(C) Forfeiture of Licence.

The Justices are not warranted in adjudicating a forfeiture of the licence without *legal proof* of a former conviction; a mere reference to the records of the petty sessions, where former convictions were entered, will not suffice. *Cross* v. *Watts*, 32 Law J. Rep. (N.S.) M.C. 73; 13 Com. B. Rep. N.S. 239.

## ALIEN.

An alien, who had served on board a man-of-war for four years in time of war, held to be a natural-born subject under the 13 Geo. 2. c. 3. *In re Giraud*, 32 Beav. 385.

## AMBASSADOR.

[See Legacy Duty.]

## AMENDMENT.

[See Divorce—Practice, at Law; Appearance—Will; Proof of.]



### (A) At Nisi Prius.

#### (*a*) *Of Parties.*

##### (1) *In general.*

Where a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a body corporate, the Court allowed the writ, declaration, and subsequent proceedings to be amended by inserting the name of a director of the bank as nominal plaintiff, it appearing that by the law of the country the bank was entitled to sue in his name. *La Banca Nazionale sede di Torino* v. *Hamburger*, 2 Hurls. & C. 330.

##### (2) *In Ejectment.*

In an action of ejectment by the mortgagee of a devisee against the heir-at-law, it appeared at the trial that the devisee was in fact only entitled under the will to an equitable estate, the legal estate being in trustees. Thereupon, on the application of the plaintiff, the Judge who presided at the trial inserted the names of the trustees as plaintiffs in the writ; those persons being present in court, and consenting to that course. The real question in dispute was the competency of the testator to make a will:—Held, that this was an amendment which the Judge had power to make; for if that power were not conferred as to ejectment by section 35, it was so by section 222. *Blake* v. *Done*, 31 Law J. Rep. (N.S.) Excb. 100; 7 Hurls. & N. 465.

#### (*b*) *Adding Wife as a Defendant.*

A Judge at the trial has no power, under section 222. of the Common Law Procedure Act, 1852, to amend the proceedings by adding the wife as a defendant, in an action where the husband has been sued alone for a debt incurred by the wife *dum sola*. *Garrard* v. *Giubilei*, 31 Law J. Rep. (N.S.) C.P. 131; 11 Com. B. Rep. N.S. 616.

Where the plaintiff sues the defendant for goods sold and delivered, and it turns out at the trial that the goods were supplied to the defendant's wife before marriage, the Judge has no power, under the 222nd section of the Common Law Procedure Act, 1852, or otherwise, to add the name of the wife as a defendant. *Garrard* v. *Giubilei* (Ex. Ch.), 31 Law J. Rep. (N.S.) C.P. 270; 13 Com. B. Rep. N.S. 832.

#### (*c*) *Costs of.*

In an action for breach of contract to ship a cargo of coal, the declaration described the coal as of the description called "through and through, to be hand-picked." It appeared from the evidence at the trial that the question in controversy was whether the contract was to ship hand-picked coal or not, and that the description in the declaration was contradictory in its terms, as hand-picked coal meant coal which had been passed over a screen, whilst "through and through coal" meant unscreened coal. The learned Judge amended the declaration by striking out the words "through and through," so as to raise the question whether the contract was for "hand-picked coal" or not:—Held, that the amendment was rightly made, and also that the defendant was not entitled to the costs of such amendment, as it appeared that he had not been misled by the declaration as to the matter in dispute. *St. Losky* v. *Green*, 30 Law J. Rep. (N.S.) C.P. 19; 9 Com. B. Rep. N.S. 370.

### (B) In Cases of Variance.

The plaintiff bought of defendant "the household furniture, fixtures, utensils in trade," &c. of a public-house, "as per inventory, taken by W W,"

for 262*l.*, upon a representation by the defendant that the receipts of the house were 80*l.* per month, which representation turned out to be false. In an action for this misrepresentation, the declaration alleged the agreement to be for the purchase of the goodwill, furniture, fixtures, &c.:—Held, that the declaration substantially stated the true nature of the agreement, and that, at all events, the Court would, if necessary, amend it. *Cator* v. *Wood*, 19 Com. B. Rep. N.S. 286.

(C) By the Court.

The Court has power, under the 222nd section of the Common Law Procedure Act, 1852, to amend the record, where leave to move to enter a verdict is reserved, notwithstanding the Judge at the trial expressly refuses to allow an amendment or to reserve leave to amend. *Cator* v. *Wood*, 19 Com. B. Rep. N.S. 286.

## ANCHORS AND CABLES.

The proving and sale of chain cables and anchors regulated by 27 & 28 Vict. c. 27.

## ANCIENT LIGHTS.

[See Easement.]

## ANIMALS, CRUELTY TO.

[See Negligence.]

A cock is an "animal" within the meaning of sections 2. and 29. of the 12 & 13 Vict. c. 92, and a person who takes an active part in a cockfight after one or both is disabled, is liable to be convicted under section 2. for causing and procuring a cock to be cruelly ill-treated, abused and tortured. *Bridge* v. *Parsons*, 32 Law J. Rep. (N.S.) M.C. 95.

It is no offence under section 3. of 12 & 13 Vict. c. 92. to assist at a cockfight unless in a place kept or used for the purpose. *Morley* v. *Greenhalgh*, 32 Law J. Rep. (N.S.) M.C. 93; 3 Best & S. 374.

## ANNUITY.

(A) Memorial.
(B) Validity of.
(C) Arrears of.
(D) Security for.
(E) Determination of.
(F) Refund of Excess subscribed.

### (A) Memorial.

It is sufficient, under the 53 Geo. 3. c. 141, to describe the instrument in the memorial of an annuity as a "grant of annuity." *Howkins* v. *Bennet*, 30 Law J. Rep. (N.S.) C.P. 193.

The consideration for the annuity was stated in the memorial to be 4,000*l.*, and this sum was actually paid to the grantor; but, in pursuance of a previous arrangement, 400*l.* was immediately returned by him to the grantee's solicitor for procuration money and expenses:—Held, that this was no defence to an action on the covenant, even if it were ground for setting aside the securities on motion under the 6th section of the 53 Geo. 3. c. 141. Ibid.

The annuity deed was attested by two witnesses, but in the memorial the names of four were inserted; the clerk who prepared the memorial having, in consequence of the way in which the names of two of the grantors were written in the deed, by mistake added their names as witnesses,—Held, that this, so transparent a blunder that no one could be misled by it, did not affect the validity of the memorial. Ibid.

*Gibbs* v. *Hooper* distinguished; and the latter ground of the decision in that case questioned. Ibid.

The payment of the annual sums, exceeding 5*l.* per cent. per annum on the sum advanced, was secured upon land, and the principal by a policy on the life of one of the grantors, with a covenant for payment of the annual premium:—Held, that, as the principal was in some risk, the transaction was not void on the ground of usury. Ibid.

[And see next case, *Thompson* v. *Carlwright*.]

### (B) Validity of.

In the year 1828, F C, in consideration of 1,998*l.*, granted an annuity of 139*l.* 17*s.* a year for the first five years, with a reversionary annuity of 199*l.* 16*s.* a year for ninety-nine years, if five persons or any of them should so long live: and his brother T C, for a merely nominal consideration, charged the annuity on a moiety of certain real estates of which he was owner, and covenanted that he was seised free from incumbrances. No memorial of the deed was enrolled under the 53 Geo. 3. c. 141. The estates produced about 400*l.* a year, and T C's moiety was already mortgaged to secure 1,000*l.*, with interest at 5*l.* per cent., so that the annual value of the moiety over and above the interest was about 150*l.* per annum. W M, one of the mortgagees, acted as the solicitor of all parties in the preparation of the annuity deed:—Held, by the *Master of the Rolls*, and on appeal by the *Lord Justice Knight Bruce* (the *Lord Justice Turner* not expressing any opinion upon the points in controversy): First, that T C, although he had not actually joined in the grant of the annuity itself, was a grantor within the equitable construction of the 53 Geo. 3. c. 141. s. 10, which dispenses in certain cases with enrolment of a memorial. Secondly, that although for the purposes of that clause, the annuity granted must be taken to be of the larger amount, yet that W M must be regarded as having wilfully suppressed the prior incumbrance, and that the grantee could not therefore be affected with constructive notice thereof through W M; and, consequently, that the annual value of the lands, excluding interest on incumbrances *of which the grantee had notice*, was greater than the annuity, and that the clause dispensing with enrolment of a memorial applied. *Thompson* v. *Cartwright*, 33 Law J. Rep. (N.S.) 234; 2 De Gex, J. & S. 10; 33 Beav. 178.

A was entitled under a will to an annuity of 50*l.*, charged upon real estate. She applied to B, a solicitor, to procure a loan of money to meet her present needs. The loan could not be procured from a third person, but B, who was previously unknown to A, agreed to purchase a portion of her annuity. B was the only solicitor in the transaction, and on

the execution of the deed handed to A his bill of costs, the charges in which were reasonable, and which A. forthwith paid out of the consideration money. Eleven years afterwards, A filed a bill to set aside the transaction, but one of the Vice Chancellors dismissed the bill with costs; and on appeal, the Lords Justices held that the payment of the costs was not a return of part of the consideration money within the meaning of the Annuity Act, and considering that the case was not one coming strictly within the rules applicable to dealings between solicitor and client, and there being no evidence of unfair advantage taken of A by B, they affirmed the decision of the Vice Chancellor. *Edwards* v. *Williams*, 32 Law J. Rep. (N.S.) Chanc. 763.

A B, resident in Brussels, was indebted to C D, resident in London. In August, 1838, C D went over to A B and settled accounts, and advanced him a further sum of money, and it was agreed that A B should give a *post obit* security for part, and his notes for the remainder of the debt. This was not completed, but in January, 1839, C D went over again, when it was arranged that A B should grant an annuity in lieu of the *post obit* security, and a bill at ten days was given by A B for the amount, which was delivered up upon the execution by A B of the annuity deed in February at Brussels:—Held, that this was one transaction, that the annuity was granted for money or money's worth, and that the deed, not being enrolled, was void under the Annuity Act:—Held, also, that the contract was English and not Belgian. *Burgess* v. *Richardson*, 29 Beav. 487.

### (C) ARREARS OF.

A testator devised his real and personal estate to trustees (of whom his wife was one), upon trust for conversion, and to invest in government or real securities, and that his trustees should stand possessed of the trust premises to pay his wife an annuity of 100*l.*, clear of all deductions whatsoever, and directed the trustees to appropriate and set apart a fund for securing such annuity, and after the death of his wife directed the trustees to pay and divide or transfer the money thereinbefore appropriated and directed to be set apart among his (the testator's) children. Part of the testator's property consisted of 2,500*l.* 4*l.* per cent. stock, which, at his death and for some time after, produced 100*l.* a year; this fund was set apart by the trustees for securing payment of the widow's annuity, but owing to successive reductions of the interest of the stock by parliament, there was, at the widow's death, a considerable arrear to make up the deficiency between the 100*l.* a year and the reduced income of the fund which had for many years been received by the widow:—Held, that on the construction of the will the widow would have been entitled to have the deficiency made good out of the *corpus*, but that she having forborne to assert her claim for so long a period during her lifetime, and having been aware of the dealings of several of her children in respect of their shares with persons who were acting on the belief that they were shares in a certain definite amount of stock, without giving any intimation of her intention to claim such arrears out of the *corpus*, the representatives of the widow could not, as against the parties who so dealt for value with the knowledge of the widow, assert the claim to which she would otherwise have been entitled to have the arrears of the annuity made good out of the *corpus*. *Upton* v. *Vanner*, 1 Dr. & Sm. 594.

A testator directed his trustees out of the income of his residuary real and personal estate to pay an annuity of 200*l.*, and after the decease of the annuitant to permit the fund out of which the annuity should arise to fall into his general residuary personal estate, and the will contained gifts over of the residuary real and personal estate. The income of the testator's estate being insufficient for payment of the annuity,—Held, that the deficiency ought to be made good out of the *corpus*. *Perkins* v. *Cooke*, 31 Law J. Rep. (N.S.) Chanc. 823; 2 Jo. & H. 393.

A testator gave leaseholds to trustees upon trust to receive the rents and profits and to pay the annual sum of 60*l.* to H for life, and after the death of H to raise by sale or mortgage the sum of 400*l.* for the children of H, and after the death of H and the raising and payment of the 400*l.*, to assign the said leaseholds, or such part thereof as should remain undisposed of, unto T absolutely. The income proving insufficient to satisfy the annuity, it was held that it was chargeable upon the *corpus*. *Phillips* v. *Gutteridge*, 32 Law J. Rep. (N.S.) Chanc. 1.

Annuitants under a will are not entitled to interest on the arrears of their annuities. *Booth* v. *Coulton*, 30 Law J. Rep. (N.S.) Chanc. 378.

A tenant for life, having a power to give a life interest to his wife, by his marriage settlement appointed certain hereditaments to trustees, during his wife's life, upon trust, if she survived him, to pay her an annuity of 500*l.* out of the rents and profits, during her life, for her jointure, in lieu of dower. He afterwards acquired the fee; and the hereditaments, subject to the jointure, being considered an insufficient security, the husband and wife joined in conveying the same, with other hereditaments, to trustees, discharged from the annuity, upon trust within three months to raise, by mortgage, sufficient money to purchase an annuity of 500*l.* for the life of the wife, if she survived him, or, if the money should not be raised by mortgage within three months, upon trust to sell the hereditaments, and invest a sufficient part thereof in 3*l.* per cent. consols, or (if insufficient) to invest the whole of the moneys in the parliamentary stocks or public funds, or in Government or real securities, and after the decease of the tenant for life, to pay the income to the wife during her life in satisfaction of the annuity, and to stand possessed of the surplus in trust for the husband. The power to raise money by mortgage was not exercised, and the trust premises were sold and invested in consols, but the whole income was insufficient to pay the annuity. Upon a bill filed by the wife after the death of the husband,—Held, by the *Lord Chancellor*, affirming the decision of the *Master of the Rolls*, that she was not entitled to have the deficiency of the income made good out of the *corpus* of the fund. *Mortimer* v. *Picton*, 33 Law J. Rep. (N.S.) Chanc. 337.

### (D) SECURITY FOR.

A testator directed his executors to pay an annuity to his wife for life, and also that it should be secured to her out of his leasehold messuages, &c. The residue of his property he gave to his children:

—Held, that not only the rents, but the estate itself was a security for the annuity; and the estate having been sold, and the fund being small and insufficient to meet the arrears and future payments of the annuity, the executors were ordered to pay the whole to the annuitant. *Howarth* v. *Rothwell*, 31 Law J. Rep. (N.S.) Chanc. 449; 30 Beav. 516.

A testator gave his real and personal estate to trustees, and directed them to get in and sell his residuary personal estate which should not consist of leaseholds or moneys invested on security, and to appropriate a sufficient portion for payment of an annuity, which on the marriage of his daughter he had agreed to pay. He then gave his trustees a discretionary authority as to the sale of his real and leasehold estate. The residuary estate was exhausted, but the real and leasehold estates were sufficient to answer the annuity, which had been regularly paid. In a creditors' suit by the annuitant asking for administration of the real and personal estate, and that provision might be made for payment of the annuity,—Held, that the plaintiffs ought to have accepted an offer made to secure the annuity; that they were entitled to a charge on the testator's estates; that as the annuity had been paid, no ground existed for interfering with the authority of the trustees, but that a fund must be set apart to answer the annuity in the event of a sale of any part of the estates, with liberty to apply if the annuity fell into arrear, and that the plaintiffs must pay the costs up to and including the hearing. *Burrell* v. *Delevante*, 31 Law J. Rep. (N.S.) Chanc. 365; 30 Beav. 550.

Upon the grant of an annuity during the grantor's life, the grantee undertook that when the annuity "came to be paid off," and "as soon as the annuity was redeemed," he would assign the policy on the grantor's life to the grantee. The policy was effected by and paid for by the grantee:—Held, on the death of the grantor without having redeemed the annuity, that the representative of the grantor was not entitled to the produce of the policy, or even to the surplus beyond the redemption money. *Bashford* v. *Cann*, 33 Beav. 109.

### (E) Determination of.

Marriage will not determine an annuity given to a feme sole for life until she shall be bankrupt or insolvent, or shall assign or dispose of it, or do any act whereby the annuity, or any part thereof, shall be vested, or become liable to be vested, in any other person. *Bonfield* v. *Hassell*, 32 Law J. Rep. (N.S.) Chanc. 475; 32 Beav. 217.

### (F) Refund of Excess subscribed.

A proposal was made to establish, by the subscription of individuals (if approved of and aided by the East India Company), a fund for the purpose of creating, at the end of a certain number of years' service, a retiring pension to be held by members of the East India Company's civil service in Bengal. The directors did approve of the proposal, and undertook to pay in every year a sum equal to that subscribed by the subscribing members. They suggested rules which were adopted, and in the course of the correspondence between the directors and the subscribers, it was settled, by order of the directors and consent of the subscribers, that a subscriber should pay a certain per-centage on his salary during the whole time of his service, and that if, when he wished to retire, he had not paid half (the other half being contributed by the company) of the amount of the principal of the retiring pension (which was fixed at 10,000 rupees, or 1,000*l.*) he must fully make up his half; but nothing was expressly declared as to what should be done with the excess, if his payments had exceeded the amount of the half:—Held, affirming the judgments of the Courts below (see 29 Law J. Rep. (N.S.) Chanc. 125), that the subscriber was not entitled to have such excess refunded. *Boldero* v. *the East India Co.* 10 H.L. Cas. 405.

## APPEAL.

[Under Queen's Remembrancer's Act, see Revenue. And see Inclosure Acts—Inferior Court—Justice of the Peace—Practice, at Law—Sessions.]

## APPORTIONMENT.

(A) Rents.
(B) Dividends.

### (A) Rents.

A testator directed that, for twenty-one years next after his death, his trustees should receive and accumulate the rents and profits of his real estate, and apply them towards payment of his debts and legacies, and, subject to that term, he gave the beneficial interest in the income of his estate to the plaintiff for life:—Held, under the Apportionment Act, that the rent which fell due after the expiration of the twenty-one years must be apportioned between those beneficially interested in the accumulations, and the tenant for life who was entitled on the expiration of the term. *St. Aubyn* v. *St. Aubyn*, 30 Law J. Rep. (N.S.) Chanc. 917; 1 Dr. & Sm. 611.

A portion of the income was derived from royalties payable under mining sets or leases, when the ore should be obtained:—Held, that, this rent not becoming due at fixed periods, it did not come within the Apportionment Act. Ibid.

Held, also, that although the above direction carried the period of accumulation to the half-yearly day of payment beyond twenty-one years, this did not bring the case within the operation of the Thellusson Act. Ibid.

[See *Bridges* v. *Potts*, 33 Law J. Rep. (N.S.) C.P. 338, *post*, title Lease.]

### (B) Dividends.

Land forming part of the estate of an intestate was sold under the compulsory powers of an act of parliament, and one-third of the purchase-money was invested in consols and set apart to meet his widow's dower:—Held, that the representative of the widow was entitled, under the 11 Geo. 2. c. 19. s. 15, to a proportion of the dividends up to the day of her death. *Harrop* v. *Wilson*, 34 Law J. Rep. (N.S.) Chanc. 235; 34 Beav. 166.

Lady M, being entitled, under the will of her late

husband, to a life interest in certain shares in the Alliance Insurance Company (the dividends on which were under the deed of settlement to be declared half-yearly, and made payable in the months of April and October in each year), and also to a life interest in certain shares in railway and gas companies, died in November 1860. Subsequently a dividend was declared on the shares in the Alliance Company for the half-year ending on the 25th of March, 1861, and on the shares in the railway and gas companies for the half-year ending the 31st of December, 1860. The executrix of Lady M now claimed an apportioned part of these dividends:—Held, that the dividends on the shares in the Alliance Company were apportionable under the Apportionment Act, because the profits were by the deed of settlement of the company divisible at fixed periods. *In re Maxwell's Trusts*, 32 Law J. Rep. (N.S.) Chanc. 333; 1 Hem. & M. 610.

The apportionment must be made with reference to the last previous time when the dividends were made payable, and not to that when they were earned. Ibid.

The dividends on shares in companies incorporated by acts of parliament containing clauses similar to section 91. of the Companies Clauses Consolidation Act, or in which the last-mentioned act is incorporated, are not within the Apportionment Act. Ibid.

A testator bequeathed certain railway debentures to trustees to pay the interest to his children for life, and afterwards the capital to go to his grandchildren. The testator died in February, and the next half-year's payment of dividend upon the debentures was received in the following July:—Held, that debentures being in the nature of mortgages upon which the interest accrued *de die in diem*, the portion of the half-year's dividend due up to the testator's death was to be considered as capital and not income, as between the tenants for life and remaindermen. *In re Rogers's Trust*, 30 Law J. Rep. (N.S.) Chanc. 153; 1 Dr. & Sm. 338.

The Apportionment Act, 4 & 5 Will. 4. c. 22. s. 2, applies to a determinable interest in dividends, created by a will made after the passing of the act, in exercise of a power contained in a deed dated before the act. *Wardroper* v. *Cutfield*, 33 Law J. Rep. (N.S.) Chanc. 605. *Plummer* v. *Whiteley* (Johns. 585; s. c. 29 Law J. Rep. (N.S.) Chanc. 245) approved. *Fletcher* v. *Moore* (26 Law J. Rep. (N.S.) Chanc. 530) explained and qualified. Ibid.

## APPRENTICE.

[See POOR; Settlement.]



### (A) BILL TO ENFORCE EXECUTION OF INDENTURE.

Bill by an apprentice praying that the defendant (his master) might be ordered to execute the indenture of apprenticeship, and to take him into his employ and teach him his trade, dismissed without costs, it appearing that the plaintiff's conduct was objectionable on account of his idleness and other unsatisfactory particulars. *Brown* v. *Banks*, 3 Giff. 190.

### (B) JURISDICTION OF COURT OF CHANCERY TO CANCEL INDENTURE.

A bill was filed by the trustees and guardians of an infant, whose mother in her lifetime had paid 200 guineas as a premium to apprentice her son to an engineer, alleging that the master had improperly suspended him from work and excluded him from the factory, and asking the Court to cancel the indenture of apprenticeship, and to direct a return of the premium:—Held, that this Court had no jurisdiction, and that relief could only be obtained by an action at law for breach of the contract; and, as the defendant omitted to demur, the bill was dismissed, without costs. *Webb* v. *England*, 30 Law J. Rep. (N.S.) Chanc. 222; 29 Beav. 44.

### (C) ABSENTING FROM SERVICE—JURISDICTION OF JUSTICES.

By an indenture of apprenticeship, J C, an infant, with the consent of his father, put himself apprentice for seven years to T S, of W, lock-maker, his executors and administrators, such executors or administrators carrying on the same trade or business, and in the town of W, for seven years; and T S, in consideration of the services of his said apprentice, agreed to teach and instruct him, or cause him to be taught and instructed, in the art of a lock-maker during the said term, and to pay the apprentice certain weekly wages:—Held, that the apprentice was bound to serve the executrix of T S, his widow, who carried on her husband's business at W, and that the executrix was bound to teach him. *Cooper* v. *Simmons*, 31 Law J. Rep. (N.S.) M.C. 138; 7 Hurls. & N. 707.

On the hearing of a summons, taken out by the executrix, against the apprentice, charging him with absenting himself from her service without lawful excuse, the attorney who appeared for the apprentice stated that he had advised that the apprenticeship was at an end on the death of the husband, and that the appellant, acting on the *bona fide* belief that the opinion of the attorney was correct, absented himself from the service:—Held, that the Justices were nevertheless justified in convicting the apprentice for absenting himself without lawful excuse. Ibid.

### (D) IMPLIED CONTRACT FOR MAINTENANCE.

The plaintiffs and the defendant verbally agreed that the defendant's son should be bound apprentice to the plaintiffs for four years, the son to go on trial for a month, a premium of 100*l.* to be paid by instalments. The son went on trial, and remained upwards of a year, when the defendant removed him. No deed of apprenticeship was executed, or any part of the premium paid:—Held, that the plaintiffs could not recover from the defendant for the main-

tenance of the son. *Harrison* v. *James*, 31 Law J. Rep. (N.S.) Exch. 248; 7 Hurls. & N. 804.

(E) RIGHT OF MASTER TO DAMAGES FOR ABSENCE OF APPRENTICE.

An action was brought by the master against the father of an apprentice on an indenture of apprenticeship to serve the master for a period of five years from the 1st of May, 1860, and it was alleged as a breach of covenant that the apprentice unlawfully absented himself from his master's service. It was proved that the defendant took his son away from the plaintiff on the 18th of January, 1862, and the writ in the action issued on the 10th of February, 1862: — Held, that the plaintiff was entitled to recover damages for the absence of his apprentice from the 18th of January to the 10th of February, and was not entitled to prospective damages for the whole term of the apprenticeship. *Lewis* v. *Peacey*, 31 Law J. Rep. (N.S.) Exch. 496; 1 Hurls. & C. 518.

## ARBITRATION.

[See LANDS CLAUSES CONSOLIDATION ACT — PUBLIC HEALTH ACT—SESSIONS.]

(A) SUBMISSION TO ARBITRATION.
- (*a*) *Validity and Effect of Agreement to refer.*
- (*b*) *Agreement signed by an Agent.*
- (*c*) *Amendment and Revocation of.*
- (*d*) *Making the Submission a Rule of Court.*

(B) COMPULSORY REFERENCE.

(C) ARBITRATOR.
- (*a*) *Power and Duty.*
- (*b*) *Excess of Authority.*
- (*c*) *Effect of attending Arbitrator under Protest.*

(D) AWARD.
- (*a*) *Form and Validity.*
- (*b*) *Setting aside and remitting.*
- (*c*) *Taking up Award: Moiety of Fee.*
- (*d*) *Enlarging Time for making.*
- (*e*) *Making Award a Rule of Court.*
- (*f*) *Enforcing.*

(E) COSTS.
- (*a*) *To abide the Event.*
- (*b*) *Taxation of.*

(A) SUBMISSION TO ARBITRATION.

(*a*) *Validity and Effect of Agreement to refer.*

A marine policy of assurance was made in a mutual assurance association (managed by a committee of members), subject to the following rule: "All average claims and claims of abandonment shall be adjusted and settled conformably to the custom of Lloyd's or the Royal Exchange by a professional average-stater, but should the committee or the assured be dissatisfied with such adjustment, they may refer the same to two professional average-staters, or to two other competent persons, with power to such two persons to appoint an umpire, and the award of such three persons shall be final, and all other causes of dispute of whatever nature shall be referred in like manner, but the committee and assured, by mutual consent, may refer all such adjustments or disputes to one person only, whose award shall also be final, and no action at law shall be brought until the arbitrators have given their decision ":—Held, that this was a valid agreement within the rule in *Scott* v. *Avery*, and that the reference to arbitration or offer to refer was a condition precedent to a claim on the policy for a total loss, and that an action could not be maintained on the mere refusal to pay the claim. *Tredwen* v. *Holman*, 31 Law J. Rep. (N.S.) Exch. 398; 1 Hurls. & C. 72.

In an action on the policy, the declaration, after setting out the policy and rule and alleging the total loss, averred that the plaintiff had always been willing that the loss and amounts payable in respect thereof should be adjusted and settled according to the rule, and had performed all conditions precedent to entitle the plaintiff to a performance of the agreement and rule and to maintain the action, and had requested the defendant and the members of the association to settle and adjust, or to allow to be settled and adjusted the amount payable in respect of the loss and in accordance with the terms of the policy and of the rule. Breach, that the defendant and the said members had wholly refused so to do, and that the amount insured had not been paid, nor been settled or adjusted in accordance with the policy and rule:—Held, that the declaration was good as either containing an averment that the defendant had refused to refer the dispute, or that a reference had been had and an award made in favour of the plaintiff; and on the other hand, that a plea alleging that the claim had not been adjusted and settled according to the rule, and that there was a dispute in respect thereof within the meaning of the rule, and that it had not been arbitrated upon, nor had the arbitrators or arbitrator given a decision thereupon, was an answer to the declaration. Ibid.

Articles of partnership comprised an agreement to submit all disputes to arbitration, and until such arbitration should have taken place neither party was to be at liberty to sue the other with reference to the affairs of the partnership:—Held, that although an arbitration clause is legal, there may not be a negative clause superadded to withdraw the decision of the question from the tribunals of the country. *Lee* v. *Page*, 30 Law J. Rep. (N.S.) Chanc. 857.

Where a mining lease contained a clause for referring to arbitration all questions to arise between lessor and lessee "relative to or concerning the indenture, or any covenant, clause, matter or thing therein contained," upon the request in writing of either party, and after bill filed by lessors to compel lessees to work the mine in a particular manner, notices to refer had been served by the lessees upon motion under the 11th section of the Common Law Procedure Act, 1854, to stay proceedings, the Court held that the case was one which came within the 11th section, but that the section gave the Court a discretion; and the Court, in its discretion, refused to stay proceedings, on the ground that the notices to refer related to other matters besides those the subject of the suit, and that questions arose in the suit which did not come within the clause in the lease. *Wheatley* v. *the Westminster Brymbo Coal and Coke Co. (Lim.)*, 2 Dr. & S. 347.

An agreement between A and B contained the following clauses,—"In every case of any difference between the parties hereto, or their representatives,

whether touching the true intent or construction of this agreement or of anything therein expressed, or touching anything to be done or omitted in pursuance of this agreement, or as to any of the incidents or consequences thereof, or otherwise relating to the premises, the matter in question shall be referred to arbitration." "Every such reference shall be made to two persons, one to be named by each party." "If either party for fourteen days after being requested by the other party to name an arbitrator fail so to do, then both arbitrators may be named by the party making such request." Differences having arisen, A appointed an arbitrator, but B declined to do so on request, whereupon A appointed a second arbitrator; and the two proceeded to hear and dispose of the matter. The appointment of the arbitrators purported to be made by A *and one C* (who was said to be an incumbrancer on A's presumed interest under the agreement) *severally*, and the notice was also given by A *and C*:—Held, that the appointments were not vitiated by the introduction of the name of C. *Haddan* v. *Roupell*, 9 Com. B. Rep. 683.

Held, also, that it was not necessary in the appointment of the arbitrators to particularize the matters to be arbitrated upon. Ibid.

Held, also, that the request to B to appoint an arbitrator was not rendered invalid by its requiring him to notify the appointment to the solicitors, who had been acting for A throughout, instead of to A himself. Ibid.

(*b*) *Agreement signed by an Agent.*

Upon a submission to arbitration between two individuals (not being partners in trade) and a third party, where the agreement of reference is signed by one of them thus, "A, for self and B,"—on making the submission a rule of Court, it must be shewn by affidavit that A had the authority of B to sign for him. *In re Aldington*, 15 Com. B. Rep. N.S. 375.

(*c*) *Amendment and Revocation of.*

An order of reference of a cause made by a Judge at chambers by consent of both parties "on the usual terms," includes such power to the arbitrator to amend, as a Judge would have at Nisi Prius. If, therefore, after such consent, the formal order drawn up by the Judge's clerk accidentally omits such power, the Judge may insert it therein at the request of either party, notwithstanding the reference has been proceeded with. *Thompsett* v. *Bowyer*, 30 Law J. Rep. (N.S.) C.P. 1; 9 Com. B. Rep. N.S. 284.

If an arbitrator refuse to allow a party to a reference to put in evidence certain documents which by law he is entitled to have read on his behalf, the party aggrieved may, pending the reference, apply for leave to revoke the submission. If, however, it be shewn that the arbitrator has acted wrongly in law, the Court will not necessarily make the rule absolute; but, on the contrary, will discharge it, provided it be satisfied that the arbitrator, on hearing the decision of the Court, will comply with its directions, and receive the evidence. *Hart* v. *Duke*, 32 Law J. Rep. (N.S.) Q.B. 55.

The Court will not allow an amendment so as to introduce a new cause of action, where a cause has been referred by consent under an order which does not reserve power to the arbitrator to amend. Nor will they permit the plaintiff to revoke the submission, there being no suggestion of any breach of faith on the part of the defendants. *Smuthwaite* v. *Richardson*, 15 Com. B. Rep. N.S. 463.

(*d*) *Making the Submission a Rule of Court.*

[See *ante*, (*b*).]

Where matters in difference had been referred to an arbitrator by Judge's order, and the arbitrator, after twice enlarging the time, had made his award, the order of reference may be made a rule of Court without an affidavit verifying the dates of such enlargement. *Roberts* v. *Evans*, 34 Law J. Rep. (N.S.) Q.B. 73; 6 Best & S. 1.

Where two persons agree by deed to refer all matters in dispute which shall arise between them to two arbitrators, one to be chosen by each for that purpose; and on such disputes arising, in pursuance of such agreement the arbitrators are appointed by parol, the submission to arbitration is a parol submission, and therefore cannot be made a rule of Court under the 17 & 18 Vict. c. 125. s. 17. *Ex parte Glaysher*, 34 Law J. Rep. (N.S.) Exch. 41; 3 Hurls. & C. 442.

A lease contained a proviso that in case any disputes and differences should arise between the parties, they should be referred to two arbitrators, one to be chosen by each party, and that if either of them should neglect to name an arbitrator on his part within seven days after notice of the appointment of an arbitrator by the other, the arbitrator so appointed should act for both; and it was further agreed that "the submission of the said parties to the award of the said arbitrators or arbitrator might at the instance of either party be made a rule of Court." Disputes having arisen, the lessor appointed an arbitrator in writing, and gave notice in writing to the lessee that he had done so; the latter did not appoint an arbitrator on his part, whereupon, after due notice, the arbitrator appointed by the lessor proceeded *ex parte*, and made an award:—Held, upon the construction of the 17th section of the Common Law Procedure Act, 1854, that upon filing the appointment with an affidavit by the lessor verifying his signature thereto, the submission might be made a rule of Court. *Newton* v. *Hetherington*, 19 Com. B. Rep. N.S. 342.

Held, also, that by the combined effect of the 17th and 26th sections, an affidavit by the attesting witness to the lease was not necessary. Ibid.

(B) COMPULSORY REFERENCE.

In the case of a compulsory reference, under the Common Law Procedure Act, 1854, section 3, the parties are bound by the opinion of the arbitrator upon questions both of law and fact, as in the case of any voluntary reference. *Baguley* v. *Markwick*, 30 Law J. Rep. (N.S.) C.P. 342; s. c. *nom. Baggalay* v. *Borthwick*, 10 Com. B. Rep. N.S. 61.

*Semble*—A party has not a right to demand a case to be stated for the opinion of the Court, but that whilst the reference is pending before the arbitrator he may apply to a Judge, under section 4, for an interim order to state a case. Ibid.

A Judge at Nisi Prius has no power, under the Common Law Procedure Act, 1854, to make a compulsory order of reference of a cause before him for trial in the ordinary way, the power conferred by section 3. being confined to applications before trial,

and section 6. to trials of questions of fact by the Judge without a jury. *Robson* v. *Lees*, 30 Law J. Rep. (N.S.) Exch. 235; 6 Hurls. & N. 258.

To an action for damages for not delivering up premises at the expiration, in as good repair and condition as at the commencement, of a tenancy, and for breach of a covenant in a lease to deliver up in good repair,—the defendant paid 10*l.* into Court, which the plaintiff denied to be enough to satisfy his claim. A Judge at chambers, on the application of the plaintiff, having made an order referring the action to the Master, under the 17 & 18 Vict. c. 125. s. 3, the Court held, that it was a matter for the discretion of the Judge; that he had exercised a wise discretion, and refused to rescind his order. *Angell* v. *Felgate*, 31 Law J. Rep. (N.S.) Exch. 41; 7 Hurls. & N. 396.

## (C) ARBITRATOR.

[Appointment of—see *Haddan* v. *Roupell*, *ante*, (A) (*a*).

### (*a*) *Power and Duty.*

The Court of Chancery referred to arbitration certain matters in dispute between parties to the suit of *H* v. *H*, and also between the same parties as to the estate of H, the testator in the cause; those disputes related to certain collieries, their management and the dealings with them for many years. One of the parties had a son, who was well acquainted with the mining accounts, and had assisted his father in the business, and this party applied to the arbitrator to allow his son to be present; but that officer refused to permit him to be present, on the ground of his behaviour in the matter. A shorthand writer, whose presence the same party wished to take notes at the meetings, was also excluded. After the award, a motion was made to set it aside:—Held, that, without going into the question whether the award did or did not do substantial justice between the parties, it must be set aside, the exclusion by the arbitrator of the son and the shorthand writer having been made without adequate ground, and the acquiescence of the party complaining, in the proceedings under the reference after their exclusion, not being such as to deprive him of his right to have the award set aside. *In re Haigh's Estate; Haigh* v. *Haigh*, 31 Law J. Rep. (N.S.) Chanc. 420; 3 De Gex, F. & J. 157.

Observations on the duties of arbitrators, and on their power to delegate authority. Ibid.

An arbitrator, in taking accounts, allowed two bills of costs sent to him by one side after the last meeting, without communicating them to the other side, and he, being authorized under the reference to appoint an accountant, "not objected to by any of the parties," appointed one without communicating with the parties. The award was set aside. *In re Tidswell*, 33 Beav. 213.

An arbitrator awarded that a sum, which he found due from one party, should "be forthwith paid and accounted for by him, and brought into trust accounts":—Held, that this was too uncertain, and fatal to the award. Ibid.

Observations as to remitting an award back to the same arbitrator, under the 17 & 18 Vict. c. 125. s. 8. Ibid.

Bill by a contractor, alleging unfair conduct on the part of the architect, whose decision was by the terms of the contract made final, and who ousted the contractor and finished the buildings. The Court, on proof of such unfair conduct, decreed payment of the balance due to the plaintiff on the contract, and relieved the contractor from penalties, declared the architect's decision not binding, and ordered both the defendants (the architect and the contracting party) to pay the costs of the suit. *Pawley* v. *Turnbull*, 3 Giff. 70.

It is not absolutely necessary that the evidence before an arbitrator should be taken on oath; the parties may waive it. *Wakefield* v. *the Llanelly Railway and Dock Co.*, 34 Beav. 245.

At the trial of an action on covenants in a lease (which had many years to run) for non-repair, and for waste by alteration of the premises, raising many issues, an order of reference was made, which directed "that the jury do find a verdict for the plaintiff for the claim in the declaration, subject to a reference to a valuer, who is to decide whether there is any damage to the plaintiff by reason of the premises not being in a sufficient state of repair, under the terms of the lease, in which case the valuer is to award the amount of damage to the reversion. It is also ordered that the valuer is to say what compensation (if any) the plaintiff is entitled to in consequence of the alterations which have taken place in the premises, and that the valuer should be attended by two witnesses only on each side, to explain the past and present state of the premises." The appointed valuer found as follows: "I hereby certify that beyond the sum of 17*l.* paid into Court, there is no damage to the plaintiff by reason of the premises not being in a sufficient state of repair under the terms of the lease; nor is the plaintiff entitled to any compensation in consequence of the alterations which have taken place in the premises":—Held, that the arbitrator had no power over the verdict, but that his duty was limited to deciding on the two specified matters of damage, viz., by reason of non-repair, and by reason of the alterations; that the certificate was good and valid, though it did not dispose of the issues raised, and that it authorized an entry of a verdict for the plaintiff, with nominal damages. *Sowdon* v. *Mills*, 30 Law J. Rep. (N.S.) Q.B. 175.

It is competent to arbitrators, under the Friendly Societies Act, to decline to hear counsel. *In re Macqueen*, 9 Com. B. Rep. N.S. 793.

*Semble*—That all arbitrators have the like discretion. Ibid.

It is a matter entirely in the discretion of an arbitrator whether he will or will not postpone the reference, in order to give one of the parties an opportunity of bringing a material witness from abroad. And the Court will not interfere unless the circumstances under which he refuses to do so are such as to amount to misconduct. *Ginder* v. *Curtis*, 14 Com. B. Rep. N.S. 723.

### (*b*) *Excess of Authority.*

The plaintiff had effected three policies on goods, one for 6,000*l.* with the A company, another for 2,500*l.* with the B company, and a third for 2,500*l.* with the C company. A fire having happened, the plaintiff's claims against these three companies were referred to arbitration. The agreement of reference recited that the plaintiff had claimed to have made good, by the several companies parties thereto, or

some of them, the loss thereby sustained to the chattels and things insured, so far as the said loss was covered by the policies, or any of them; and that four schedules, severally marked A, B, C, and C*a*, contained the particulars of all the chattels and things alleged by the plaintiff to have been covered by the said policies, or some or one of them, and to have been destroyed or injured by fire. It further recited, that "it had been agreed between the said parties thereto that the claim of the plaintiff, so far as respected the chattels and things particularized in schedule A should be satisfied by means of the payment to him of a sum of 2,771*l.* 19*s.* 5*d.*, such sum being the agreed value at the time of the occurrence of the fire of the last-mentioned chattels and things, as the plaintiff did thereby admit." It further recited, that difficulties had arisen respecting the settlement of the said claim of the plaintiff, so far as the same had not been agreed to be satisfied as aforesaid, and respecting the adjustment of the respective liabilities of the said companies, as between or among themselves, to the total loss covered by the said policies. It then proceeded to refer it to the arbitrators "to award and determine what was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said policies, or any of them, in respect of loss or damage occasioned by the said fire to or in the said chattels or things particularized as aforesaid in schedules B, C, and C*a*, and what were the several proportions in which such total sum, and also the said sum of 2,771*l.* 19*s.* 5*d.* agreed to be paid as aforesaid, ought to be borne and paid among or between the several companies." The arbitrators by their award found that 8,288*l.* 0*s.* 7*d.* was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said three policies, in respect of loss or damage occasioned by the fire to the chattels and things particularized in schedules B, C, and C*a*; and they directed that this sum of 8,288*l.* 0*s.* 7*d.* and the 2,771*l.* 19*s.* 5*d.*, so agreed to be paid to the plaintiff in satisfaction of his claim in respect of the loss or damage occasioned by the fire to the chattels and things particularized in schedule A, making together 11,060*l.*, should be borne and paid by the three companies in certain proportions. They then found that the loss or damage sustained exceeded the sums insured, and that the whole salvage and proceeds of the salvage of and from the said fire belonged absolutely to the plaintiff:—Held, that, in awarding that the plaintiff was entitled to the salvage, which it appeared from the record arose solely from the goods particularized in schedule A, the arbitrators had exceeded their jurisdiction. *Skipper* v. *Grant*, 10 Com. B. Rep. N.S. 237.

By bond of submission dated the 19th of March, 1859, it was referred to an arbitrator to determine of and concerning all matters of accounts then pending between A and B. The arbitrator, by his award, reciting the submission, awarded "of and concerning the premises," that, "up to the 31st of October, 1857, the accounts between A and B, in reference to the W C farm, were adjusted, and that the balance then due from A to B amounted to 4,314*l.* 14*s.* 10*d.*; and that no partnership existed between A and B in respect of the said farm;" and he further awarded that "A do pay to B the sum of 781*l.* 5*s.* 3*d.*, the amount due from him in respect of the farm aforesaid; and that the said A do pay to the said B the sum of 1,137*l.* 17*s.* due from him to B in respect of shares in the C company; and that, on payment of such last-mentioned sum, the said B do deliver to the said A 118 shares in the said company, held by him as collateral security for the said sum." In an action brought by the executors of B to enforce payment of the two sums so awarded,—Held, that the award was not uncertain, and that the arbitrator had not exceeded the authority given to him by the submission in awarding that no partnership existed between A and B, or that the shares held by B as collateral security for the 1,137*l.* 17*s.* should be delivered up to A on payment of that sum. *Harrison* v. *Lay*, 13 Com. B. Rep. N.S. 528.

(c) *Effect of attending Arbitrator under Protest.*

If an arbitrator, who has suffered his time to expire, determine to proceed in the reference, notwithstanding an objection taken on that ground by a party to the reference, and the party protests that any award which the arbitrator may make will be therefore void, his continuing to attend and contest the case before the arbitrator under such protest does not give the arbitrator authority to make an award. *Ringland* v. *Lowndes* (Ex. Ch.), 33 Law J. Rep. (N.S.) C.P. 337; 17 Com. B. Rep. N.S. 514.

If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them, and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party, still under protest, continues to attend before the arbitrators and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter. *Davies* v. *Price* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 8.

(D) AWARD.

(*a*) *Form and Validity.*

A railway company gave to the plaintiff, who was owner and occupier of a leasehold hotel, the usual notice to treat, and it was referred to arbitration to ascertain the value of the premises, and the damages sustained by the execution of the works, and the compensation to be paid by the company in respect thereof. The arbitrator awarded 2,700*l.* as the compensation to be paid for all the leaseholder's interest, of whatever nature, in the leasehold. Upon a bill by the leaseholder for a specific performance,—Held, that the award was bad, and the bill was dismissed with costs. *Wakefield* v. *the Llanelly Rail. and Dock Co.*, 3 De Gex, J. & S. 11; 34 Beav. 245.

By a Judge's order, after issue joined, an action was referred to a lay arbitrator, who by his award ordered "that there should be a verdict for the plaintiff for 7*l.* 9*s.* 11*d.*":—Held, that although there was no power to enter a verdict, the award was good and an action maintainable upon it, for the award must be read as an expression of the arbitrator's opinion that the plaintiff was entitled to the sum mentioned, and not as an award that a verdict should be entered for that sum. *Everest* v. *Ritchie*, 31 Law J. Rep. (N.S.) Exch. 350; 7 Hurls. & N. 698.

An action for use and occupation having been referred to the Master, under the 17 & 18 Vict. c. 125. s. 3, the Master certified that there was nothing due from the defendant to the plaintiffs, and on the

same day wrote a letter to the defendant's attorney, which he shewed to the plaintiff's attorney, and in which "in order to carry out the friendly spirit of arrangement which appeared to exist between the parties," he gave his opinion on several questions raised upon an agreement between the defendant and some third parties "as founded upon the evidence given in the cause referred," and in order "to assist the parties, and to prevent the necessity for future litigation":—Held, on motion to set aside the certificate on the ground that it appeared from the arbitrator's letter that he was mistaken in the law, that, whether he were mistaken or not, the letter formed no part of the award, and could not be looked at by the Court. *Hogge* v. *Burgess* explained. *Holgate* v. *Killick*, 31 Law J. Rep. (N.S.) Exch. 7; 7 Hurls. & N. 418.

Where an award is valid in form, and is made on all the matters referred and on no more, and is intended by the arbitrators to express their decision, an objection that the arbitrators had made their award without exercising their own judgment, but according to the opinion of a third person by whose decision they had beforehand agreed to be bound, cannot be taken on a plea of *nul tiel agard* to an action on the award, but ought to be raised on a motion to set the award aside. *Whitmore* v. *Smith* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 107; 7 Hurls. & N. 509.

A dispute arose between the plaintiff and the defendants, as to whether a certain carriage archway had been constructed in conformity with an agreement entered into between them. An action having been brought, by an order of Nisi Prius the cause was referred to an arbitrator, who was empowered to direct, if he found for the plaintiff, what should be done to make the carriage archway in conformity with the agreement. The arbitrator found for the plaintiff, without awarding any damages, and directed certain alterations to be made in the archway. The plaintiff signed judgment for the amount of the damages claimed in the declaration:—Held, that the plaintiff was entitled only to nominal damages. *Brown* v. *the Somerset and Dorset Rail. Co.*, 34 Law J. Rep. (N.S.) Exch. 152.

In an application to set aside an award, it appeared that the dispute arose respecting the condition of a cargo of rape-seed, which had been shipped and forwarded to one of the parties upon the terms contained in a sold-note, which provided that any dispute arising out of the contract should "be settled by arbitration in London in the usual way." Two arbitrators were chosen, one for each side, and they being unable to agree, appointed an umpire according to the terms of the reference. The umpire made his award after looking at samples furnished to him by the arbitrator representing the party in whose favour he decided, without any communication with the other party, after communicating directly with some of the witnesses, and without giving the party against whom he decided any opportunity of being heard. In so doing, he stated (in an affidavit filed by him) that he had followed the usual and ordinary practice in such cases. Evidence was also given by a number of merchants engaged in the oil and seed trade that it was the usual and ordinary practice in arbitrations in the oil and seed trade, and also in mercantile arbitrations generally, for an umpire, in case he sees fit, to inspect samples produced on behalf of one of the parties, without any communication with the other, to communicate directly with witnesses without notice to the parties, and to make his award without giving the parties or their arbitrators an opportunity of being heard:—Held, that such an usage, as tending to allow parties to be decided against without being heard, was contrary to the principles of equity and justice, and that the award could not therefore be supported. *In re Brook*, 33 Law J. Rep. (N.S.) C.P. 246; 16 Com. B. Rep. N.S. 403.

*(b) Setting aside and remitting.*

An award was made on the 9th of June, 1859, under a submission to arbitration, which, however, contained no agreement to make it a rule of Court. The plaintiff objected to the award; but he did not make it a rule of Court, or take any measures to have it set aside prior to an action which was brought against him on the award in December, 1859. He pleaded *nul tiel agard* to the action; but his plea having been overruled by the Exchequer Chamber, and judgment entered against him, he then filed a bill to have the award cancelled and for an injunction against execution on the judgment:—Held (affirming the decision of the *Vice Chancellor Wood* but *dissentiente* the *Lord Justice Turner*), that the plaintiff had by his conduct lost his equity, if ever existing, against the action and against the award. *Smith* v. *Whitmore*, 33 Law J. Rep. (N.S.) Chanc. 713; 1 Hem. & M. 576; 2 De Gex, J. & S. 297.

A having brought an action against B, and B a cross-action against A, the same and all matters in difference were by a Judge's order, by consent, referred. B died pending the reference, and before administration could be taken out the arbitrator, notwithstanding a protest, proceeded *ex parte*, and made an award directing payment of a sum of money and costs to A. A had filed a creditors' bill for the administration of B's estate, founded upon the alleged debt under the award:—Held, on demurrer, that a bill would not lie by B's executor praying that the bill in the creditors' suit might be dismissed and the award set aside. *Harding* v. *Wickham*, 2 Jo. & H. 677.

The Court of Chancery has no jurisdiction to set aside an award made under a reference of an action at law, whether the same be or be not under the statute, 9 & 10 Will. 3. c. 15. Ibid.

It is in the discretion of the Master or other arbitrator, to whom an action in respect of a claim for work has been referred, to inspect the premises on which the work was done; and his refusal to inspect is no ground for setting aside his award. *Mundy* v. *Black*, 30 Law J. Rep. (N.S.) C.P. 193; 9 Com. B. Rep. N.S. 557.

After an arbitrator had made his award, one of the parties discovered that the award had been drawn up by the person who had acted as attorney and advocate for the other party, and that this person had also advised the arbitrator privately in the matter of the award. This was admitted by the arbitrator, but he positively denied that he had done more than consult the attorney, who was his own ordinary professional adviser, as to the form of the award, or that his decision was in any way influenced thereby. Under these circumstances, the affidavits in exculpation of the arbitrator being very strong, the Court refused to set aside the award. *Under-*

*wood* v. *the Bedford and Cambridge Rail. Co.*, 31 Law J. Rep. (N.S.) C.P. 10; 11 Com. B. Rep. N.S. 442.

An arbitrator to whom an action for a claim above 20*l.* had been referred as a matter of account, awarded to the plaintiff a sum less than 20*l.*, and certified that the action was fit to be brought in a superior Court, but gave no other certificate. The Master having taxed the costs on the lower scale, the arbitrator, on being applied to, on behalf of the plaintiff, stated in effect that he intended by his certificate to give the plaintiff his costs. The Court gave the plaintiff leave at his (the plaintiff's) expense to refer the matter back to the arbitrator. *Caswell* v. *Groucutt*, 31 Law J. Rep. (N.S.) Exch. 361.

An agreement of reference in an appeal against a poor-rate, contained a clause enabling the arbitrators, at the request of either party, to state a case, to be settled by the umpire, for the opinion of the Court. The arbitrators having disagreed, the umpire made his umpirage, and subsequently, at the request of the appellants, set out the principles upon which he had acted, with a view of enabling the appellants to have the question discussed in Court. Upon a rule calling upon the defendants to shew cause why the umpirage should not be sent back to the umpire, in order that he might state the facts more fully, this Court refused to interfere, as the appellants had had the opportunity of getting a case stated, and, instead of doing so, had taken their chance of getting the umpirage made in their favour. *In re the London Dock Company* v. *the Trustees of the Parish of Shadwell*, 32 Law J. Rep. (N.S.) Q.B. 30.

References to the Master under the Common Law Procedure Act, 1854, stand upon the same footing with regard to applications to set aside or send them back for reconsideration as ordinary references. The Court, therefore, will not send an award back to the Master in order that he may state a case, when at the hearing he declined to state one. *Holloway* v. *Francis*, 9 Com. B. Rep. N.S. 559.

### (c) *Taking up Award: Moiety of Fee.*

Where two parties employ an arbitrator, and one pays the arbitrator's fees to enable him to take up the award (there being no event of the award to entitle either party to costs), the party so paying is entitled to recover from the other a moiety of the sum paid as money paid to his use. *Marsack* v. *Webber*, 6 Hurls. & N. 1.

### (d) *Enlarging Time for making.*

By a submission to arbitration, which might be made a rule of Court, the time for making the award was limited to a day named, or such further day, not exceeding two calendar months from the date of the submission, as the arbitrator might appoint. The arbitration was closed before the day named; and the arbitrator, also before the day named, enlarged the time for making the award, but to a day later than the two months. The arbitrator made his award within the enlarged time, but after the two months:—Held, that the Court or a Judge had power afterwards to enlarge the time for making the award under the 39th section of the 3 & 4 Will. 4. c. 42. *Ward* v. *the Secretary of State for War*, 32 Law J. Rep. (N.S.) Q.B. 53.

Where there was cause to believe that an arbitrator had failed to enlarge the time for making his award within the time provided by the order of reference, and he had refused to give any information as to whether the enlargement had been duly made or not, this Court, upon the application of one of the parties who wished to make the order of reference a rule of Court, ordered the arbitrator to attend before the Master to be examined upon the matter, in order that the order of reference might be made a rule of Court. *Roberts* v. *Evans*, 34 Law J. Rep. (N.S.) Q.B. 7.

### (e) *Making Award a Rule of Court.*

Where a decree sanctions a reference to arbitration, and reserves liberty to either party to apply to make the award an order of Court, the application for that purpose should be made upon motion, and not *ex parte*. *Lipscomb* v. *Palmer*, 30 Law J. Rep. (N.S.) Chanc. 169.

### (f) *Enforcing.*

By the agreement of reference between P and S, costs were in the discretion of the arbitrator. The award directed that 149*l.* 5*s.* 7*d.*, being the costs of the award, should be paid by the parties in the following proportions: that 25*l.* should be paid by P to certain attorneys forthwith, and 124*l.* 5*s.* 7*d.*, the residue, should be paid by S in like manner, and if P paid any part of the 124*l.* 5*s.* 7*d.*, that S should repay it to him:—Held, on an application by P for a rule calling on S to pay the several sums, that as the arbitrator had fixed in the award the amount payable to himself, the matter was too doubtful to grant a rule. *Threlfall* v. *Panshawe* doubted. *Parkinson* v. *Smith*, 30 Law J. Rep. (N.S.) Q.B. 178.

If an award finds that the plaintiff is entitled to recover a certain sum from the defendant, the Court will grant a rule ordering the defendant to pay the amount, although the award contains no direction to the defendant to pay the amount, and though, consequently, no attachment could issue. *Bowen* v. *Bowen*, 31 Law J. Rep. (N.S.) Q.B. 193.

If a person ordered to pay money under an award satisfies the Court that he has a *bona fide* claim for a cross-demand larger than the sum awarded, which he might reasonably hope to support by way of set-off to an action on the award, the Court will not grant a rule ordering him to pay the sum awarded,—*Semble*, otherwise if the set-off be one cognizable only in equity. *Swayne* v. *White*, 31 Law J. Rep. (N.S.) Q.B. 260.

It is no answer to a rule to pay money pursuant to an award, that the party in whose favour the award is made has, since the award, been committed to take his trial for perjury committed during the arbitration. *Woollen* v. *Bradford*, 33 Law J. Rep. (N.S.) Q.B. 129.

The Court will not make absolute a rule *nisi* on a defendant to pay money pursuant to an award unless there has been personal service, or unless it be shewn that personal service cannot be effected because the party is keeping out of the way to avoid service. An acceptance by the attorney of the defendant of the service of the rule *nisi*, and a consent by him to the rule being made absolute, are not for this purpose equivalent to personal service. *Evans* v. *Prosser*, 34 Law J. Rep. (N.S.) Q.B. 256.

The Court refused a rule for payment of money

under an award, where it appeared that the costs (unascertained) of certain proceedings in Chancery were payable to the other party under the same award. *Lambe* v. *Jones*, 9 Com. B. Rep. N.S. 478.

### (E) Costs.

#### (*a*) *To abide the Event.*

Where an action for alleged breaches of covenant in a farming lease, in which the plaintiff claimed 100*l.* damages, was, after pleas but before issue joined, by a Judge's order and by consent, referred to arbitration, "the costs of the reference to abide the event," and the arbitrators found in favour of the defendant on all the alleged breaches, with the exception of one, on which they awarded 16*s.* damages to the plaintiff, —Held, that the event of the reference was in favour of the defendant, and that the plaintiff was not entitled to his costs. *Kelcey* v. *Stupples*, 32 Law J. Rep. (N.S.) Exch. 6; 1 Hurls. & C. 576.

An action of slander, after issue joined and before trial, was by agreement referred to arbitration, "the costs of the cause to abide the event of the award." The arbitrator found one issue for the plaintiff, with 20*s.* damages:—Held, that the plaintiff was entitled to the costs of the cause. *Frean* v. *Sargent*, 32 Law J. Rep. (N.S.) Exch. 281; 2 Hurls. & C. 293.

#### (*b*) *Taxation of.*

An action of trespass was referred, by consent, at Nisi Prius, and by an order of Nisi Prius, drawn up in the usual form, the verdict was, by consent, entered for the plaintiffs, with damages 40*s.*, costs 40*s.*; and, by the like consent, it was also ordered that the costs of the reference and award should be paid by the defendants. The award having been made, the Master taxed the costs of the action as between party and party on the ordinary scale; and then proceeded to tax the costs of the reference and award on the same scale, but the plaintiffs objecting that the proceedings on the reference were virtually under the Lands Clauses Consolidation Act, and that the costs ought to be taxed on the scale usually allowed in proceedings under that statute, the Master adjourned the taxation to enable the plaintiffs to apply to the Court:—Held, that the costs the defendants had stipulated to pay, and which they were bound to pay under the order of Nisi Prius, were ordinary costs as between party and party, and ought to be taxed on such and on no other scale. *Eccles* v. *the Mayor, Aldermen and Burgesses of Blackburn*, 30 Law J. Rep. (N.S.) Exch. 358.

And per *Martin, B.* and *Bramwell, B.*, that the Court ought not to be called on to give directions to the Master how to tax, but that the Master should announce the principle on which he taxes, and then the Court may be called on to review his taxation. Ibid.

## ARMY PRIZE.

The law relative to the payment of money belonging to deceased officers and soldiers of Her Majesty's land forces amended by 27 & 28 Vict. c. 36.

## ARREST.

[Of Garnishee, see Attachment of Debts.]



### (A) By Police-Officer not having the Warrant in his Possession.

A police-officer arrested W G under a warrant for disobedience to a bastardy order, but at the time of doing so, the warrant was actually at the police-station, and not in the possession of the officer, although it had been so previously:—Held, that the arrest was illegal, as the officer ought to have had the warrant ready to be produced at the time of the arrest, if required by W G. *Galliard* v. *Laxton*, 31 Law J. Rep. (N.S.) M.C. 123; 2 Best & S. 363.

After the arrest of W G the appellant assaulted the officer. Two informations were laid against the appellant, the one charging him with the rescue of W G, and the other with an assault upon the police-officer. At the hearing before the magistrates the former information was abandoned:—Held, that this did not in any way prevent the officer from proceeding upon the latter information. Ibid.

### (B) On Ca. Sa. for more than is due.

An action will lie against a judgment creditor for maliciously and without reasonable or probable cause indorsing a writ of *ca. sa.*, issued on such judgment, with directions to levy a larger sum than due, and causing the debtor to be arrested thereunder; and it is not necessary to allege that the proceedings have terminated in the plaintiff's favour, or that the illegality of the arrest should have been ascertained before the action by the debtor's obtaining an order of a Court or Judge for his discharge from custody, as such illegality must depend altogether on the amount for which it was made being greater than the sum due, which is a fact to be only conclusively decided by a jury. *Gilding* v. *Eyre*, 31 Law J. Rep. (N.S.) C.P. 174; 10 Com. B. Rep. N.S. 592.

### (C) Under Absconding Debtors' Arrest Act.

Where a debtor is arrested on a warrant granted under the Absconding Debtors' Arrest Act, 1851 (14 & 15 Vict. c. 52), and the last of the seven days after the date of such warrant is Good Friday, and the offices of the Court are therefore closed until the following Wednesday, the creditor has such Wednesday to issue the writ of *capias* required by section 1. of the said act. *Hughes* v. *Griffith*, 32 Law J. Rep. (N.S.) C.P. 47; 13 Com. B. Rep. N.S. 324.

*Quære*—Whether a writ of *capias* issued after the time required by the Absconding Debtors' Arrest Act, and upon the same materials as those on which the warrant had been obtained under that act, can be supported as an independent writ, if the intention of the debtor to leave the country continues. Ibid.

The proceeding by warrant, under the Absconding Debtors' Arrest Act (14 & 15 Vict. c. 52), is only auxiliary to that by *capias*, under the 1 & 2 Vict. c. 110, and the validity of the *capias* is independent of the proceedings under the warrant. *Williams* v. *Gibbon*, 33 Law J. Rep. (N.S.) Q.B. 33; 4 Best & S. 617.

Where, therefore, a defendant has been arrested under a warrant, and is discharged at the end of the seven days, he may be arrested again on a *capias* issued under a Judge's order made on a sufficient affidavit, although it was sworn before the lapse of the seven days. Ibid.

*Masters* v. *Johnson* overruled. Ibid.

(D) PRIVILEGE FROM.

[See *In re Jewitt*, *post*, ATTORNEY AND SOLICITOR (C).]

An insolvent debtor is privileged from arrest when attending or returning from the Court in which his petition is heard, although on the day he was arrested the consideration of the final order was adjourned *sine die*. *Chauvin* v. *Alexandre*, 31 Law J. Rep. (N.S.) Q.B. 79; 2 Best & S. 47.

The deputy coroner for a county, while on his way to hold an inquest, is privileged from arrest on civil process. *Ex parte the Deputy Coroner for the County of Middlesex*, 30 Law J. Rep. (N.S.) Exch. 77; 6 Hurls. & N. 501.

If arrested under such circumstances, the Court will order his discharge; no rule need be drawn up. Ibid.

(E) DISCHARGE FROM.

W was adjudicated bankrupt in April, 1857. He did not then surrender, but went abroad for some years, coming back to England from time to time under a feigned name, and communicating with some of his assignees. In March, 1863, while in England, he was arrested on a claim of debt for 50,000*l.* on a *capias* to hold to bail, issued pursuant to a Judge's order made on the ground that the defendant was about to leave the country. The defendant surrendered in the bankruptcy in July, 1863. The plaintiff had in 1858 applied to the Commissioner of Bankrupts to admit the alleged debt as a claim, but the Commissioner had refused on the ground that the debt was for money lent by a banking company, which was not a legal company because it had not paid up a sufficient portion of the subscribed capital. The defendant swore that he did not intend to leave the country at the time of his arrest nor since, but purposed to remain in England to assist his assignees. He also stated that his health was suffering seriously from the confinement. The defendant had not passed his last examination:—Held, that the defendant was not entitled to be discharged from custody. *Steward* v. *Waugh*, 33 Law J. Rep. (N.S.) Q.B. 86.

(F) EVIDENCE IN JUSTIFICATION OF THE ARREST.

The defendant was arrested by a bailiff of a county court, under a warrant of that Court good on its face. He assaulted the bailiff in resisting the arrest. On an indictment against him for a common assault on the bailiff, it was held, that it was not necessary to prove the proceedings in the county court, but that proof of the warrant alone was sufficient to shew that the officer was justified in arresting the defendant, and to sustain a conviction of the defendant for the assault. *R.* v. *Davis*, 30 Law J. Rep. (N.S.) M.C. 159; 1 L. & C. 64.

On the trial of a prisoner for wounding a constable who had arrested him on suspicion of felony, the following question, in order to assist in shewing that there were reasonable grounds for the arrest, was put to the constable on the part of the prosecution, "What do you know had been the prisoner's previous character?" The answer was, "I know the prisoner to be a very bad character":—It was held by the Court that this question ought not to have been put in the examination in chief, although it was open to the prisoner to have cross-examined the constable as to the grounds of his suspicion. *R.* v. *Turberfield*, 34 Law J. Rep. (N.S.) M.C. 20; 1 L. & C. 495.

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## ASSAULT.

[See ARREST (A) and (F).—And see FALSE IMPRISONMENT.]

(A) CONSENT.
(B) CONVICTION FOR.
(C) JUSTICE'S CERTIFICATE OF DISMISSAL OF CHARGE.
(D) PLEADING IN ACTIONS FOR.
(E) MIS-TRIAL AND VENIRE DE NOVO.

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(A) CONSENT.

If a girl of ten years of age consent to indecent liberties being taken with her the person who takes them cannot be convicted of an assault. *R.* v. *Johnson*, 34 Law J. Rep. (N.S.) M.C. 192; 1 L. & C. 632.

(B) CONVICTION FOR.

The first count of an indictment was for unlawfully and maliciously inflicting grievous bodily harm on the prosecutor; the second for assaulting and unlawfully wounding and ill-treating the prosecutor, and thereby occasioning him bodily harm. The verdict was, guilty of common assault:—Held, that this verdict sustained the conviction on the second count. *R.* v. *Oliver*, 30 Law J. Rep. (N.S.) M.C. 12; Bell's C.C. 287.

The defendant was indicted, in one count, for assault, and unlawfully and maliciously inflicting grievous bodily harm; and, in another count, for a common assault. The jury returned, as their verdict, that they found the defendant guilty of an aggravated assault, but without premeditation, and that it was done under the influence of passion:—Held, that the Judge who tried the case was justified, on this finding, in directing a verdict of guilty to be entered on the first count. *R.* v. *Sparrow*, 30 Law J. Rep. (N.S.) M.C. 43; Bell's C.C. 298.

On a summons under the Municipal Corporation Act, for assaulting a constable in the execution of his duty, the accused cannot be convicted of a common assault under 24 & 25 Vict. c. 100. s. 24. *R.* v. *Brickhall*, 33 Law J. Rep. (N.S.) M.C. 156.

(C) JUSTICE'S CERTIFICATE OF DISMISSAL OF CHARGE.

The plaintiff, having laid an information for an

assault under 9 Geo. 4. c. 31, took out a summons, which was served on the defendant, but afterwards, and before the day for hearing, the plaintiff, by his agent, gave notice to the defendant that the summons was withdrawn, and that he need not attend, and the plaintiff also gave notice to the magistrates' clerk that he would not attend. The defendant, however, attended in obedience to the summons, and claimed to have the information dismissed and a certificate of dismissal granted, although the plaintiff was absent. The magistrates having accordingly dismissed the complaint, and granted a certificate shewing these facts,—Held, that such dismissal was "a hearing" of the case within section 27, and that, therefore, the certificate was a bar to an action for the assault. *Bradshaw* v. *Vaughton*, 30 Law J. Rep. (N.S.) C.P. 93; 9 Com. B. Rep. N.S. 103.

Where on a complaint for a common assault by the party aggrieved, the Justices, under the 9 Geo. 4. c. 31. s. 27, dismiss the complaint as not proved, their certificate of dismissal is, under section 28, a bar to an indictment for unlawfully wounding, and for assault causing actual bodily harm, arising out of the same circumstances. *R.* v. *Elrington*, 31 Law J. Rep. (N.S.) M.C. 14; 1 Best & S. 688.

(D) Pleading in Actions for.

If A wrongfully, after request to give it up, detain a chattel from B the owner entitled to possession, B in law has the possession, and A's wrongful detention against B's request is no possession, but is the same violation of the right of property as the taking the chattel out of the actual possession of B, and B (or his servants acting under his command) is justified in using force sufficient to defend his right and re-take the chattel. *Blades* v. *Higgs*, 30 Law J. Rep. (N.S.) C.P. 347; 10 Com. B. Rep. N.S. 713.

Declaration for assault and battery. Plea, that the plaintiff had wrongfully in his possession dead rabbits belonging to E, and being about to carry them away, the defendants, as servants of E, and by his command, requested the plaintiff to refrain, which he refused to do, and thereupon defendants, as servants of E and by his command, gently laid their hands on the plaintiff and took the rabbits from him, using no more force than was necessary:—Held, a good plea, although it did not allege how the plaintiff took the property of E, and became the holder thereof. Ibid.

(E) Mis-trial and Venire de novo.

On an indictment for an assault, occasioning actual bodily harm, the jury brought in a verdict, guilty of a common assault. The chairman, mistaking the law, told the jury that they could not find such a verdict on that indictment. The jury then found the prisoner guilty simply. The verdict was entered as a verdict of guilty of the aggravated assault, and a sentence of imprisonment with hard labour was passed:—Held, that the first verdict was not tantamount to a verdict of acquittal; that the chairman ought to have taken the first verdict; that the second verdict could not stand; that there had been a mis-trial, and that there must be a *venire de novo*. *R.* v. *Yeadon*, 31 Law J. Rep. (N.S.) M.C. 70; 1 L. & C. 81.

## ASSIGNMENT.

[See Debtor and Creditor.

Notice of an equitable assignment having been given to the trustees before the fund actually reached their hands, it was held to give priority over a subsequent assignment of which earlier notice was given. *Buller* v. *Plunkett*, 30 Law J. Rep. (N.S.) Chanc. 641; 1 Jo. & H. 441.

As between two equitable assignees the time of giving notice to a person who afterwards becomes trustee is of no importance, if both notices are given before the relation of trustee and *cestui que trust* is created. *Webster* v. *Webster*, 31 Law J. Rep. (N.S.) Chanc. 655; 31 Beav. 39.

As between two assignees of a possible future fund, notice, before the fund has come into existence, to a person who is merely a potential future trustee or stakeholder is ineffectual to disturb the usual order of priorities. *Somerset* v. *Cox*, 33 Law J. Rep. (N.S.) Chanc. 490; 33 Beav. 634.

An officer in the army upon his marriage covenanted with trustees that any money which should be received from the sale of his then or any future commission, &c., should be paid to the trustees upon the trusts of his marriage settlement. He subsequently became indebted to the regimental agents; he then gave them authority to apply for the sale of his commission, and he charged the proceeds with the payment of the debt. The trustees shortly afterwards gave the agents notice of the settlement, and of their claim to the proceeds. The commission was subsequently sold and the money was paid to the agents. Upon a bill by the trustees of the settlement,—Held, that the charge of the agents upon the proceeds arising from the sale of the commission was entitled to priority over the settlement; since, if notices given before receipt of the sale moneys were to be regarded as effectual, the army agents had notice of their own security before receiving any notice of the settlement; and if as ineffectual, then the first notice after the receipt of the sale moneys, and therefore the first effectual notice, was also that of their own claim. Ibid.

## ATTACHMENT.

[For non-payment of costs, see Divorce. And see Legacy Duty—Attorney and Solicitor (D) (*b*) (1) (iii).]

(A) For Contempt.
(B) For disobeying Rule to pay Money.
(C) Rule for, when absolute in first Instance.

(A) For Contempt.

The sheriff having seized goods under a writ of *fi. fa.* against A, B claimed them, whereupon an interpleader summons was taken out by the sheriff and served on B, notwithstanding which B took the goods forcibly out of the possession of the officer in whose custody they were, and sold them:—Held, that B was guilty of contempt; and the Court made absolute a rule for an attachment against him, not to be enforced if he paid the amount of the execution into

Court. *Cooper* v. *Asprey*, 32 Law J. Rep. (N.S.) Q.B. 209; 3 Best & S. 932.

*Semble*—That if no interpleader summons had been taken out, B would have been guilty of contempt at common law in taking the goods out of the custody of the sheriff. Ibid.

(B) For disobeying Rule to pay Money.

A party who had been ordered by rule of a Court of law to pay a sum of money executed a deed of assignment for the benefit of his creditors, under section 192. of the Bankruptcy Act, 1861. The party not paying the money on demand made after the assignment, the Court made absolute a rule for an attachment against him for the non-payment; but directed that the attachment should not issue until the leave of the Court of Bankruptcy had been obtained. *Welch* v. *Buck*, 31 Law J. Rep. (N.S.) Q.B. 263.

(C) Rule for, when absolute in first Instance.

Where in pursuance of the 13 & 14 Vict. c. 97. s. 8. a rule *nisi* for the payment of a sum of money to the Receiver General of Inland Revenue as legacy duty has, on no cause being shewn, been made absolute against the person withholding such duty, and both rules have been personally served, the Court will grant a rule for an attachment absolute in the first instance. *In re Evans*, 3 Hurls. & C. 562.

## ATTACHMENT OF DEBTS.



(A) What Debts may be attached and by what Courts.

[*Burton* v. *Roberts*, 8 Law J. Dig. 36; 6 Hurls. & N. 93.]

A party in an interpleader issue who has obtained an order for his costs under the 1 & 2 Will. 4. c. 58. s. 7. is a judgment creditor within the garnishee clauses (sections 60. and 61.) of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). A judgment creditor is not prevented from attaching a debt due to his debtor by the fact that the garnishee is taken in execution for the debt. *Hartley* v. *Shemwell*, and *Marples* v. *Hartley*, 30 Law J. Rep. (N.S.) Q.B. 223; 1 Best & S. 1.

Where an Order in Council has directed that the Common Law Procedure Act, 1854, shall apply to an inferior Court of record, that Court has power, under section 60, to issue garnishee orders in respect of judgments obtained in such Court. *Dauber* v. *Barnes*, 31 Law J. Rep. (N.S.) Q.B. 302.

(B) Foreign Attachment—Custom of City of London.

The custom of the City of London, in reference to foreign attachment, cannot be pleaded, as a custom, on a plaint being entered in the Mayor's Court, to attach a debt due to the defendant from a third person, on the bare fact of the latter being found within the jurisdiction, although none of the parties are either citizens or resident in the City, and neither the original debt nor that of the garnishee accrued within the City; for such a custom is bad. *Cox* v. *the Mayor and Aldermen of the City of London*, 32 Law J. Rep. (N.S.) Exch. 64; 1 Hurls. & C. 338—affirmed in Ex. Ch., 32 Law J. Rep. (N.S.) Exch. 282; and by the House of Lords, 36 Law J. Rep. (N.S.) Exch. 225.

(C) Discharge of Garnishee.

A judgment creditor, who has arrested his judgment debtor on a *ca. sa.*, and detains him in execution, cannot proceed under the garnishee clauses of the Common Law Procedure Act, 1854; and, therefore, to a declaration against the garnishee in the form prescribed by the Reg. Gen. Mich. Vac., 1854, it is a good plea, that the plaintiff had issued a *ca. sa.* against the debtor, who was still in execution at the plaintiff's suit. *Jauralde* v. *Parker*, 30 Law J. Rep. (N.S.) Exch. 237; 6 Hurls. & N. 431.

(D) Arrest of Garnishee.

A garnishee, against whom a judgment creditor has obtained leave to proceed by writ, calling upon him to shew cause why there should not be execution against him under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 128. s. 64, cannot be held to bail or arrested under stat. 1 & 2 Vict. c. 110. s. 2. *Homer* v. *Luff*, 3 Best & S. 818.

(E) Bankruptcy of Debtor before Payment by Garnishee.

If a judgment creditor obtain an order under section 61. of the Common Law Procedure Act, 1854, attaching a debt due to the judgment debtor, and, subsequently, another order under section 63, directing the garnishees to pay the amount attached to the judgment creditor, or that execution may issue against them, and the judgment debtor become bankrupt before payment by the garnishees or execution levied on them, the judgment creditor cannot avail himself any longer of the order, but must share equally with the other creditors; as he is only in the situation of a creditor having security under section 184. of the Bankruptcy Consolidation Act, 12 & 13 Vict. c. 106, and not within the exception to that section as a creditor having a mortgage or lien. *Tilbury* v. *Brown*, 30 Law J. Rep. (N.S.) Q.B. 46.

## ATTEMPTS TO COMMIT FELONY.

[See Jurisdiction; of Quarter Sessions.]



(A) To steal.

The prisoner was indicted under the stat. 24 & 25 Vict. c. 96. s. 57. for breaking and entering a shop, with intent to commit a felony, viz. to steal. It was proved that the prisoner broke in the roof, with

intent to enter and steal, and was then disturbed; but there was no evidence that he ever entered the shop:—Held, that the prisoner might be convicted of the misdemeanor of attempting to commit a felony. *R.* v. *Bain*, 31 Law J. Rep. (N.S.) M.C. 88; 1 L. & C. 129.

The prisoner was servant to a contractor who supplied meat to the camp at S. The course of business was for the contractor each morning to send by a servant a quantity of meat to the quartermaster-sergeant at the camp, and a soldier from each mess attended. The quartermaster-sergeant had his own scales and weights; with these he and the contractor's servant weighed out the proper quantity of meat for each mess respectively, which, after being weighed, was delivered to the soldier in attendance, for the mess. The account of the whole meat so delivered was credited to the contractor as supplied to the Queen. The surplus meat remaining after the messes had been supplied used to be taken back by the contractor's servant. On one occasion of a weighing the prisoner being in charge of the meat, and being the person who put the weights into the scale, fraudulently and with intent to cheat, put a false weight into the scale instead of the true one of the quartermaster-sergeant; so that when all the messes had been supplied 60 lb. of meat remained over, instead of 15 lb. A complaint having been made by a soldier of short weight during this weighing, an investigation took place at its close, and the fraud was discovered. The prisoner absconded at the commencement of the investigation. The intention of the prisoner was to steal the difference between the just surplus of 15 lb. and the actual surplus of 60 lb. Nothing remained to be done by him to complete his scheme, except to carry away and dispose of the meat, which he would have done if the fraud had not been detected:—Held, that on these facts the prisoner was rightly convicted of attempting to steal 45 lb. of meat, the property of the contractor. *R.* v. *Cheeseman*, 31 Law J. Rep. (N.S.) M.C. 89; 1 L. & C. 140.

If a person puts his hand into the pocket of another, with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal. *R.* v. *Collins*, 33 Law J. Rep. (N.S.) M.C. 177; 1 L. & C. 471.

(B) INDICTMENT.

In an indictment for attempting to steal in a dwelling-house, it is sufficient to aver that the prisoner attempted to steal the goods of A B in the house of A B, without specifying what the goods were. *R.* v. *Johnson*, 34 Law J. Rep. (N.S.) M.C. 24; 1 L. & C. 489.

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## ATTORNEY AND SOLICITOR.



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### (A) ARTICLED CLERK.

(*a*) *Service under Articles.*

[See also (*b*) *Order to enrol Articles stamped after Execution.*]

Where articles of clerkship of an attorney had not been stamped within six months from their execution, but had been subsequently stamped under the 19 & 20 Vict. c. 81. s. 3, and the clerk had served under them from their execution, the Court allowed the service to be reckoned from the date of the execution, and not from the date of the filing of the affidavit required by sections 8. and 9. of 6 & 7 Vict. c. 73, it satisfactorily appearing that the non-payment of the stamp-duty on the execution arose entirely from some unforeseen emergency, and was not intentional on the part of the attorney. *Ex parte Bishop*, 30 Law J. Rep. (N.S.) C.P. 48; 9 Com. B. Rep. N.S. 150.

W was articled as a clerk to his father, an attorney, and served till the death of his father on the 23rd of January, 1858. He continued to attend at the office and to work at the business there till the 20th of February, when his articles were assigned to C, who had succeeded to the business of his father, and under whom he continued to serve:—Held, that the period between the death of the father and the assignment of the articles to C could not be reckoned in the computation of the five years required by the 6 & 7 Vict. c. 73. s. 12. *Ex parte Wallis*, 31 Law J. Rep. (N.S.) Q.B. 176; 2 Best & S. 416.

The managing clerk to an attorney, upon the occasion of the latter dying, leaving a widow and a young son unable to take up the business, gave his services to them, and succeeded in keeping the business together; and the son, as soon as he was admitted an attorney, gave the clerk his articles, and promised that they should be duly stamped, the widow promising to pay the stamp-duty. Under these circumstances, the clerk became bound to the son by articles duly executed on the 11th of June, 1858. After the expiration of the time allowed by

law for stamping and enrolling the articles, and not before, the clerk discovered that the duty had not been paid; but he continued to serve under the articles, and was in constant belief that the widow would perform her promise, until January, 1862, when he petitioned the Lords of the Treasury, who permitted the articles to be stamped on payment of the duty and 40*l.* penalty, pursuant to the 19 & 20 Vict. c. 81. s. 3. This was done, and the articles enrolled in March, 1862. Under the above circumstances, the Court of Queen's Bench refused an application in Easter Term, 1862, that the service under the articles might date from their execution, on the ground that the clerk went on serving, having himself full knowledge that the articles were not stamped and enrolled (*Cockburn, C.J.* doubting). *Ex parte Breden*, 31 Law J. Rep. (N.S.) Q.B. 184; 2 Best & S. 649.

But the Court of Common Pleas granted an application, made on behalf of the clerk in June, 1862, that the service under the articles might be computed from the date of their execution. *Ex parte Breden*, 31 Law J. Rep. (N.S.) C.P. 321; 12 Com. B. Rep. N.S. 351.

Although the Treasury have consented to accept the penalty and stamp articles of clerkship more than six months after execution, under the 19 & 20 Vict. c. 81. s. 3, yet, both for the purpose of protecting the revenue and ensuring the respectability of those who are to become attorneys, before this Court will allow the service under the articles while unstamped and unenrolled to count, pursuant to the 6 & 7 Vict. c. 73. s. 9, the circumstances must be shewn to be such as satisfactorily to account for the omission to pay the stamp-duty and enrol the articles in due time. *Ex parte Wilson*, 33 Law J. Rep. (N.S.) Q.B. 89; 4 Best & S. 889.

In December, 1859, W entered into articles for five years with S, an attorney, the articles being duly stamped and enrolled. In May, 1861, S got into difficulties and was obliged to go abroad; while S was abroad, W agreed with Messrs. B to serve the rest of his five years with them, and get his articles assigned to them; S returned in June and assented to this, and W went into Messrs. B's service, and in October, 1861, signed an agreement with them, to the above effect, which was then handed to them. This agreement was not stamped, as it was anticipated that the original articles would be assigned. S however ultimately refused to assign them, and the agreement of October, 1861, could not then be stamped without paying the penalty of 10*l.*, which W at that time was not in a position to afford. In Hilary Term, 1862, S was struck off the roll of attorneys; and on the 13th of May, 1862, W was by rule of Court discharged from his articles to S. In July, 1863, it was discovered that through inadvertence Messrs. B had not signed the agreement of October, 1861, but they afterwards signed it; and the penalty having been paid and the agreement stamped, the Court, on application in Michaelmas Term, 1863, allowed it to be enrolled as articles of clerkship, and the service under it to date from the 13th of May, 1862, the date when W was discharged from his former articles. Ibid.

An articled clerk having previously to his becoming articled, served for ten years as an attorney's clerk, is entitled to be admitted after three years' service as an articled clerk under section 4. of the 23 & 24 Vict. c. 127, although the two services are not immediately consecutive; and the Court directed that an articled clerk should be examined for his admission in a case in which there had been an interval of seven years between the two services. *Ex parte Vosper*, 33 Law J. Rep. (N.S.) Q.B. 113; 4 Best & S. 901.

What is sufficient service under articles of clerkship to an attorney must depend on the circumstances of each particular case, and the Court will not lay down any general rule. *In re Duncan*, 33 Law J. Rep. (N.S.) Q.B. 190; 5 Best & S. 341.

"Supervision and control" of the Master is to be understood in a relative, not an absolute sense. Ibid.

An articled clerk, having served part only of the five years under his articles, after the expiration of the five years applied to the Court to be allowed to enter into fresh articles, and to count the time actually served as part of the necessary time of service. The Court refused to make any order; overruling *Ex parte Smith* (4 Best & S. 993) on this point. *Ex parte Keddle*, 34 Law J. Rep. (N.S.) Q.B. 136.

A clerk, under articles for five years, having served for two years and a half, was incapacitated by ill health from serving for more than a year; he then resumed service. Before the expiration of the five years, he applied to the Court that the interval during which he had been unable to serve might be allowed to count as actual service. The Court refused the application as premature. *Ex parte Rogers*, 34 Law J. Rep. (N.S.) Q.B. 136.

Where an articled clerk had served for nineteen months under his articles, and had then been compelled from illness and other causes to be absent for more than sixteen months, this Court permitted him to be discharged from the old articles and to serve the same master under new ones, for such a period as with the time during which he had already served would make up the full period of five years. *Ex parte De Jivas*, 34 Law J. Rep. (N.S.) Q.B. 7; 4 Best & S. 992.

(*b*) *Order to enrol Articles stamped after Execution.*

H entered into articles of clerkship as an attorney with his father, and duly served his clerkship for the five years from their execution. H did not know till nearly the end of his time that it was necessary that the articles should be stamped and enrolled; after his service was out they were handed to him by his father, who had always kept possession of them, and being unstamped, on application to the Lords of the Treasury, they permitted them to be stamped on the payment of 50*l.* penalty, pursuant to the 19 & 20 Vict. c. 81. s. 3. The father made affidavit, that he omitted to have the articles stamped and enrolled within six months of the execution, from his being "wholly without the means to pay the stamp-duty, and because he thought that under the above section they could be afterwards stamped on the payment of a penalty; that he had no preconceived plan to article his son speculatively, but solely with the intention of ultimately stamping and enrolling the articles." Under the above circumstances, the Court allowed the articles to be enrolled and the service under them to be computed from the date of their execution on the authority of *Ex parte Bishop* (*ante*, (*a*) *Service under Articles*): *Crompton, J.* dissenting. *Ex parte*

*Herbert*, 31 Law J. Rep. (N.S.) Q.B. 33; 1 Best & S. 825.

The Court will not order articles of clerkship to be enrolled and the service to count from the time of the execution, where the articles have been stamped after the six months on payment of a penalty by the permission of the Treasury, under the 19 & 20 Vict. c. 81. s. 3, unless the delay in payment of the duty be satisfactorily accounted for. *Ex parte Edwards*, 32 Law J. Rep. (N.S.) C.P. 213.

A father and son executed a mortgage for 500*l.*, the mortgagee advancing only 400*l.*, and agreeing to advance the remaining 100*l.* shortly afterwards, and the father promised the son that he should be articled out of such 100*l.* as soon as it could be procured from the mortgagee. It never was procured; but the son, upon applying for it to the solicitor of the mortgagee, was told that as the money would probably be obtained in a month or six weeks, he had better article himself, and the articles could be stamped within a few months after they were executed. The son, acting on this advice, articled himself to an attorney on the 1st of November, 1861, and some time afterwards, on finding that the mortgagee would not make the advance, he attempted to raise the money required for stamping the articles from another person, but did not succeed in getting it until February, 1863, when the articles were stamped by permission of the Lords of the Treasury, on payment of a penalty of 20*l.* The Court, being of opinion that the clerk at the time he articled himself had not any reasonable expectation that the money would be forthcoming, refused to order the articles to be enrolled and the service to date from the time of their execution. Ibid.

The stamping of articles of clerkship to an attorney after their execution on payment of the duty and a penalty, under the statute 19 & 20 Vict. c. 81. s. 3, does not place the clerk in the same position as if the duty had been duly paid at the time, and the articles enrolled under the 6 & 7 Vict. c. 73; and the Courts before giving effect to articles of clerkship which have been so stamped will inquire into all the surrounding circumstances. *Ex parte Belk*, 33 Law J. Rep. (N.S.) Exch. 73; 2 Hurls. & C. 737.

Where the articles of clerkship were stamped after the expiration of the service under them on payment of the duty and a penalty of 50*l.*, and it appeared that the omission to stamp and enrol the articles had arisen from the failure, through want of means, of the father of the applicant to provide a portion of the duty, according to his agreement with his son, on his entering into the articles, and partly owing to the parties having acted under the advice of counsel, the Court refused to allow the service to count from the execution of the articles, but allowed two years of service under the articles. Ibid.

The Court will not allow articles of clerkship to be enrolled *nunc pro tunc*, and the service under them to be reckoned as from their date, where there has been an omission to cause them to be stamped within the time required by law, even though the Treasury has accepted the stamp-duty, with a penalty, unless it is shewn that the omission has been the result of some unforeseen emergency, or of the failure of same just expectation. The mere disappointment of a vague hope will not suffice. *Ex parte Jones*, 14 Com. B. Rep. N.S. 301.

Articles of clerkship were, by a mere slip, not enrolled within six months. The Court relieved the clerk from the effect of the error. *In re Follett*, 30 Beav. 629.

### (B) ADMISSION AND RE-ADMISSION.

A person who has been admitted and enrolled an attorney or solicitor of the Courts of the Counties Palatine of Lancaster or Durham before the 23 & 24 Vict. c. 127, is entitled to be admitted an attorney of the Court of Queen's Bench, under section 14, without giving a term's notice. *In re Watson*, 30 Law J. Rep. (N.S.) Q.B. 1.

*Quære*—Whether the Court has power to admit an attorney, except during term. *Ex parte Steele*, 33 Law J. Rep. (N.S.) Q.B. 326.

*Quære*—Whether the Court will admit a minor as an attorney under any circumstances. Ibid.

There must, at all events, be very urgent necessity to induce the Court to interfere in either case. Ibid.

An attorney having been struck off the roll in Easter Term, 1859, for misappropriating to his own use money received from a client for a particular purpose, the Court, in Hilary Term, 1865, allowed his name to be restored to the roll, on affidavits of numerous attorneys to his good character and conduct in the interval. *In re Robins*, 34 Law J. Rep. (N.S.) Q.B. 121.

An attorney having been struck off the roll, in order to be called to the bar, was afterwards disbarred for professional misconduct; the decision of the Benchers being affirmed, on appeal, by the fifteen Judges. After the lapse of twenty years an application was made on his behalf to be re-admitted an attorney; but the Court refused the application, on the ground that there were no affidavits of professional persons and others as to his good conduct and character in the interval. *In re Pyke*, 34 Law J. Rep. (N.S.) Q.B. 121.

But upon a subsequent application it appeared that since he was disbarred he had lived a very secluded life; and he had filed affidavits two months before the application, stating every place at which he had lived, and no affidavits were filed impeaching his character. The Court therefore dispensed with the affidavits usually required of professional and other persons as to his good conduct and character in the interval, and re-admitted him without a re-examination. *In re Pyke*, 34 Law J. Rep. (N.S.) Q.B. 220; 6 Best & S. 703.

A solicitor, who had ceased to take out his certificate in 1853, with the intention of being called to the bar, which he had abandoned, was allowed to renew his certificate without undergoing an examination. *In re Sewell*, 32 Beav. 475.

A solicitor who, by a slip, neglected to produce his certificate to the Registrar within a month, as required by the 23 & 24 Vict. c. 127. s. 21, was relieved from the consequences, and it was ordered that the certificate should have effect from the time of stamping the same. *In re Smith*, 33 Beav. 248.

### (C) POWERS AND PRIVILEGES.

To a declaration by a client against his attorney for negligently conducting the defence in an action of ejectment, the defendant pleaded that the alleged grievances were sustained by the defendant, as such attorney, consenting to a Judge's order, which was

set out in the plea, and by which the action of ejectment was stayed on certain terms therein mentioned, and that the defendant was not bound by any direction from the now plaintiff not to compromise such action, and was as such attorney, and under and by virtue of his retainer, at liberty to conduct such action in such manner as to him should, in the exercise of reasonable skill and care, appear to be more beneficial to the interests of the now plaintiff. Averment, that the defendant, in consenting to such Judge's order, acted in good faith, and exercised reasonable skill and care, and that it appeared to the defendant that by so consenting he was acting in the manner most beneficial to the interests of the now plaintiff:—Held, on demurrer, that the plea was a good answer. *Chown* v. *Parrott*, 32 Law J. Rep. (N.S.) C.P. 197 ; 14 Com. B. Rep. N.S. 74.

*Semble*—That an attorney has authority from his client to compromise an action under the ordinary retainer, to bring or defend such action unless he be expressly forbidden by the client to do so. Ibid.

The plaintiff recovered judgment and took the defendant on a *ca. sa.;* W, attorney of the plaintiff's father, agreed with the defendant, that on delivery of certain documents he would discharge the defendant; the documents were delivered, and W gave defendant an order of discharge, directed by the plaintiff to his attorney; the sheriff refused to discharge, as the order was not directed to him:—Held, that the defendant was entitled to his discharge on condition that no actions were brought against the sheriff or any one else, and that the plaintiff's attorney's remedies on the judgment should not be prejudiced. *Langley* v. *Headland*, 34 Law J. Rep. (N.S.) C.P. 183; 19 Com. B. Rep. N.S. 42.

An action was brought to recover the price of a piano. The plaintiff's attorney agreed to settle the action by the return of the piano and payment of costs:—Held, that, in the absence of a distinct prohibition from his client, he had authority to do so; and the defendant was entitled to have all further proceedings stayed. *Pristwick* v. *Poley*, 34 Law J. Rep. (N.S.) C.P. 189; s.c. *nom. Prestwich* v. *Poley*, 18 Com. B. Rep. N.S. 806.

A solicitor on his way to attend a summons at the chambers of one of the Judges in Serjeants' Inn held to be privileged from arrest under an attachment. *In re Jewitt*, 33 Law J. Rep. (N.S.) Chanc. 730; 33 Beav. 559.

## (D) DUTIES AND LIABILITIES.

### (*a*) *In general.*

When money, which forms part of a larger sum placed by his client in the hands of a solicitor for purposes of investment, is lent by him on the security of a mortgage, in which he has affected to act as principal, the client is bound by notice of all the circumstances which come within his (the solicitor's) knowledge. *Spaight* v. *Cowrie; Edwards* v. *Spaight*, 1 Hem. & M. 359.

Where in such a case the mortgage debt is afterwards settled upon trusts which are substantially trusts for the benefit of the original mortgagee, the trustees have no higher rights than their *cestui que trust* had before the settlement. Ibid.

A bill of interpleader, where the whole ground for relief rested on a false allegation of a threat, and intention by one of the defendants to bring an action, was dismissed, and the plaintiff's solicitor who filed the bill being proved to be aware that the allegation was groundless, it was ordered on the petition of one of the defendants, for whom he also acted as solicitor, that all items in his bill of costs in respect of the interpleader suit be disallowed. *Cook* v. *the Earl of Rosslyn, in re Hook*, 3 Giff. 175.

### (*b*) *Summary Jurisdiction over.*

#### (1) *At Law.*

##### (i) *Suspension for Misconduct.*

Where an attorney of the Court has been guilty of gross misconduct, the Court will interfere summarily, although the misconduct does not amount to an indictable offence, and arose in a transaction in which the attorney was not acting in that character. *In re Blake*, 30 Law J. Rep. (N.S.) Q.B. 32; 3 E. & E. 34.

B, having previously known an attorney and employed him as an attorney and solicitor, informed him that he had some money to invest, on which the attorney himself borrowed it, on the security of his promissory note and the deposit of a mortgage-deed of an estate in Ireland on which he had advanced a larger sum. The estate coming into the Encumbered Estates Court, the attorney borrowed the deed of B, in order, as he informed B, to substantiate his claim on the estate; he afterwards returned the deed, but by this temporary possession of it was enabled to receive the whole of his advance, which he accordingly received, and appropriated the whole to his own purposes. He told B nothing of the matter, but went on for several years paying him interest on his loan. The attorney, afterwards, became insolvent, and B lost the whole of his principal. On these facts, the Court suspended the attorney from practising for two years. Ibid.

##### (ii) *Striking off the Roll.*

An attorney having been convicted of embezzlement, in July, 1861, and sentenced to seven years' penal servitude, an application to strike him off the roll was held not to be too late in Michaelmas Term, 1862. The rule for that purpose may be served upon the prisoner. *In re Thompson*, 13 Com. B. Rep. N.S. 288.

The Court will not strike an attorney off the roll, where he has become bankrupt, having moneys of a client in his hands, which ought to have been paid over, unless a clear case of fraudulent misappropriation be made out against him. *In re Sparks*, 17 Com. B. Rep. N.S. 727.

##### (iii) *Answering Matters of Affidavit.*

If a rule be obtained against an attorney to answer affidavits and to shew cause why he should not pay a sum of money, and he do not answer or shew cause why he should not pay, the Court, on an affidavit of service, will make absolute the rule to pay and grant an attachment for not answering. *In re Bluck*, 31 Law J. Rep. (N.S.) Q.B. 262.

Where an attorney does not appear to shew cause against a rule calling on him to answer the matters of an affidavit, the Court will grant a rule to answer within a certain time, and, in default, will issue an attachment, and strike him off the roll. *In re*

*Worman*, 32 Law J. Rep. (N.S.) Exch. 83; 1 Hurls. & C. 636.

It is no answer to a rule calling on an attorney to answer matters that the applicant has already filed a bill in equity against the attorney for an account in reference to the transactions complained of, even though the proceedings in equity have resulted in a decree against the attorney. *Ex parte Thomas*, 12 Com. B. Rep. N.S. 705.

Where it has been referred to the Master to examine into the charges and to report to the Court, it is not competent to the counsel for the accused to go into the evidence given before the Master; the Court will only look to his report. Ibid.

(2) *In Equity.*

The jurisdiction of the Court over solicitors as officers of the Court for misconduct is very special, and will not be exercised on an ordinary summons for taxation of a bill of costs. *In re Forsyth*, 2 De Gex, J. & S. 509.

On occasion of the transfer of the securities of first and second mortgagees to a third mortgagee, a sum of money was paid to the solicitor acting on behalf of the first and second mortgagees and the mortgagor on account of his costs, and was added to the mortgage debt. Afterwards he sent in his bill of costs to the third mortgagee, which included charges for business done for the mortgagor, and also for business done for the mortgagees in a common law Court. The third mortgagee took out a summons for taxation of the bill:—Held, that he could have no relief upon the application, either under the Solicitors' Act or under the general jurisdiction of the Court. Ibid.

(c) *Privileged Communications.*

Motion that a former solicitor of the plaintiff, who had declined on the ground of privilege to answer to whom he had applied on behalf of the plaintiff, might attend at his own expense before the examiner and answer the question, refused with costs. *Marriott* v. *the Anchor Reversionary Co. (Lim.)*, 3 Giff. 304.

The rules of the Court as to privileged communications will not exempt a defendant from answering, who states that his knowledge has been acquired "by virtue of his employment as the solicitor of his client." It must have been acquired by means of confidential communications between the solicitor and client. *March* v. *Keith*, 30 Law J. Rep. (N.S.) Chanc. 127; 1 Dr. & S. 342.

Information obtained by a solicitor from a third party, though while acting professionally for a client, is not privileged (overruling *Greenough* v. *Gaskell*, 1 Myl. & K. 98). *Ford* v. *Tennant*, 32 Law J. Rep. (N.S.) Chanc. 465; 32 Beav. 162.

(d) *Negligence.*

A receiver was appointed by the Court upon the representation of the plaintiff's solicitor that the receiver had entered into the usual recognizances, which he had not in fact done. A loss occurred, in consequence of the receiver's liability being only in the nature of a simple contract debt. The solicitor was, at the instance of a defendant, made personally liable for the loss occasioned by his neglect. *Simmons* v. *Rose; Weeks* v. *Ward, in re R. A. Ward*, 31 Beav. 1.

Held, also, that the country solicitor was liable, though the representations were made by his London agents. Ibid.

An attorney is not liable to an action for negligence at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of a deed. *Fish* v. *Kelly*, 17 Com. B. Rep. N.S. 194.

(e) *Delivery of Papers.*

If a solicitor is in custody for debt, he will be ordered to deliver the papers and documents of his client to a new solicitor, upon his undertaking to hold them subject to any lien there may be upon them for costs. *In re Williams*, 30 Law J. Rep. (N.S.) Chanc. 609.

The Master of the Rolls decided that the retention of papers by a counsel for fees and by a law-stationer for charges will not entitle a solicitor to his discharge under an attachment for the non-delivery of the papers of a late client; but, upon appeal to the Lords Justices, it was held that the solicitor, having delivered all papers in his possession or power within the meaning of the order, was entitled to his discharge, with costs to him of the appeal. *In re Williams*, 30 Law J. Rep. (N.S.) Chanc. 610; 3 De Gex, F. & J. 104.

A client employing a firm of solicitors is entitled to the services of all the members of the firm, and a dissolution of partnership amounts to a discharge of the client. For the purpose of completing any business in hand at the time of discharging a client, the papers must be given up to his new solicitor, the lien of the former solicitor reviving on the completion of the business. The former solicitor is entitled to have a schedule of the documents so handed over, and the expense of preparing such schedule must fall upon the person requiring the papers. *Rawlinson* v. *Moss*, 30 Law J. Rep. (N.S.) Chanc. 797.

(E) PROFITS.

*Prima facie*, the emoluments derived from offices of the character of a clerkship to the guardians of a union do not fall within the ordinary description of profits of an attorney. *Collins* v. *Jackson, Jackson* v. *Collins*, 31 Beav. 645.

The profits of the offices of clerkship to poor law guardians, or superintendent registrar of births, &c., treasurer of turnpike trust, stewardship of a manor, treasurership of a charity, and receivership of tithes, at a fixed salary,—Held, to form part of a partnership between solicitors. Ibid.

(F) DEALINGS WITH CLIENT.

A contract between attorney and client that the attorney shall advance money for carrying on a lawsuit to recover possession of an estate, and that the client shall, if the suit be successful, pay the attorney, over and above his legal costs and charges, a sum according to the benefit to the client from possession of the estate, is void on the ground of maintenance. *Earle* v. *Hopwood*, 30 Law J. Rep. (N.S.) C.P. 217; 9 Com. B. Rep. N.S. 566.

After the issuing of a writ, the attorney gave the plaintiff the following memorandum,—"I undertake to carry on this action on having cash provided for costs out of pocket, such costs not to exceed 15*l.*, in-

cluding counsel's fee; not any witnesses' expenses":—Held, that this was an engagement on the part of the attorney not in any event to charge the client more than 15*l*. *Moon* v. *Hall*, 17 Com. B. Rep. N.S. 760.

An agreement (to be carried into effect in this country) which would be void on the ground of champerty if made here, is not the less void because made in a foreign country where such a contract would be legal. Where, therefore, an attorney entered into an agreement in France with a French subject to sue for a debt due to the latter from a person residing here, whereby the attorney was to receive by way of recompense a moiety of the amount recovered,—Held, that, the agreement being void for champerty, the attorney was remitted to his ordinary retainer as an attorney, and the work having been done, and the client having received the benefit of it, was entitled to his costs as between attorney and client. *Grell* v. *Levy*, 16 Com. B. Rep. N.S. 73.

Lapse of time is a ground for not setting aside a purchase, though the contract was to be kept secret, and the purchase was made by a solicitor from his client, and the question may be determined independently of the question of value. *The Marquis of Clanricarde* v. *Henning*, 30 Law J. Rep. (N.S.) Chanc. 865; 30 Beav. 175.

If the Court considers that full value was given for the estate, the bill will be dismissed with costs, but if the question of value is doubtful, without costs. Ibid.

In 1837 a solicitor bought lands from his client, who was in embarrassed circumstances. In 1855 the heir-at-law of the client filed a bill to have the sale set aside and it was set aside accordingly, on the ground of the relative position of the vendor and purchaser, and of gross inadequacy of price. An account was directed to be taken between the parties, and it appeared, on taking the account, that there was no evidence of the payment of the purchase-money beyond the acknowledgment in the deed of conveyance and the receipt indorsed upon it. One of the Vice Chancellors considered this sufficient; but upon appeal,—Held, by the Lords Justices, that no part of the purchase-money could be allowed in the account, it being the duty of the solicitor to give his client the same protection as if the transaction had been with a stranger, and to preserve independent proof that he (the solicitor) had actually made the payment. *Gresley* v. *Mousley*, 31 Law J. Rep. (N.S.) Chanc. 537; 3 De Gex, F. & J. 433.

Gift made in 1852, pending the relation of solicitor and client, by a client to his solicitor, by means of a parol direction on the part of the client to the solicitor to retain a sum of money in the hands of the latter belonging to the client, set aside upon a bill filed in November, 1861, the relation of solicitor and client having continued from the time of the gift up to the early part of 1861, when it was terminated. *O'Brien* v. *Lewis*, 32 Law J. Rep. (N.S.) Chanc. 569; 4 Giff. 221.

Although a gift by a client to his solicitor may be influenced by proper motives, it is subject to be set aside unless there be clear evidence of removal of that pressure upon the client, which the Court always presumes where the relation of solicitor and client is proved to subsist. Ibid.

Claim by a solicitor against a testator's (his client's) estate for a sum of money advanced to the client on loan, but which, in fact, formed the proceeds of a bond debt due to the testator, and received by the solicitor at the client's direction, and which the solicitor alleged the client had given him, by an agreement prepared by such solicitor at the client's expense, and containing no recital of intended bounty, disallowed. *In re Holmes's Estate; Woodward* v. *Humpage, Bevan's case*, 3 Giff. 337.

Gift by a client to a solicitor, while that relation subsisted between them, was declared invalid at the instance of the residuary legatees of the donor, but legacies to the solicitor, his wife and children were supported. The principles which govern such cases stated. *Walker* v. *Smith*, 29 Beav. 394.

By agreement in writing between a solicitor and his client it was stipulated that the former should have 5*l*. per cent. commission on the gross amount of property recovered by him for the latter, in addition to his costs:—Held, that the stipulation was contrary to the policy of the law, and that the solicitor must refund the amount received by him for commission, though included in a settled account. *Pince* v. *Beattie*, 32 Law J. Rep. (N.S.) Chanc. 734.

A purchase by solicitors of the equity of redemption of their client's property set aside, although another solicitor had been called in, and the defendants had ceased to act as solicitors just before the contract for purchase, it appearing that the other solicitor had, with the knowledge of the defendants, not properly discharged his duty, and that the defendants had concealed from him an important fact. *Gibbs* v. *Daniel*, 4 Giff. 1.

The intervention of another solicitor or adviser, who, with the knowledge of the purchaser, neglects or does not properly discharge his duty, is not sufficient to support a purchase by a solicitor from his client. Ibid.

### (G) BILL OF COSTS.

#### (*a*) *Delivery of Bill.*

No particular form of heading being prescribed by section 37. of 6 & 7 Vict. c. 73. as essential to an attorney's bill of costs, if the bill be sent with a letter, and the party to whom it is sent knows that it is intended to charge him, it is sufficient within the requirements of that section. *Champ* v. *Stokes*, 30 Law J. Rep. (N.S.) Exch. 243; 6 Hurls. & N. 683.

The defendant, when surveyor of the highways of the parish of L, retained the plaintiff to conduct the defence of an indictment against the inhabitants for non-repair of a highway. Pending these proceedings, the defendant ceased to be surveyor, and a new surveyor was appointed. The plaintiff sent by post to the defeodant his bill of costs, headed, "The surveyor of the township, &c. to A B C, solicitor.—The Queen against the Inhabitants, &c.," inclosed in the following letter:—"Mr. C. Stokes. Dear Sir,—Herewith you have my bill of costs in the Lanphey matter, &c. I have sent a *copy* to the surveyor of the highways of the parish of Lanphey. Yours truly, A B C":—Held, a sufficient delivery of a signed bill, within section 37, to entitle the plaintiff to recover against the defendant. Ibid.

A clerk to Improvement Commissioners under a local act, who is paid by a fixed salary, is not within the Attorneys and Solicitors' Act, 6 & 7 Vict. c. 73,

so as to require the delivery of a signed bill, although he is an attorney, and his services consisted of work which, before his appointment at a fixed salary, he did as an attorney. *Bush* v. *Martin; The Same* v. *the Same*, 33 Law J. Rep. (N.S.) Exch. 17; 2 Hurls. & C. 311.

(*b*) *Taxation of.*

(1) *In general.*

Upon a motion by a *cestui que trust* to tax a bill of costs, which had been delivered to and paid by a trustee, the solicitor will not be allowed to amend it by adding a sum of money, part of a previous bill of costs, which had also been paid. *In re Gregg*, 31 Law J. Rep. (N.S.) Chanc. 632; 30 Beav. 259.

A solicitor had employed an auctioneer to sell some property for his client. He, however, made no previous arrangement as to the amount of his remuneration, and the auctioneer had retained, out of the deposits, more than would be allowed under the Bankruptcy scale:—Held, reversing the decision of the Taxing Master, who had merely allowed the amount according to the scale in Bankruptcy, that the whole charge ought to be allowed to the solicitor. *In re Page* (No. 3), 32 Beav. 487.

A solicitor, who has included in his bill of costs a lump or gross sum, may on taxation before the Master supply a detailed statement shewing how the sum is made up, and the Master may allow such of the items contained in the detailed statement as are proper, not exceeding in the aggregate the gross sum originally charged; but the Master can in no case allow more than the original amount. *In re Tilleard*, 32 Law J. Rep. (N.S.) Chanc. 765.

Six railways, forming parts of a general system, were projected by the same persons. An act of parliament was obtained authorizing the construction of two only, the other four being abandoned, and the special act provided that the expenses, costs and charges of obtaining and passing the act, and incidental and preparatory thereto, should be paid by the company:—Held, that the costs incurred in relation to the abandoned railways were to be regarded as costs incidental and preparatory to the obtaining of the act, and were properly payable by the incorporated company. Ibid.

Application of a solicitor after an order for taxation to withdraw a non-taxable item from his bill refused. *In re Blakesley and Beswick*, 32 Beav. 379.

On an ordinary taxation, the Taxing Master had disallowed the costs of a deed of reconveyance from a benefit building society of the property in a registered county, thinking that a receipt was sufficient under the 6 & 7 Will. 4. c. 34. s. 2. The decision was reversed by the Court. *In re Page*, 32 Beav. 485.

A client having objected to a bill of costs delivered by his solicitor, the solicitor admitted that the bill (which he alleged was made out on the understanding that he was to be paid liberally), contained items which would not be allowed on taxation. The client applied for an order to tax the bill; but the order could not be obtained for some days, the offices being closed for the vacation. In the mean time, and before the order could be carried into the Taxing Master's Office, the solicitor delivered a second bill on a reduced scale, with notice of his withdrawal of the first bill. The Court allowed the second bill to be substituted for the first in the order for taxation, upon payment by the solicitor of the client's costs up to the time of the delivery of the second bill. *In re Chambers*, 34 Law J. Rep. (N.S.) Chanc. 292; 34 Beav. 177.

(2) *When granted.*

N, a solicitor, was employed as such by J. from 1833 to 1857, and also in the payment and receipt of money, and he delivered his bills of costs and cash accounts between himself and J, to the number of forty-six, most of them before the year 1857. Other of the bills were delivered after April in that year, but none of them were paid, excepting that N was allowed by J. to retain moneys in his hands in respect of certain items in the accounts. No settlement was ever come to between the parties. In March, 1858, J presented a petition under the statute, 6 & 7 Vict. c. 73, alleging overcharges and improper charges, and praying taxation:—Held, on appeal from an order of the Master of the Rolls, that as the bills formed items of account, themselves unsettled, none of those bills could be considered as paid: that the bills contained excessive and improper charges; and that, although there had been a delay of more than twelve months between the delivery of the bills and the presentation of the petition, the Court could order a general taxation more especially as the relation of solicitor and client existed up to a time within twelve months of the presentation of the petition. *Ex parte Johnson, in re Nicholson*, 30 Law J. Rep. (N.S.) Chanc. 585; 3 De Gex, F. & J. 93.

When a bill of costs is paid, the onus of proving overcharges is thrown on the client. *In re Towle*, 30 Beav. 170.

Charges for attendances, to the extent of eight on one day, are not sufficient to open a paid bill. Ibid.

Where a mortgagee had instituted a suit for foreclosure, and an arrangement had been made for a transfer, and the bill of costs was not delivered until the day appointed for completion, and was not paid until fourteen days after, the Court refused to order a taxation, no overcharges being satisfactorily proved. The Court considered that the mortgagee ought to have obtained an order to stay the suit, on payment of the mortgage and the deposit of the amount claimed for costs. Ibid.

In an action by a client against his solicitor, the latter pleaded his bill of costs by way of set-off. The client obtained an order for the delivery of the bill, and suffered himself to be non-prossed:—Held, that it was not necessary to state these circumstances on an *ex parte* application in Chancery for taxation. *In re David*, 30 Beav. 278.

A and B compromised a suit, B agreeing to pay A's costs, and any question on this was to be referred to an arbitrator who was named. A's solicitor delivered his bill of costs to B:—Held, that B was entitled to a taxation by an order of course. *In re Hartley*, 30 Beav. 620.

Where a bill of costs cannot be taxed as against the solicitor, the Court has no jurisdiction under the 38th section of the 6 & 7 Vict. c. 73. to order it to be taxed as between a client and a third party—*In re Jessop* (32 Beav. 406) and *In re Baker* (Ibid. 526) overruled. *In re Massey*, 34 Law J. Rep. (N.S.) Chanc. 492; 34 Beav. 463.

On the day fixed for the completion at a solicitor's

office of the sale of mortgaged property belonging to a former client, who was in somewhat embarrassed circumstances, the solicitor delivered his bill of costs. The client and his new solicitor attended, and in order to prevent the postponement of the completion, allowed the solicitor to retain the amount of his bill, but under protest. The bill contained overcharges to a considerable amount:—Held, that the bill was paid under circumstances of pressure, and that taxation ought to be ordered. *In re Pugh*, 1 De Gex, J. & S. 673.

Agreement by a solicitor to receive a fixed sum for costs for business hereafter to be done is not binding on the client, who is, notwithstanding payment under it, entitled to an order of Court for the delivery of a bill of costs and its taxation. *In re Newman*, 30 Beav. 196.

A solicitor delivered his bill of costs to his client, made out in double columns, one being the amount allowed on taxation, which he refused to accept when tendered. The client then paid the larger sum to obtain his papers; and, upon his petition,—Held, notwithstanding the payment, that he was entitled to an order to tax the bill, as he had been constrained to pay the larger sum by the refusal of the solicitor to accept what he himself had stated that he was legally entitled to. *Ex parte Tosland, in re Letts*, 32 Law J. Rep. (N.S.) Chanc. 100; 31 Beav. 488.

To prevent the sale of the mortgaged property by a first mortgagee, a puisne mortgagee took a transfer of the first mortgage, by deed executed by him, which recited the amount due on the first mortgage. This, however, included the costs of the first mortgagee's solicitor, no account of which had been delivered until afterwards. The bill contained some costs of the solicitor against the mortgagor, and, therefore, not mortgagee's costs:—Held, that the puisne mortgagee was not entitled, on summons, to an order for the taxation of the bill. *In re Forsyth*, 34 Beav. 140.

### (3) *Costs of Taxation.*

Moneys specifically paid by a client to his solicitor for counsel's fees and stamps, as they were required,—Held, properly included in the solicitor's bill in calculating the sixth on a taxation. *In re Metcalfe*, 30 Beav. 406.

### (4) *Practice.*

An order to tax the bill of a solicitor, deceased, will be revived upon an *ex parte* motion made by his executors. *In re Waugh*, 30 Law J. Rep. (N.S.) Chanc. 796 n.; 29 Beav. 666.

A client may apply *ex parte* against an executrix of a solicitor deceased, to revive an order for the taxation of the solicitor's bills of costs. *In re Nicholson*, 30 Law J. Rep. (N.S.) Chanc. 796; 29 Beav. 665.

The order to revive an order to tax will be made in the Rolls Court, though the order for taxation was made specially by the Lords Justices, and though they reserved to themselves a right to deal with such special circumstances as might be certified by the Taxing Master. Ibid.

Upon a petition by a mortgagor to tax the bill of the mortgagee's solicitor, after payment the mortgagee must be served. *In re Baker*, 32 Beav. 526.

An order of course to tax a solicitor's bill incurred by three persons, obtained on the application of two of them, is irregular. *In re Ilderton*, 33 Beav. 201.

A client obtained an order of course to tax, after action brought, but before notice of it, and the order did not provide for the costs of the action:—Held, that this was not irregular, and a motion to discharge it was refused, with costs. *In re Farington*, 33 Beav. 346.

A solicitor delivered four bills, the last of which and the cash account shewed, upon the whole, a large balance due to the solicitor. The solicitor brought an action to recover the balance, whereupon the client obtained an order of course to tax the last bill and to stay the action in the mean time. The order was held irregular, and was discharged, with costs. *In re Yetts*, 33 Beav. 412.

An application for the delivery and taxation of the bill of costs of a solicitor, who claims to retain, in satisfaction of costs, money received by him on his client's account, and for payment by the solicitor to the client of the excess of the money retained over the amount of his bill, is an application under the 6 & 7 Vict. c. 73, and must therefore be made in chambers under the General Order of the 2nd of August, 1864. *In re May*, 34 Law J. Rep. (N.S.) Chanc. 236; 34 Beav. 132.

When the common order for taxation has been obtained, not made in a suit or matter, but under the Solicitors' Act, all special applications connected therewith must be made to the Master of the Rolls, even though the Chancery proceedings, in respect of which the order has been made, may have been depending in some other branch of the Court, and orders may have been made therein. *In re Bell*, 2 Hem. & M. 501.

## (H) LIEN FOR COSTS.

An attorney cannot set up the lien of his London agent on the papers of his client against the claim of that client, the client having paid his attorney's bill of costs. *In re Andrew*, 30 Law J. Rep. (N.S.) Exch. 403; 7 Hurls. & N. 87.

The Court will grant an attachment against the attorney for disobeying an order of the Court, for delivery of such papers to his client, notwithstanding those papers are detained by the London agent against the will of the attorney. Ibid.

The attorney for a successful litigant was declared by the Court in which the action was brought to be entitled, pursuant to 23 & 24 Vict. c. 127. s. 28, to a charge upon the property recovered through his instrumentality, for the amount of his taxed costs in the action, although the estate of his client (who had died since the action) was being administered in the Court of Chancery. *Wilson* v. *Hood, in re Seaman*, 33 Law J. Rep. (N.S.) Exch. 204; 3 Hurls. & C. 148.

Though the Court will not interfere as against the defendants with a *bona fide* settlement of an action with a view of enforcing the plaintiff's attorney's lien for his costs of the action, they will, nevertheless, while the sum agreed upon as a compromise remains unpaid, direct the defendants to pay to the plaintiff's attorney so much of the sum as is necessary to satisfy his charge. *Slater* v. *the Mayor of Sunderland*, 33 Law J. Rep. (N.S.) Q.B. 37.

The London agent of a country solicitor is not entitled to a lien on the documents of a client for the

amount of his charges, if nothing is due from the client to the country solicitor. *Waller* v. *Holmes*, 30 Law J. Rep. (N.S.) Chanc. 24; 1 Jo. & H. 230.

It makes no difference whether the bill has been paid in cash or by set-off in account, if at the time of the lien claimed nothing remains due to the country solicitor. Ibid.

Although in a suit instituted on behalf of an infant plaintiff, the Court will, where the defendants have been ordered to pay the costs of the suit but are insolvent, direct the costs due to the plaintiff's solicitor to be paid out of a fund in court, the proceeds of sale of real estate recovered in the cause, it will not, under section 28. of 23 & 24 Vict. c. 127. (the Attorneys and Solicitors' Act, 1860), direct those costs to be made a charge on the real estate so recovered, inasmuch as that section applies only to suits instituted by adult plaintiffs. *Bonser* v. *Bradshaw*, 30 Law J. Rep. (N.S.) Chanc. 159.

Where the directors of a joint-stock company carry on a business not authorized by the deed of settlement, and costs are thereby increased, the solicitors of the company have no lien for their costs on the papers of the company. *In re the Phœnix Life Assurance Co.; Howard and Dolman's case*, 1 Hem. & M. 433.

Where, in such a case, moneys have been recovered in any of the actions, although the solicitors would have had a lien for their costs on such moneys while in their hands, yet, after they have paid over such moneys to the company, and allowed them to be incorporated with the general assets, they have no lien on those assets in respect of such costs. Ibid.

Where, in such a case, moneys have been paid by the company to the solicitors, an account of costs generally, the solicitors have no right, *post litem motam*, to appropriate such payments to the costs incurred in respect of the unauthorized business, but on the contrary the Court will appropriate the payments to the costs which the company was liable to pay. Ibid.

Where a sum is due for costs in a suit to a London agent of a country solicitor, whose costs in the suit have been ordered to be paid out of a fund in court, the Court will, under section 28. of 23 & 24 Vict. c. 127. (the Attorneys and Solicitors' Act, 1860), order the costs of the London agent to be paid out of the fund in court to the extent of the country solicitor's interest therein. *Tardrew* v. *Howell, Parry* v. *Howell*, 31 Law J. Rep. (N.S.) Chanc. 57; 3 Giff. 381.

A solicitor is entitled, under 23 & 24 Vict. c. 127, to a charge upon property recovered or preserved, for his costs of the litigation by which it is recovered or preserved, irrespective of his client's interest in the property, and although it turns out that the latter has not and never had any interest therein. *Bailey* v. *Birchall, Barnes* v. *Ratcliffe, Bailey* v. *Ratcliffe*, 2 Hem. & M. 371.

The Court will, before the completion of a taxation, order the delivery up of papers by a solicitor to his client, either upon payment into court of the amount claimed, or in case it appears from the solicitor's own account that a balance is due from him to his client. *In re Bevan and Whitting*, 33 Beav. 439.

A solicitor does not, by taking the body of his client in execution on a judgment obtained by him at law for his costs in a suit in equity, lose his lien for such costs upon the costs of the suit ordered to be paid by the opposite party to his client. *O'Brien* v. *Lewis*, 32 Law J. Rep. (N.S.) Chanc. 665; 4 Giff. 396.

Where a solicitor had obtained a foreclosure decree for a client (who had subsequently died, and a decree for administration of his estate had been made), the Court, under the 28th section of the 23 & 24 Vict. c. 127, made a charging order for the costs of the suit against the real estate of the client. *Wilson* v. *Round*, 4 Giff. 416.

The solicitor of a party to a suit has, independently of the 23 & 24 Vict. c. 127, a paramount lien for his costs of suit upon the interest of that party in a fund brought into court, through the solicitor's exertions; and, *semble*, notwithstanding the doubt suggested by the terms of the statute, this lien must prevail, even against an assignee for value without notice. *Haymes* v. *Cooper, Cooper* v. *Jenkins*, 33 Law J. Rep. (N.S.) Chanc. 488; 33 Beav. 431.

Where, therefore, a plaintiff in a suit, to whom a defendant had been ordered to pay costs, obtained a charging order *nisi* upon a share of funds in court belonging to the defendant,—Held, that it could only be made absolute, subject to the lien for the taxed costs of the defendant's solicitor. Ibid.

Where a solicitor was employed by the next friend in establishing an infant's title to certain land, the infant having attained twenty-one, the Court, under the 23 & 24 Vict. c. 127. s. 28, declared, on petition, so much of the costs as remained unpaid a charge on the land recovered. *Brown* v. *Bradshaw*, 4 Giff. 260.

A solicitor ordered, pending a taxation of his bill, to deliver over his client's papers, on the client undertaking to produce them, and giving security for the amount claimed. *In re Jewitt* (No. 2), 34 Beav. 22.

### (I) SET-OFF OF COSTS.

An attorney may set off the amount of his costs, although he has not delivered a bill of such costs one month before the action. *Brown* v. *Tibbits*, 31 Law J. Rep. (N.S.) C.P. 206; 11 Com. B. Rep. N.S. 855.

Declaration on an agreement, by the defendant, to indemnify the plaintiff against the costs which the plaintiff might be obliged to pay in a certain suit, conducted by the defendant as the attorney of the plaintiff, with an allegation that the plaintiff was compelled to pay in such suit a certain sum for costs; and breach, that the defendant had not indemnified the plaintiff, or paid such sum:—Held, that a plea of set-off, pleaded to so much of the declaration as related to the plaintiff's claim in respect of the payment of the said sum for costs, was a good plea. Ibid.

A, being indebted, employed a solicitor to prepare a deed of assignment for the benefit of his creditors, which the solicitor did, but in such a form as not to bind non-assenting creditors. The trustees accepted the trusts of the deed, and employed the solicitor to get in the estate. Subsequently, but more than twelve months after the execution of the deed, A was adjudicated a bankrupt. The deed contained a trust for payment of the costs of preparing it. In taxing the

solicitor's bill of costs against the trustees,—Held, that the solicitor was entitled to set off, against moneys received by him on behalf of the trustees, the costs of preparing the deed, although it had not been prepared upon the retainer of the trustees. *In re Sadd*, 34 Law J. Rep. (N.S.) Chanc. 562; 34 Beav. 650.

(K) ORDER FOR PAYMENT OF COSTS.

After declaration the plaintiff executed a release to the defendant and gave his own attorney notice not to proceed; the release was pleaded; to this plea there was a replication confessing the release; judgment was signed for the costs, and writ of execution issued. Notice was then given to the sheriff by the plaintiff not to execute process on peril of being treated as a trespasser, and thereupon the plaintiff's attorney obtained an order, calling on the plaintiff "or defendant" to pay his costs:—Held, that this was a proper case for the interference of the Court, and that the form of the order was good. *Ex parte Games, in re Williams* v. *Lloyd*, 33 Law J. Rep. (N.S.) Exch. 317; 3 Hurls. & C. 294.

(L) RECOVERY OF COSTS BY UNCERTIFICATED ATTORNEY.

The objection that the attorney is not duly qualified, and that a party to an action cannot, therefore, recover his costs, must be taken before the Master on the taxation of costs, and, if not taken then, cannot afterwards be taken on a motion to set aside the taxation, unless the omission be satisfactorily explained. *Fullalove* v. *Parker*, 31 Law J. Rep. (N.S.) C.P. 239; 12 Com. B. Rep. N.S. 246.

It is not a satisfactory explanation merely to state that the applicant was not aware of the defect in the attorney's qualification, when the taxation took place, but it must also appear that by the exercise of reasonable diligence the defect could not have been discovered earlier. Ibid.

If money has been paid by a party to an action to an unqualified attorney, he cannot recover it back, and to this extent he may recover his costs from his opponent. Ibid.

## AUCTION AND AUCTIONEER.

[See SALE—VENDOR AND PURCHASER.]

## AUDIT AND AUDITOR.

[See POOR-LAW.]

## BAIL.

[See ARREST.]

*Bail in Error: Payment into Court in lieu of.*

The plaintiff had judgment in this Court, and the damages were referred to an arbitrator, and a sum of money paid into Court to cover the damages and costs, upon the terms that it should be in lieu of giving bail in error and to abide the further order of the Court, and that thereupon all further proceedings upon the reference should be stayed until after the proceedings in error should be disposed of. The judgment for the plaintiff was afterwards reversed in the Exchequer Chamber:—Held, that the defendant was entitled to have the money paid out to him without awaiting the result of an appeal to the House of Lords. *Castrique* v. *Imrie*, 30 Law J. Rep. (N.S.) C.P. 281; 10 Com. B. Rep. N.S. 340.

*Bail on Appeal: dispensing with.*

The Court or a Judge has a discretion to dispense with bail on appeal, as well as with bail in error. *Beavan* v. *Witmore*, 15 Com. B. Rep. N.S. 442.

An official assignee of a district Court of Bankruptcy, having been sued by the trade assignee for contribution to the costs of an unsuccessful action to which the former was an assenting party, and judgment having gone against him,—Held, that it was a fit case for dispensing with bail on appeal. Ibid.

## BAILMENT.

(A) CONSTRUCTIVE DELIVERY AND RIGHTS OF THE BAILEE.
(B) JUS TERTII.

(A) CONSTRUCTIVE DELIVERY AND RIGHTS OF THE BAILEE.

The plaintiff, being indebted to A, entered into an agreement that certain goods should be held by A as a security for the debt, and the agreement contained an acknowledgment that A had received into his possession the goods which were the subject of the pledge. Part of the goods were, in fact, delivered to A, but a cart and one set of harness were, by arrangement, left in possession of the plaintiff. Shortly afterwards, upon A getting into difficulties, the plaintiff took back all the goods which were the subject of the pledge into his own possession, but, upon A's being declared bankrupt, his assignees seized the goods, and sold them for the benefit of A's creditors:—Held, in trover by the plaintiff, against the assignees, that there was a constructive delivery of all the goods into the possession of the pawnee. *Martin* v. *Reid*, 31 Law J. Rep. (N.S.) C.P. 126; 11 Com. B. Rep. N.S. 730.

*Semble*, per *Willes, J.*, that the pawnee of a chattel has a right to sell it, although no special day be named for the performance of the obligation, after which day the property of the pawnee shall become absolute. Ibid.

(B) JUS TERTII.

Where one of two contracting parties so conducts himself as to hinder the performance of the contract by the other, or to subject the latter to an action at the suit of some third person if he duly perform the contract, no action will lie for the non-performance. *The European and Australian Co.* v. *the Royal Mail Steam Packet Co.*, 30 Law J. Rep. (N.S.) C.P. 246.

When a bailor mortgages the chattel bailed, and the mortgagee has a right to demand possession from the bailee and does demand it, the bailee may refuse to give the chattel up to the bailor. Ibid.

The plaintiffs delivered a ship to the defendants

under a contract, which provided, among other things, that the defendants should during the continuance of the contract and while the ship remained in the possession and use of the defendants, pay and discharge certain claims which would arise against the owners of the ship for its expenses, and upon the determination thereof re-deliver the ship to the plaintiffs. The plaintiffs afterwards mortgaged the ship, and certain expenses were incurred within the above provision, and after that the mortgagees demanded possession under their mortgage:—Held, first, that such mortgage and demand were an answer to the claim of the plaintiffs to have the ship re-delivered to them; but, secondly, were no answer to their claim to have the expenses paid. Ibid.

A bailee is not estopped from disputing the title of his bailor, and setting up the *jus tertii*, where the bailment has been determined by what is equivalent to an eviction by title paramount. *Biddle* v. *Bond*, 34 Law J. Rep. (N.S.) Q.B. 137; 6 Best & S. 225.

The plaintiff seized goods belonging to R under a distress for rent of a house alleged to have been demised by the plaintiff to R, and having seized them he delivered them to the defendant, an auctioneer, for the purpose of selling them. When the sale was about to begin R gave notice to the defendant that he must not sell the goods, or if he did sell them that he must retain the proceeds for him, R, as the distress was void, and as the relation of landlord and tenant did not exist between himself and the plaintiff. This was true, and the distress was void altogether. The defendant did sell the goods, but kept the proceeds for R:—Held, that he was entitled to set up the *jus tertii*, and had a good defence to an action by the plaintiff. Ibid.

Plaintiff when a young child resided with her aunt in the house of the defendant's testator, where the aunt lived as housekeeper, and the plaintiff was almost adopted into the testator's family. The aunt was a married woman living apart from her husband who had deserted her, and previously to her death she gave the plaintiff some articles of jewelry and apparel; part of these the plaintiff gave the testator to keep for her, and the rest she placed in her own boxes in the testator's house. Upon the aunt's death her husband once called and claimed her effects, but the testator repudiated the husband's right, and the husband never afterwards claimed them or interfered further in the matter. When the testator died, which happened whilst the plaintiff was away at school, the defendant as executor took possession of the articles which had been so given to the plaintiff, and refused to restore them to her:—Held, that the plaintiff was in possession so as to be entitled to maintain an action against the defendant for these articles; and that it was not competent to the defendant to set up the right of the aunt's husband as an answer to the action. *Bourne* v. *Fosbrooke*, 34 Law J. Rep. (N.S.) C.P. 164; 18 Com. B. Rep. N.S. 515.

## BAKEHOUSE.

An Act for the Regulation of Bakehouses—26 & 27 Vict. c. 60.

## BANKER AND BANKING COMPANY.

[Certain banking copartnerships discontinuing the issue of their own notes enabled to sue and be sued by their public officer by 27 & 28 Vict. c. 32.]

(A) Nature of a Banking Company.
(B) Dealings with Customers.
(C) Actions by and against.
(a) *Payment by Mistake.*
(b) *Conduct of Manager.*

### (A) Nature of a Banking Company.

A company called a "Savings Bank" was formed with limited liability and registered under the Joint-Stock Companies Act, 1856, the objects being alleged to be to receive deposits, grant loans on security and to conduct emigration agencies, with a capital of 50,000*l.* in shares of 1*l.* each. An order to wind up was made in Bankruptcy, and afterwards a petition to wind up in Chancery was presented, on the ground that the company was not a banking company, and therefore that there was no jurisdiction to wind up in Bankruptcy; and it being proved that the company was not registered under either of the Banking Companies Acts, 1857 and 1858; that money could not be withdrawn except upon a stated period of notice; that cheques could not be drawn in the ordinary form; and that the company itself kept an account with a banking-house,—Held, that the company was not a banking company within the meaning of the statutes regulating joint-stock companies, and that being a company of limited liability registered under the act of 1856, it must be wound up as directed by that statute in the Court of Bankruptcy. *Ex parte Coe, in re the District Savings Bank (Lim.)*, 31 Law J. Rep. (N.S.) Bankr. 8; 3 De Gex, F. & J. 335.

### (B) Dealings with Customers.

In 1847 the customer of a bank gave a mortgage to the bankers to secure, with interest at 5*l.* per cent., money due and to become due to them upon a running account, on which it had been usual to make annual rests, and charge compound interest on the balances. In 1855 the customer assigned his property to trustees for the benefit of creditors:—Held, that the bankers had no right to make rests after the relation of banker and customer had ceased, and that the mortgage was a security only for the balance due at the date of the assignment, with simple interest from that time at 5*l.* per cent. per annum. *Crosskill* v. *Bower*, *Bower* v. *Turner*, 32 Law J. Rep. (N.S.) Chanc. 540; 32 Beav. 86.

If bankers take a mortgage security from a customer for a fixed sum owing to them by the latter, the relation of banker and customer ceases thenceforth as to that sum, and it cannot be included in the customer's banking account so as to entitle the bankers to charge compound interest thereon; and in reference to the sum so secured, the mutual rights and obligations are thenceforth those of mortgagees and mortgagor. *Mosse* v. *Salt*, 32 Law J. Rep. (N.S.) Chanc. 756; 32 Beav. 269.

Bankers cannot refuse to allow income-tax to a customer upon interest accruing on a mortgage security. Ibid.

As between a banker and his customer, the mode

in which the account has habitually been made out will be viewed as evidence of an agreement that it should be taken in that way; and in the absence of any special agreement, express or implied, evidence as to the custom of bankers is receivable for the purpose of determining the principle upon which the account is to be taken. Ibid.

*Quære* — Whether a conveyance of land is a "security" within the custom which gives to bankers a general lien on securities deposited by their customers. *Semble*—not. *Wylde* v. *Radford*, 33 Law J. Rep. (N.S.) Chanc. 51.

The articles of association of a joint-stock bank provided that the bank should have a paramount lien on the shares of any shareholder for all moneys due to them from him, and that they might decline to register any transfer whilst the transferring shareholder was indebted to them. A shareholder being unable to meet certain bills of exchange accepted by him and held by the bank, the bank took from him renewed bills for the same amount. Before the renewed bills arrived at maturity the shareholder transferred his shares, but the bank declined to register the transfer:—Held, that the renewed bills, though they suspended the remedy, did not discharge the antecedent debt, and that consequently the bank had a lien on the shares and were not bound to register the transfer. *In re the London, Birmingham and South Staffordshire Bank*, 34 Law J. Rep. (N.S.) Chanc. 418; 34 Beav. 332.

Bankers retained the balance of a customer to answer a future liability which might arise in respect of bills which they had discounted for him to a much larger amount than the balance, and the customer brought an action against the bankers for damages for having dishonoured his cheques, and for the amount of his balance. After the action was commenced several of the above bills, to a larger amount than the balance, were dishonoured. Upon a bill filed by the bankers against the customer for an account and for an injunction to restrain the action at law, the Court (considering there was a substantial question to be tried in equity), upon motion, made during the Sittings in London at which the trial of the action was to take place, granted an injunction restraining the action. *The Agra and Masterman's Bank (Lim.)* v. *Hoffman*, 34 Law J. Rep. (N.S.) Chanc. 285.

Where a customer of bankers gets them to discount bills at a time when his account is largely overdrawn, and the amount is simply carried to the credit of his account, the bankers are holders for value, though no money was actually paid. *In re Carew's Estate Act*, 31 Beav. 39.

The defendant, a merchant at Newcastle, was a customer of the plaintiff's bankers at Newcastle, whose London agent was the Union Bank. H, a merchant at Wolgast, in Prussia, wrote to the defendant, stating that he was inclined to consign to him a cargo of wheat, and asking for how much and at what date the defendant would open for him a credit in London. The defendant wrote in reply: "You may draw against transmittal of bill of lading at 30*s.* to 32*s.* per quarter in advance for your best yellow wheat on our account at fourteen days, one, two or three months' date, on the Union Bank of London." H afterwards wrote to the defendant, stating that he was about to consign to him 8,320 scheffels of wheat, shipped by the vessel *Anna*, Capt. K, and that he annexed duplicate bill of lading. On the same day H wrote to the Union Bank, stating that he had drawn on them six bills of exchange for 400*l.* each, for account of defendant. The Union Bank, having no instructions, sent the letter to plaintiffs. Messrs. B & C afterwards presented to the Union Bank for acceptance six bills of exchange for 400*l.* each, drawn and indorsed by H, together with a paper writing, purporting to be a bill of lading, addressed to the Union Bank. The defendant came to the plaintiffs' bank and had some conversation with the manager respecting the cargo of wheat supposed to have been shipped by H, when defendant said "it was a large amount, and that they must only accept against the bill of lading." The defendant then wrote to the plaintiffs as follows: "We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. H, of Wolgast, for 2,400*l.* against properly indorsed bill of lading of 8,320 scheffels of wheat, per *Anna*, E K Master, on our account." The Union Bank, at the request of the plaintiffs, accepted the drafts, and the plaintiffs debited the defendant with the amount. Before the drafts became due, it was discovered that the bill of lading was forged, and that no cargo was shipped on board the *Anna*. H was afterwards convicted of uttering a forged bill of lading. The Union Bank having paid the bills and debited the plaintiffs with the amount,—Held, that the plaintiffs were entitled to recover the amount from the defendant on an implied contract to indemnify them. *Woods* v. *Biedemann*, 1 Hurls. & C. 478.

### (C) Actions by and against.

#### (*a*) *Payment by Mistake.*

The plaintiff presented a cheque at a bank, which the cashier of the defendants (the bankers) took, and gave the plaintiff in return notes and gold. Whilst the plaintiff was counting the notes one of the defendants, having discovered that the drawer of the cheque had no assets, demanded the money back. The plaintiff refused to give it up, and the defendants thereupon took it by force:—Held, in an action by A of assault and trespass for taking the money from him by force, that he was entitled to recover. That the transfer of the money was complete; that as between the plaintiff and the defendants there was no mistake at all, the mistake being between the defendants and their customer; and that the defendants, therefore, could not have recovered back the money from the plaintiff in an action for money had and received. *Chambers* v. *Miller*, 32 Law J. Rep. (N.S.) C.P. 30; 13 Com. B. Rep. N.S. 125.

*Quære*—Whether, even if they could have so recovered it, they had any defence to this action. *Semble*—that they had not. Ibid.

Per *Williams, J.*, payment in fulfilment of an undertaking, and not in satisfaction of a prior breach of an agreement, requires no assent on the part of the payee to make it a complete transaction. It is complete as soon as the money is handed over. Ibid.

#### (*b*) *Conduct of Manager.*

The declaration in an action against the manager of a banking company, after alleging the retainer and employment of the defendant and the nature of

his duties as manager, stated, amongst other things, that he "did not, nor would take due and proper care not to advance the money of the company to persons of doubted, insufficient or bad means of credit, or on doubtful, insufficient or bad securities, or to discount bad or forged bills and notes, and negligently and improperly advanced the money of the company to persons of doubtful, insufficient and bad means and credit, and on doubtful, insufficient and bad securities, and discounted and renewed bad and forged bills and notes, and wholly neglected to take due and proper care, or to use or employ due and proper skill and diligence in and about the management of the affairs of the bank, and the discharge of the duties of manager as aforesaid." Plea to so much of the breach as above set out, that the deed of settlement of the company contained a clause, which provided, amongst other things, that "none of the directors, trustees or other officers should be answerable or accountable for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company might be placed out or invested, or for any loss, damage or misfortune which might happen to the moneys, funds, effects or property of the company, unless the same should happen in consequence of the wilful neglect or default respectively of such director, trustee or other officer of the company." That the defendant was the manager and an officer of the said company within the meaning of the said deed of settlement, and was employed as such upon the terms of the said last-mentioned clause; and that the said alleged breaches to which the plea was pleaded did not happen by reason or in consequence of the wilful neglect or default of the defendant as such manager as aforesaid:—Held, that the plea was a good answer as to so much of the breach to which it was pleaded. *Ward* v. *Greenland*, 19 Com. B. Rep. N.S. 527.

## BANK OF ENGLAND.

Further provision respecting certain payments to and from the Bank of England made and facilities for the transfer of stocks and annuities increased by 24 Vict. c. 3.

## BANKRUPTCY.

[The Law relating to Bankruptcy and Insolvency in England amended by the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134). The Bankruptcy Act, 1861, amended by 25 & 26 Vict. c. 99.]

(A) Jurisdiction of the Court of Bankruptcy, the Commissioners, and the County Court.
(B) Act of Bankruptcy.
  (a) *Assignment of Property.*
  (b) *Compounding with Petitioning Creditor.*
  (c) *Absenting from Place of Business.*
(C) Petition for Adjudication.
(D) Adjudication and Annulling thereof.
(E) Proof of Debt.
  (a) *Annuity.*
  (b) *Contingent Debts and Liabilities.*
  (c) *Bills and Notes.*
  (d) *Covenants.*
  (e) *Partners.*
  (f) *Breach of Trust.*
  (g) *Secured Creditors.*
  (h) *Double Proof.*
  (i) *Gaming.*
(F) Transactions affected by Bankruptcy.
(G) Assignees.
  (a) *Choice of.*
  (b) *What Property passes to.*
    (1) *In general.*
    (2) *Order and Disposition and Reputed Ownership.*
    (3) *Book Debts.*
    (4) *Chose in Action of Bankrupt's Wife.*
    (5) *Lease.*
    (6) *Sequestration.*
    (7) *Under Second Bankruptcy.*
  (c) *Landlord's Right to Arrears of Rent.*
  (d) *Rights and Liabilities.*
  (e) *Actions by.*
(H) Of the Bankrupt.
  (a) *Protection from Arrest and other Process.*
  (b) *Indictable Offences.*
  (c) *Evidence.*
(I) Arrangements under the Control of the Court.
(K) Arrangements by Deed—[See title Debtor and Creditor.]
(L) Certificate and Order of Discharge.
  (a) *Grant of, in general.*
  (b) *Conduct as a Trader.*
  (c) *Fraud.*
  (d) *Fraudulent Preference.*
  (e) *Misdemeanor.*
  (f) *Allowance to.*
  (g) *Effect of.*
(M) Practice.

### (A) Jurisdiction of the Court of Bankruptcy, the Commissioners, and the County Court.

A Court of competent jurisdiction having pronounced its decision, it is not proper or competent for any other tribunal of law or equity to enter into the consideration of the foundation of the debt. *In re Hayward*, 31 Law J. Rep. (N.S.) Bankr. 33.

The jurisdiction over trust-deeds for the benefit of creditors, executed and registered in London under the 192nd and following sections of the statute 24 & 25 Vict. c. 134, is confined exclusively to the Court which would have adjudicated the bankruptcy and exercised jurisdiction over the estate of the debtor. *Ex parte Cox, in re Eaton and Eaton*, 31 Law J. Rep. (N.S.) Bankr. 49.

Trustees were appointed of a deed of arrangement between debtors and their creditors, and disputes arose among such trustees. Two of them petitioned that the remaining trustee might be removed and the trust fund vested in them. The Court of Bankruptcy made an order directing the fund in hand to be paid over to the accountant in Bankruptcy; and appointed an official assignee to act as if appointed under a bankruptcy. On appeal, the Lord Chancellor decided that the Court below had no power to make such order. *Ex parte Ruck and Wickham, in re Wickenden and Mansell*, 32 Law J. Rep. (N.S.) Bankr. 9.

The Court has jurisdiction to order a respondent in bankruptcy to pay the costs of a co-respondent. The official assignee, on the above bankruptcy being annulled, was allowed his expenses of the custody and sale of the bankrupt's estate out of the assets received by him, and the petitioning creditor was ordered to pay the amount of such expenses to the bankrupt as well as his costs and the costs of the official assignee. *Ex parte Woolheim, in re Woolheim*, 32 Law J. Rep. (N.S.) Bankr. 26.

The Court of Bankruptcy has jurisdiction to summon a trustee under a deed of assignment for the benefit of creditors to be examined touching his dealings with the trust estate; and the Court of Appeal will not inquire into the sufficiency of the grounds upon which such a summons has been issued. *Ex parte Laurence, in re Beale's Assignment*, 32 Law J. Rep. (N.S.) Bankr. 61; 1 De Gex, J. & S. 307.

A Commissioner in Bankruptcy made an order, under the 12 & 13 Vict. c. 106. s. 125, in these terms: "That the household goods, furniture, &c. being in or about the messuage or dwelling-house and premises in the occupation of the said T. Taylor, in Cross Street, Middleton, and known as the Cross Keys, be sold and disposed of by the assignees for the benefit of the creditors of the said T. Taylor":—Held, per *Erle, C.J.*, and *semble*, per *Byles, J.*, that the order was sufficiently specific. Held, also, per *Byles, J.*, that the order was not bad upon the face of it; and could not be held to be bad, unless it appeared from the evidence that a more specific order might have been made. *Fielding* v. *Lee*, 34 Law J. Rep. (N.S.) C.P. 143; 18 Com. B. Rep. N.S. 499.

Section 94. of the 24 & 25 Vict. c. 134. does not apply to the case of a prisoner presenting a petition *in forma pauperis*, and owing debts exceeding 300*l.*; and, therefore, where in such a case the Judge of the county court of the district in which the bankrupt was in prison adjudicated him bankrupt, and transferred the proceedings to the county court of the district in which the bankrupt had resided for six months next before the filing of his petition, it was held that the Judge of the latter county court was right in refusing to entertain the case. *In re Coombs*, 32 Law J. Rep. (N.S.) Q.B. 65; 3 Best & S. 296.

A debtor being in custody in the gaol at C, within the jurisdiction of the C County Court, the registrar of the C County Court, holden at C, made an order of adjudication in Bankruptcy, directing the adjudication to be prosecuted in the county court of N, holden at P, the district in which the debtor had resided and carried on his business for the six months prior to his imprisonment. On the investigation before the county court at P, it appeared that the debts would amount to a sum exceeding 300*l.*, and the registrar of the last-named Court thereupon declined to proceed with the adjudication:—Held (making absolute a rule calling on the Judge and Registrar of the county court of N, holden at P, to shew cause why the said adjudication should not be prosecuted in their court), that whether the words "having regard to the amount of debts," in section 101, refer to the limitation "not exceeding 300*l.*" in section 94, or not, it was sufficient to give the jurisdiction that the Registrar of the county court of C should have been satisfied that the debts were not likely to exceed 300*l.* *In re Harrison*, 32 Law J. Rep. (N.S.) Exch. 159; 1 Hurls. & C. 819.

## (B) ACT OF BANKRUPTCY.

### (*a*) *Assignment of Property.*

A person bought iron ore, and mixed it with ore which he raised from lands rented by him in the proportion of 65 per cent. of what he bought to 35 per cent. of what he so raised, and then smelted the whole into pig iron, which he sold:—Held, that he was a trader, within the meaning of the Bankrupt Act, 12 & 13 Vict. c. 106, although he only so mixed the ore which was the produce of his lands with ore which he bought in order to make the former a marketable commodity. *Turner* v. *Hardcastle*, 31 Law J. Rep. (N.S.) C.P. 193; 11 Com. B. Rep. N.S. 683.

A deed of assignment of all the stock and effects of a trader, in trust for his creditors, was executed for the purpose of being used as an act of bankruptcy only in case it should be necessary to so use it in order to defeat an execution creditor, the intention being, at the time the deed was so executed, not to have a general act of bankruptcy of which any one could take advantage, but to wind up the estate, if possible, under the deed:—Held, that the deed operated, nevertheless, as a valid act of bankruptcy, and that the general form of notice was sufficient. Ibid.

*Quære*—Whether the validity of such act of bankruptcy could be affected by the petitioning creditor being privy to the making of such deed. Ibid.

In an action of trover for goods by the assignees of a bankrupt, which had been purchased by the bankrupt under an agreement, by which the purchase-money was to be paid by instalments, and an assignment of the property was to be executed by the vendor, when the whole purchase-money had been paid; with power for the vendor to re-enter in case of default in payment of the instalments,—Held, that the plaintiffs were entitled to recover the full value of such goods against a mere wrong-doer, notwithstanding default had been made in payment of some of the instalments, and the vendor had to that extent an interest in the goods. Ibid.

An assignment made under pressure by a trader to certain creditors to secure their debts, which does not assign all his property, but leaves untouched a substantial portion, is not a fraudulent transfer, nor void under the Bankrupt Laws. *Smith* v. *Timms* (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 215; 1 Hurls. & C. 849.

A trader, being pressed by two creditors, one of whom had a bill of sale on part of his property, and the other creditor an execution on the residue of his goods, applied to the defendant to assist him, and in consideration of the defendant agreeing to pay off the two creditors, assigned to the defendant, by a bill of sale, all his estate and effects. The defendant paid off the creditors:—Held (affirming the judgment below, 31 Law J. Rep. (N.S.) Q.B. 141), that the assignment was not an act of bankruptcy, as it was not an assignment in consideration of a past debt only, but an assignment in consideration of the assignee releasing the trader's property from a charge already laid upon it. *Whitmore* v. *Claridge* (Ex. Ch.), 33 Law J. Rep. (N.S.) Q.B. 87.

A debtor by deed, in consideration of a bygone debt of 230*l.*, assigned to the defendants certain property amounting to 160*l.* He had other property

consisting of an equity of redemption valued at 150*l.*, and book debts to the amount of 50*l.*, of which 22*l.* were good. His debts amounted to 1,100*l.*, of which 600*l.* was due to the defendants, and the residue to other creditors. At the time the deed was executed the debtor was insolvent, and the defendants knew it, and they also knew that if they put the deed in force it would prevent the debtor from carrying on his trade. The deed was put in force by the defendants, and the debtor's trade was stopped:—Held, that the assignment was an act of bankruptcy, as the defendants by putting the deed in force prevented the continuance of the trade, and thereby necessarily defeated and delayed creditors. *Young* v. *Fletcher*, 34 Law J. Rep. (N.S.) Exch. 154; 3 Hurls. & C. 732.

An assignment by a trader of all his property and effects for a present advance of part of their value is not necessarily an act of bankruptcy. It is for the jury to say whether, under the circumstances, the effect of the assignment is to defeat and delay creditors. *Pennell* v. *Reynolds*, 11 Com. B. Rep. N.S. 707.

If a trader raises money by selling his goods at an undue value (not for the purpose of carrying on his business, but in contemplation of stopping payment, and for the purpose of cheating his creditors) to one who has notice, either by express information or from the nature of the transaction, that he is selling his goods not in order to carry on his business but with a fraudulent intention, the sale is an act of bankruptcy and void, and the assignees may recover the goods from the purchaser. *Fraser* v. *Levy*, 6 Hurls. & N. 16.

An assignment by a trader in insolvent circumstances of all his stock-in-trade, is an act of bankruptcy. *The Oriental Bank Corporation* v. *Coleman*, 30 Law J. Rep. (N.S.) Chanc. 635; 3 Giff. 11.

A trader owed money to his brother, and the latter issued an execution for recovery of the same and took the whole of the bankrupt's property. One of the Commissioners considered that the issuing of the execution had not been at the instance of the bankrupt, and that, therefore, there had been no good act of bankruptcy to support an adjudication under the 67th section of the Bankrupt Law Consolidation Act, 1849. On appeal, the Lords Justices refused to interfere with the discretion of the Commissioner. *Ex parte Boyd, in re Murless*, 31 Law J. Rep. (N.S.) Bankr. 6.

One of the Commissioners having annulled an adjudication, on the ground of want of an act of bankruptcy, the bankrupt having executed a mortgage of all his effects, &c., in consideration of an advance from a society, of which the bankrupt was a member, to secure his monthly payments, with a proviso that in default, or if any legal proceedings should be taken against the mortgagor "tending towards bankruptcy," the whole payments were to be due, and the trustees of the deed were then to have a power of sale; on appeal, the Lords Justices reversed the decision. *Ex parte Lewis, in re Hollier*, 31 Law J. Rep. (N.S.) Bankr. 11.

A trader, by deed, after reciting that he was unable to pay his debts, conveyed certain real estate to a trustee, upon trust to pay all costs, charges and expenses, "already or hereafter" to become due to his solicitor, and the professional charges of an accountant, and apply the residue in payment of the debts of such of the creditors of the bankrupt as should execute the deed, rateably. The deed was not registered under the 194th section of the act, 24 & 25 Vict. c. 134:—Held, that the deed could be received in evidence against the bankrupt, and (supporting a decision of one of the Commissioners) that it was, under the circumstances of the case, an act of bankruptcy. *In re Wensley*, 32 Law J. Rep. (N.S.) Bankr. 23; 1 De Gex, J. & S. 273.

An unstamped deed of assignment for the benefit of creditors is not admissible in evidence to prove an act of bankruptcy. *Ex parte Potter, in re Barron*, 34 Law J. Rep. (N.S.) Bankr. 46.

Whether such a deed is admissible for that purpose unless registered—*quære*. Ibid.

*Ex parte Wensley* (1 De Gex, J. & S. 273; 32 Law J. Rep. (N.S.) Bankr. 23) questioned. Ibid.

Traders having overdrawn their account at the bank, and being hopelessly insolvent, gave to the bankers a bill of sale comprising their whole property to secure the existing debt and future advances, with a stipulation that no further advances were to be made until the debt was reduced to 300*l.* Two days afterwards they sent letters to their creditors, offering a composition of 10*s.* in the pound:—Held, affirming the decision of one of the Vice Chancellors, that the bill of sale was an act of bankruptcy. *Lacon* v. *Liffen*, 32 Law J. Rep. (N.S.) Chanc. 315; 4 Giff. 75.

Although a mortgage given on the eve of bankruptcy to secure an antecedent debt is not void as a fraudulent preference if made under pressure, yet if the result of the mortgagee's entering into possession would be immediately to render it impossible for the mortgagor to carry on business, it is an act of bankruptcy as being "an assignment of the mortgagor's solvency." *Goodricke* v. *Taylor*, 2 Hem. & M. 380.

It makes no difference in the application of this rule that the mortgagor was liable as surety only, if it be clear, from the surrounding circumstances, that the principals were known by him to be unable to pay. Ibid.

*Semble*—It is immaterial whether the debt for which the mortgage is given was or not recoverable at law at the time. Ibid.

*(b) Compounding with Petitioning Creditor.*

An adjudication was made against a trader in 1861, which was afterwards annulled. Another adjudication was made in 1862. The act of bankruptcy on which the second adjudication was founded was the payment of a sum of 1,100*l.* to the party at whose instance the adjudication of 1861 was made in settlement of his demand. One of the Commissioners confirmed the adjudication of 1862. On appeal, the Lords Justices (having called for other evidence than that which was before the Commissioner) were of opinion that the payment of the 1,100*l.* not being proved to have been made by an agent on behalf or with the knowledge or assent of the alleged bankrupt, was not a compounding with the petitioning creditor, within the 71st section of the Consolidation Act, 1849 (12 & 13 Vict. c. 106), and annulled the adjudication. *In re Scott Russell*, 31 Law J. Rep. (N.S.) Bankr. 37.

*(c) Absenting from Place of Business.*

A trader absented himself for three or four days

from his place of business, and in his absence a bill of exchange was presented for payment and was dishonoured; and application was also made for payment of other bills. The trader was adjudicated bankrupt, the act of bankruptcy being this absence "with intent to delay his creditors." One of the Commissioners in the country annulled the bankruptcy, the alleged bankrupt swearing that his absence was occasioned by an attempt of his to get up evidence of perjury against one of his workmen, and to obtain pecuniary assistance. Pending this dispute as to the adjudication, the trader signed a declaration of insolvency. On appeal, the decision of the Commissioner was affirmed, on the ground that there was not sufficient evidence to support the adjudication; but the Lord Chancellor, under the circumstances, refused to allow the trader his costs, as his "declaration of insolvency" whilst applying to annul an adjudication was inconsistent with an honest desire for the equal distribution of his assets. *Ex parte Barney, in re Horton*, 32 Law J. Rep. (N.S.) Bankr. 41.

(C) PETITION FOR ADJUDICATION.

An adjudication ought not to be founded upon a doubtful debt. *In re Potts*, 31 Law J. Rep. (N.S.) Bankr. 34.

It is an objectionable, or at least an inconvenient mode of proceeding, and one not deserving of encouragement, to found a petition for adjudication upon a disputed balance of a complicated diversity of cross-demands and unsettled accounts. *In re Scott Russell*, 31 Law J. Rep. (N.S.) Bankr. 37.

*Semble*—That the pendency of an action by a creditor against the debtor in which an order of reference has been made to arbitration, but no arbitrator appointed, does not prevent the creditor from proceeding in bankruptcy against the debtor in respect of the same debt. Ibid.

It is doubtful whether a trader can, under the Bankruptcy Act, 1861, petition for adjudication against himself for his own benefit alone. *Ex parte Hewitt, in re Drinkwater*, 31 Law J. Rep. (N.S.) Bankr. 83.

Where a company has been ordered to be wound up, the relation of debtor and creditor is, as a general rule, not constituted between a contributory and the official manager until a call is made; and, consequently, a call made after the passing of the Bankruptcy Act, 1861, is, in the absence of special enactments as to its legal effect, a sufficient petitioning creditor's debt to support an adjudication in bankruptcy against a contributory who is a non-trader. *Secus*, where the winding-up is under the Companies' Act, 1862, in which case having regard to the 75th section of the act, the call will be held to be a debt accrued due at the time when the contributory executed the deed of settlement, and therefore not to constitute a good petitioning creditor's debt, if in fact the deed of settlement was executed by the contributory previously to the passing of the Bankruptcy Act, 1861. This case has been overruled on appeal to the House of Lords—see 35 Law J. Rep. (N.S.) Bankr. 25; 1 Law Rep. H.L. 9. *Ex parte Harding, in re Williams; Ex parte Canwell, in re Vaughan*, 33 Law J. Rep. (N.S.) Bankr. 26.

Where, after adjudication in bankruptcy upon the joint petition of two creditors, the debt of one of them was disallowed, and the debt of the other was insufficient as a single petitioning creditor's debt, it was held, that the latter could not, by increasing his proof to a sufficient amount, support the adjudication. *Ex parte Brown, in re Brown*, 33 Law J. Rep. (N.S.) Bankr. 51.

The proper course in such a case is either to allow the petition to be amended or to proceed upon a new adjudication. Ibid.

A trader, on the 11th of October, assigned all his estate to trustees, for the benefit of his creditors, but the deed contained a proviso that, if he should, within two calendar months, petition for arrangement under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106. s. 211), or sign a declaration of insolvency, the deed was to be void, and the property was to be administered under the Court of Bankruptcy. Four days afterwards he presented such a petition, and obtained protection. On the 31st of October a creditor petitioned for an adjudication on the act of bankruptcy committed on the 11th, and an adjudication was made on the 2nd of November. Notice to dispute the adjudication was given on the 6th, and on the 13th the same was annulled by one of the Commissioners; but, on appeal,—Held, that the adjudication must stand, the arrangement clauses of the statute not superseding or controlling the powers conferred by the 101st and 104th sections of the act. *Ex parte Treherne, in re Saunders*, 30 Law J. Rep. (N.S.) Bankr. 6.

A creditor is entitled to file a petition for an adjudication, although a petition of the bankrupt for arrangement be pending, if the creditor has not acquiesced in or sanctioned the arrangement. Ibid.

(D) ADJUDICATION AND ANNULLING THEREOF.

A trader, resident in Scotland, was adjudged bankrupt on the petition of a creditor resident in the same country. The trader brought an action against the petitioning creditor, but the latter refused to appear to it. The Court ordered that if he did not appear to the action within ten days the adjudication should be annulled; and he having failed so to appear, the adjudication was annulled. *Ex parte Woolheim, in re Woolheim*, 32 Law J. Rep. (N.S.) Bankr. 26.

Upon the sale by auction of certain property of A B, a bankrupt, it was purchased by R on behalf of himself and of S the solicitor of the assignees in bankruptcy. Subsequently, by arrangement between A B and his creditors, a composition was accepted by the latter, a composition deed executed which ratified previous sales and acts of the assignees, and the adjudication annulled, but without prejudice to sales, &c. by the assignees. A B then filed a bill against S and R to set aside the sale, when it appearing that the composition deed had been obtained upon misrepresentation, one of the Vice Chancellors dismissed the bill:—Held, on appeal, that the order for annulling the adjudication must, for the purposes of the suit, be treated as valid, and that the provision therein for ratifying sales by the assignees, though protecting purchasers against having their titles impeached by reason of the bankruptcy being annulled, did not protect them from impeachment on other grounds, and consequently that the equitable rights of the assignees to impeach the sale must be

regarded as having passed to the plaintiff, and the purchase be set aside; but without prejudice to the rights of the assignees or of the creditors, as against the plaintiff, to the benefit, if any, arising from the sale being set aside. *Adams* v. *Sworder*, 33 Law J. Rep. (N.S.) Chanc. 318; 2 De Gex, J. & S. 44.

It is competent to creditors to pass a resolution suspending proceedings under the 110th section of the Bankruptcy Act, 1861, notwithstanding that the bankrupt has obtained his order for discharge. *Ex parte Boldero, in re Rodenhurst*, 34 Law J. Rep. (N.S.) Bankr. 34.

### (E) PROOF OF DEBT.

#### (*a*) *Annuity.*

On a loan transaction between the bankrupts and a creditor, it was arranged that the creditor should, in addition to interest, be paid an annuity so long as any moneys remained owing in respect of the loan. The annuity was secured by a bond in a penal sum and by mortgage. The creditor proved against the estate for the money due on the loan, and afterwards tendered a proof in respect of the annuity, or for the penal sum mentioned in the bond; but one of the Commissioners having refused to allow the proof, the creditor appealed. The Lords Justices held, that the annuity was merely in the nature of increased interest, and was not a subject of proof, and dismissed the appeal, with costs. *Ex parte Robinson, in re Nicholson and Stone*, 31 Law J. Rep. (N.S.) Bankr. 12.

#### (*b*) *Contingent Debts and Liabilities.*

When the verdict is given before, but the judgment is not obtained until after, the plaintiff has become bankrupt, the defendant's costs are not a "debt or contingent liability" provable under the bankruptcy. *Oxlade* v. *the North-Eastern Rail. Co.*, 33 Law J. Rep. (N.S.) C.P. 171; 15 Com. B. Rep. N.S. 695.

The liability of a shareholder of a joint-stock company to pay future calls is not a liability to pay money on a contingency within section 178. of the Bankrupt Law Consolidation Act, 1849, and consequently such shareholder's bankruptcy is no bar to an action for a call made subsequently to such bankruptcy. *The General Discount Co.* v. *Stokes*, 34 Law J. Rep. (N.S.) C.P. 25; 17 Com. B. Rep. N.S. 765.

The 153rd section of the Bankruptcy Act, 1861, authorizing proof in respect of a claim for unliquidated damages, applies only where there has been a breach of contract previously to adjudication. *Ex parte Mendel, in re Moor*, 33 Law J. Rep. (N.S.) Bankr. 14; 1 De Gex, J. & S. 330.

S contracted with J to deliver twenty tons of oil in the month of January, 1863. Before the expiration of the time for completing the contract, S executed a statutory composition-deed. No part of the contract was ever completed:—Held, that J. was not entitled to prove under the deed for damages in respect of the breach of contract. Ibid.

The date of a trust-deed in the form set out in Schedule D. is that of the supposed adjudication to which the 197th section refers. Ibid.

A liability in respect of a breach of covenant for title, contained in a purchase-deed, arises immediately upon the execution of the deed; therefore, where the bankruptcy of the vendor occurred after the execution of the purchase-deed, but before the amount of damage sustained by the purchaser was ascertained, the latter was held entitled to prove for the amount. *Ex parte Elmes, in re Hughes*, 33 Law J. Rep. (N.S.) Bankr. 23.

D H mortgaged lands in fee to W H for 1,000*l.*, but fraudulently retained the title-deeds of a portion of the property. He afterwards sold and conveyed this portion for 675*l.* to E, and entered into covenants for title, and delivered over the title-deeds to him. D H afterwards became bankrupt, and W H instituted a foreclosure suit, in which he obtained a decree from the Master of the Rolls; which was affirmed, by the Lords Justices, on appeal. E paid the principal and interest, and costs, and tendered a proof for the amount against the estate of the bankrupt:—Held, that he was entitled to prove for the principal and interest and costs up to and including the original hearing, but not for the costs of the appeal. Ibid.

The bankrupts employed Messrs. W, who were metal-brokers, to purchase iron for them, to be delivered and paid for at a future day. Messrs. W, as the custom of the trade was, entered into contracts for the purchase of the iron, without disclosing the names of their principals. Before the day for delivery and payment arrived the adjudication in bankruptcy took place, and the assignees having declined to complete the contract, Messrs. W completed the purchase on their own account, and resold the iron at a loss, and carried in a proof against the bankrupt estate for the amount of the loss so sustained:—Held, reversing the decision of the Court below, that the claim could not be supported either as a liability to pay money on a contingency, under the 178th section of the Bankrupt Law Consolidation Act, 1849, or as a debt payable upon a contingency, under the 177th section of the same act, nor could it be sustained as a demand in the nature of damages, to which the bankrupts were liable at the time of the adjudication, under the 153rd section of the Bankruptcy Act, 1861, and the proof was therefore disallowed. *Ex parte Kempson, in re Barker*, 34 Law J. Rep. (N.S.) Bankr. 21.

There can be no proof under a deed of trust and the 192nd section of the Bankruptcy Act, 1861, for damages on a contract unless the contract was broken before the deed. *Ex parte Halliday, in re Hall and Jones*, 2 De Gex, J. & S. 312.

H & Co. purchased a cargo, the buyers to name the port of delivery. On arrival of the ship they declined to name the port of delivery, and signified their inability to perform the contract. The sellers therefore named the port, and sold the cargo at a loss; but before this was done, H & Co. executed a deed of trust under the 192nd section:—Held, that the contract was still subsisting at the date of the deed, and that the sellers could not prove for the loss. Ibid.

#### (*c*) *Bills and Notes.*

Shortly before the bankruptcy of J W, a foreign bill accepted by him became due, and was presented and noted, but not protested for non-payment. W W, the bankrupt's son, took up the bill for the honour of the acceptor, and applied to prove for the amount against the estate. W W agreed with the

assignees to refer it to arbitration; but no consent to such arbitration, pursuant to the 153rd section of the Bankrupt Law Consolidation Act, was obtained by the assignees. The award was against W W's claim, and the Commissioner rejected the proof. On appeal, it was held, that W W was bound by the award; but the question as to W W's right to prove as holder of the bill, independently of the award, was not decided. *Ex parte Wyld, in re Wyld*, 30 Law J. Rep. (N.S.) Bankr. 10.

The fact that the claims of several indorsees of bills of exchange, drawn upon and accepted by the bankrupts, have been satisfied by the drawer, affords no presumption that the claim of another indorsee of a similar bill of exchange drawn and accepted by the same parties has been satisfied in like manner. *Ex parte Graham, in re Grant*, 33 Law J. Rep. (N.S.) Bankr. 1.

(*d*) *Covenants.*

The amount due for damages for breach of a covenant to replace a certain amount of stock in a railway company on a given day (the stock being such as might be presumed to have a market value), is provable under the bankruptcy of the covenantor, as a demand within section 165. of the 12 & 13 Vict. c. 106. So also is provable the amount of damage sustained by a breach of a covenant to indemnify against the payment of calls on mining shares assigned as security for the replacement of such stock. Where therefore an action was brought for such breaches of covenant, it was held that a plea of the defendant's bankruptcy and that the causes of action arose before his bankruptcy was a good plea. *Betteley* v. *Stainsby*, 31 Law J. Rep. (N.S.) C.P. 337; 12 Com. B. Rep. N.S. 477.

(*e*) *Partners.*

[See PARTNERS.]

W M, a partner in trade with T L, in 1854 closed a negotiation for the purchase of a freehold estate. He then proposed to his partner to join him in the purchase, and the same was agreed to, and the purchase-money was paid out of the partnership funds by cheques upon the bankers of the firm, and an account was opened with that bank headed "The T Estate Account." In this account the purchase-money and all receipts and payments in respect of the T estate were entered. The estate was conveyed in 1855, as to one undivided moiety to such uses as L should appoint, with ultimate remainder to him in fee, and as to the other undivided moiety in the same manner in favour of M. L and M respectively built a mansion for his residence on such part of the estate as he selected, but the greater part of the estate remained in the possession of a tenant under an unexpired term already granted by the vendor of the estate. Two years after the purchase, the partners mortgaged the T estate to the Bank of England, to secure balances on bills to be discounted, and they were described as carrying on business as "S, L & Co." In 1860, the firm was adjudicated bankrupt, and the Bank of England proved against the joint estate for the amount then due on the security, and claimed also to enforce the security against the T estate as forming part of the separate estate of each partner. One of the Commissioners decided that the sites of the mansions and their appurtenances were separate estate, but that the remainder of the T estate was joint estate. From this decision both the assignees and the Bank of England appealed:—Held, varying the order of the Commissioner, that whatever equity there might be as between L and M on a partition suit, the mere erection of mansions was no proof of an intention to sever the estate, and that the whole was joint estate, and formed partnership assets, and the value that it actually realized was ordered to be deducted from the debt due to the Bank of England. *Ex parte M'Kenna, in re Streatfeild, Laurence & Co.; Ex parte the Bank of England, in re Same*, 30 Law J. Rep. (N.S.) Bankr. 25; 3 De Gex, F. & J. 645.

C, B and D by deed became partners for twenty-one years, C having a capital of 100,000*l.* in the business. The 10th clause of the deed provided that C's share in the capital, to the extent of 100,000*l.*, should be continued in and be considered as part of the partnership effects, and that the surviving partners should pay the same to C or his executors by yearly instalments; the 11th clause that the surviving partners should give a bond for the whole of C's capital, with an indemnity from all the co-partnership liabilities, and that C or his executors should release and assign to the surviving partners C's share and interest in the partnership assets and property. It was also provided that the capital of C should be secured, with interest at 5*l.* per cent., to be paid, after his death or retirement, by bond of the surviving partners, payable by instalments, and that the executors of C should indemnify the surviving partners and release and assign C's share of the assets; and it was provided that C might, by any instrument in writing, admit his nephew, R, into the partnership. R was in due form introduced into the partnership. C died, and thereupon the bond and release were executed. The partnership of B, D and R became bankrupt. There were no creditors of the old firm. The executors of C tendered a proof for the 100,000*l.* and a further sum which, on a settlement of accounts between the executors and the surviving partners, was found to be due to them, and contended that all connexion between them and the surviving partners ceased when the bond was given and the release was executed. For the other creditors, it was argued that the fund forming C's share of the capital was bound as a trading fund for twenty-one years, the whole term of the partnership. One of the Commissioners decided in favour of the executors, and the creditors appealed; but the Lords Justices affirmed the decision of the Commissioner. *Ex parte Creditors of the Bankrupts, other than Brooking and others (Executors of Coster), in re Beater, Dennant & Russ*, 31 Law J. Rep. (N.S.) Bankr. 15.

A partner cannot prove a debt against the estate of his co-partner as long as there are joint debts of the partnership unsatisfied. *Ex parte Collinge, in re Holdsworth*, 33 Law J. Rep. (N.S.) Bankr. 9.

Upon a dissolution of partnership between H & A, A assigned to H all his interest in the partnership property, and took from him a bond for 10,000*l.* H became bankrupt, and A executed an assignment for the benefit of his creditors:—Held, in accordance with the above rule, that the trustees under the deed of assignment could not prove the bond debt against the separate estate of H while there were joint debts of the partnership unsatisfied. Ibid.

Although, generally speaking, a partner has full authority to deal with the partnership property for partnership purposes, and, if the business of the partnership is such as ordinarily requires bills of exchange, to draw, accept and indorse bills, in the name of the partnership, yet, if a person discounting bills drawn and indorsed by a partner in the partnership name, has notice that the partner is dealing with the bills for his private purposes, he is bound to ascertain the extent of the authority of the individual partner, and if the dealing be not authorized, he has, upon the bankruptcy of the firm, no right to prove against the joint estate of the partnership, except to the extent to which the partnership may be indebted to the individual partner. *Ex parte the Darlington District Joint-Stock Banking Co., in re Riches*, 34 Law J. Rep. (N.S.) Bankr. 10.

The rule that a partner cannot prove against the separate estate of his co-partner until the joint debts are satisfied, was intended for the benefit of the joint creditors, and is only applicable to prevent the creditor partner from coming into competition with them. Therefore, where the separate estate of the debtor partner is insufficient for the payment of his separate debts, exclusive of the debt to his co-partner, the rule has no application. *Ex parte Topping, in re Levey and Robson*, 34 Law J. Rep. (N.S.) Bankr. 13.

When a testator has authorized the employment of his estate in trade, though the firm in which it is so employed becomes bankrupt, no proof can be made against the estate of the bankrupts in respect of the money of the testator so employed. *Scott* v. *Izon*, 34 Beav. 434.

A debt due by one partner in a firm to his co-partner cannot be proved against the joint estates until all the joint debts have been paid in full, but it can properly be proved against the separate estate of the debtor as soon as the joint debts of the partnership have been discharged by the solvent partner. Ibid.

### (*f*) *Breach of Trust.*

Three trustees were ordered to pay into court in an administration suit money found due from them. One became bankrupt and another died. An application by the third trustee for leave to prove under the bankruptcy for such sum of money as the bankrupt was indebted to the trust estate, including such sums as the bankrupt was bound to pay as between himself and his co-trustees, was refused by one of the Commissioners; but, on appeal, the Lord Chancellor gave leave to the trustee to go in and prove for such debt as he might establish, but directed that any dividend which might be realized should be dealt with by the Court in which the administration suit was pending. *Ex parte Bromley, in re Redfearn*, 34 Law J. Rep. (N.S.) Bankr. 33.

### (*g*) *Secured Creditors.*

[See (*b*) (6) *Sequestration.*]

By section 184. of the Bankrupt Law Consolidation Act, 1849, no creditor having security for his debt shall receive upon such security more than a rateable part of such debt, except in respect of any lien upon any part of the property of such bankrupt before the date of the fiat or the filing of a petition for adjudication of bankruptcy. The defendant, in an action upon a bill of exchange, obtained an order for a commission to examine witnesses abroad. It was made a condition that he should pay 100*l.* into court, which he did, and subsequently a petition for adjudication of bankruptcy was filed against him. The plaintiff went on with the action, and recovered a verdict for more than 100*l.*:—Held, by *Cockburn, C.J.* and *Wightman, J.*, *dubitantibus Blackburn, J.* and *Mellor, J.*, that the plaintiff was entitled to have the 100*l.* paid out to him, for that he was not a creditor having security for his debt within the 184th section. And held by *Blackburn, J.* and *Mellor, J.*, that he had a lien upon the 100*l.* within the meaning of the section, and that he was entitled to get the whole of it. *Murray* v. *Arnold*, 32 Law J. Rep. (N.S.) Q.B. 11; 3 Best & S. 287.

At the hearing of a suit instituted by the wife of a bankrupt for redemption of a mortgage executed by the husband and wife of the wife's real estate, the assignees of the bankrupt, who were co-defendants with the mortgagee, disclaimed their right to redeem, and a decree was made giving the first equity of redemption to the wife. After this decree, the Commissioner in Bankruptcy allowed the mortgagee to prove against the estate of the bankrupt for the full amount of his principal and interest. Upon appeal to the Lord Chancellor, it was held that the disclaimer of the assignees operated only in acceleration of the wife's right to redeem, but if she did not exercise the right, then, the purpose for which the disclaimer was given having ceased to exist, the assignees' equity of redemption would continue as before. Consequently, the mortgagee could only be admitted to prove, subject to the condition that in the event of the bill being dismissed as against him, the interest of the bankrupt in the mortgaged premises should be sold, and proof admitted for the residue of the mortgage debt, after deducting the proceeds; or, in the event of redemption by the wife, the proof should be admitted subject to the same being expunged, or remaining wholly or partially for the benefit of the person paying the mortgage debt. *Ex parte Paine, in re Gleaves*, 32 Law J. Rep. (N.S.) Bankr. 65.

The receipt of dividends under a bankruptcy will, after a great lapse of time and loss of the securities, be accepted as *prima facie* proof of the existence of the debt, and any objection to it must rest on evidence shewing some probable reason for supposing, not that it may be, but that it is, bad. *Ex parte Graham, in re Grant*, 33 Law J. Rep. (N.S.) Bankr. 1.

Thus, where a bankruptcy took place in 1783, and a person claiming under an assignment of a proof received dividends in 1820 and 1824, the representatives of the assignee claiming in 1863 were held entitled to the dividends subsequently declared, though the deed of assignment was not produced. Ibid.

A creditor, after proving his debt, received 500*l.* under a collateral security on property of the bankrupt, and was subsequently paid dividends on the full amount of his proof until application for a final dividend, when the receipt of the 500*l.* became known:—Held, that the dividends on the 500*l.* must be deducted from the final dividend, and that the creditor must be charged with interest at 5*l.* per cent. on the excess of dividends actually received from time to time over what would have been

receivable if the proof had been properly reduced. Ibid.

Under the usual order made upon the petition of an equitable mortgagee, directing the securities to be realized and applied in payment of principal, interest and costs, and giving the equitable mortgagee leave to prove for the deficiency, the calculation of interest must be made to the date of the bankruptcy only, and the mortgagee cannot claim to retain, in the first instance, out of the proceeds of the securities, interest accrued subsequent to the bankruptcy. *Ex parte Lubbock, in re Flood and Lott*, 32 Law J. Rep. (N.S.) Chanc. 58.

(*h*) *Double Proof.*

A firm of two persons, D and Y, carrying on business as D, Y & Co. at Liverpool, and of three persons, D, Y & Y, carrying on business in Pernambuco, were adjudicated bankrupts in 1854 at Liverpool. A creditor of both firms proved for a debt under this bankruptcy, and received a dividend, after which receipt the house at Pernambuco also became bankrupt, and the creditor proved the same debt against the estate there, and received a dividend in respect of it. In 1861 an order was made by the Commissioner in England that the proof in this country should be expunged, unless the creditor paid to the assignees the dividend received by him at Pernambuco. This order was varied by the Lords Justices, who declared that the creditor was not entitled to any dividend in England, except the first which he had received, but without prejudice to any question as to that dividend, or to any question under the foreign bankruptcy. The assignees presented a petition praying that the creditor might be ordered to refund such first dividend: — Held, (affirming a judgment of the Commissioner,) that, in the absence of all evidence to shew that the law of Brazil would not have given the creditor the right to receive the dividend there, he was under no obligation as to that which he received here; but that, as he had rightfully received, he was entitled to retain it, and the petition was dismissed, with costs. *Ex parte Smith, in re Deane, Youle & Co.*, 31 Law J. Rep. (N.S.) Bankr. 60.

(*i*) *Gaming.*

By the rules and the ordinary practice of the Stock Exchange, it is customary among brokers for one to make advances to another upon the deposit of foreign shares, &c., or to make purchases of similar securities; such loan to be repaid, or such purchase to be completed, upon the next of the settling days fixed for such transactions; but, according to the rules and customs of the association, if such loan should not be repaid, or such purchase completed, on that settling day, it is the right, in the absence of any new agreement, of the lender, or seller (as the case may be) either to sell the securities, or to retain them himself, at a price to be fixed by officers appointed for that purpose; and if the price so fixed should prove to be less than the debt in the case of a loan, or less than the price agreed to be paid in the case of a sale, the borrower or purchaser is liable to pay the deficiency; but any surplus beyond the loan, or the price agreed upon, is to be paid by the party retaining the shares to the borrower or purchaser. Further, if the borrower or purchaser should be unable to repay or complete, by reason of his being proclaimed a defaulter, the lender or seller is bound to take the shares in question at the price fixed by the proper officer. In the year 1858 P, M and M (the bankrupt) were members of the Stock Exchange. In November in that year P advanced M (the bankrupt) a sum of money, on the deposit of certain foreign railway shares. On each of the days for settling the account was adjusted between them, and the transaction was by agreement carried over from time to time at each successive settling day, until the month of April 1859, when M (the bankrupt) became a defaulter, at which time a balance was due to P after deducting the market value of the shares. M (the bankrupt) was so adjudicated in July, 1859, and P tendered a proof against his estate; but one of the Commissioners being of opinion that the transaction was one of gaming, and as such illegal, rejected the proof. In March 1858 M and M (the bankrupt) had this dealing, namely, that the former sold to the latter foreign railway shares, the sale to be completed on the next settling day; which was not done, but an adjustment of the account was made on each settling day, until M (the bankrupt) finally became a defaulter, when a balance was due to M after deducting the value of the shares, which shares he retained. This balance M claimed to prove in the bankruptcy; but the Commissioner, for the same reason as he rejected P's proof, rejected that of M:—Held, on appeal, that there was no gaming in either case, and that the proofs must be admitted. *Ex parte Phillips, in re Morgan; Ex parte Marnham, in re Morgan*, 30 Law J. Rep. (N.S.) Bankr. 1.

(F) TRANSACTIONS AFFECTED BY BANKRUPTCY.

[See *ante*, (B) ACT OF BANKRUPTCY.]

The sheriff, having taken the goods of A, a trader, in execution under a *fi. fa.*, at the suit of B, sold them to B. A few days before the sale B had received notice that A had filed a petition in the Court of Bankruptcy for an arrangement with his creditors. This petition was afterwards dismissed, and on the day of the dismissal, on the petition of a creditor, A was adjudicated a bankrupt. This, by relation back, made the filing of the petition for an arrangement an act of bankruptcy from the time of the filing, under section 76. of the Bankrupt Law Consolidation Act, 1849:—Held, that B had notice of a prior act of bankruptcy before the purchase under the execution; and, consequently, that the transaction was not protected by section 133. of the same act, and that the assignees of the bankrupt were entitled to recover the goods. *Edwards* v. *Gabriel* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 113; 7 Hurls. & N. 520.

The 133rd section of the 12 & 13 Vict. c. 106,—which enacts that all executions executed and levied by seizure and sale of a bankrupt's goods before the date of fiat or filing petition shall be valid notwithstanding a prior act of bankruptcy, provided the execution creditor had not at the time of levying or sale notice of any prior act of bankruptcy,—has reference only to an act of bankruptcy prior to the seizure; and, therefore, an execution levied by seizure before any act of bankruptcy is not invalidated by a subsequent act of bankruptcy and notice

thereof before sale. *Edwards* v. *Scarsbrook*, 32 Law J. Rep. (N.S.) Q.B. 45; 3 Best & S. 280.

Under the 12 & 13 Vict. c. 106. s. 202. any security given for the purpose therein mentioned is declared to be void. This section is repealed by the 24 & 25 Vict. c. 134, and is re-enacted (section 166.) with a proviso in favour of *bona fide* holders for value of such securities (if negotiable) :—Held, that the latter section is not retrospective, and that a bill of exchange drawn prior to the passing of this act is not affected by this proviso. *Reed* v. *Wiggins*, 32 Law J. Rep. (N.S.) C.P. 131; 13 Com. B. Rep. N.S. 220.

The defendant agreed with the plaintiff and others of his creditors to pay them a composition on their debts, but in order to give the plaintiff a fraudulent preference, and to induce him to agree to the composition, the defendant agreed to grant the plaintiff an additional composition, and to carry out this object the plaintiff assigned his debt to S, the defendant's brother, and accepted a bill drawn by the plaintiff for the additional composition. The bill being overdue, the defendant by deed, reciting that S was indebted to the plaintiffs in the amount of the bill, assigned to the plaintiff a policy of assurance by way of security, covenanting to keep up the assurance, and repay any premiums paid by the plaintiff:—Held, that this arrangement was an answer to an action on the covenant, within the principle of *Fisher* v. *Bridges*. *Geere* v. *Mare*, 33 Law J. Rep. (N.S.) Exch. 50; 2 Hurls. & C. 339.

*Prima facie* a trader who, on the eve of bankruptcy, hands over to a creditor assets which ought to be rateably distributed among all his creditors, must be taken to have acted in fraud of the law. But if circumstances exist which tend to explain and give a different character to the transaction, and to shew that the debtor acted from a different motive, these circumstances ought to be left to the jury; and the proper direction in such a case is that, unless the jury come to the conclusion that the debtor had the intention of defeating the law, and preventing the due distribution of his assets, by preferring one creditor at the expense of the rest, the transaction stands good in law. The whole question turns upon the intention of the trader in disposing of his goods to the particular creditor. *Bills* v. *Smith*, 34 Law J. Rep. (N.S.) Q.B. 68; 6 Best & S. 314.

## (G) ASSIGNEES.

### (*a*) *Choice of.*

Where, on the occasion of the choice of assignees, a misapprehension existed as to the willingness of a certain gentleman to act, an order was made for a new choice, and the costs attending the application were ordered to be paid out of the estate. *Ex parte the Wolverhampton and Staffordshire Banking Co., in re Boddington*, 31 Law J. Rep. (N.S.) Bankr. 30.

An executor and trustee of a will was declared bankrupt. Under the will he took both real and personal estate, in trust for the testator's widow, E C, for her life, with remainder to her infant children. He fraudulently misapplied the trust property, and under his bankruptcy E C was admitted to prove against his estate. On the choice of assignees, she applied for leave to vote, but her application was refused by the Registrar, and on appeal by the Commissioner; but, on appeal, the Lords Justices held that she was sufficiently interested to be entitled to vote. *Ex parte Cadwallader, in re James*, 31 Law J. Rep. (N.S.) Bankr. 66.

### (*b*) *What Property passes to.*

#### (1) *In general.*

Under the Bankrupt Law Consolidation Act, 1849, a bankrupt, by force of his adjudication, is divested of whatever leasehold property he possessed at the period of his bankruptcy; and the act does not reserve to him any right of electing to continue to be the owner of such property. *Cartwright* v. *Glover*, 30 Law J. Rep. (N.S.) Chanc. 324; 2 Giff. 620.

A deed of partnership contained a proviso that a withdrawing partner should not be entitled to credit for the value of the lease of certain mines vested in a trustee for all the partners in shares, according to the capital contributed by them respectively, but that the account to be taken should consist only of his share in the assets of the partnership other than the value of the lease, and that in the event of bankruptcy of any partner an account should be taken of his share and interest in the mines, except the value of the lease, which was not to be taken into account. One of the partners having become bankrupt, it was held, that such a stipulation was a fraud upon the Bankrupt Laws, and void as against the assignees in bankruptcy. *Whitmore* v. *Mason*, 31 Law J. Rep. (N.S.) Chanc. 423; 2 Jo. & H. 204.

A party bought land, &c., of a trader, and afterwards the trader was adjudicated bankrupt. A person holding the purchase-deed for the purchaser, was summoned, after the adjudication, under section 120. of the 12 & 13 Vict. c. 106, before a county court Judge, to produce the deed. The Judge ordered it to be impounded, and the property to be delivered up to the assignees to be sold for the benefit of the creditors. *Ex parte Cole, in re Attwater*, 32 Law J. Rep. (N.S.) Bankr. 11.

On appeal, the Lord Chancellor discharged the order, and the assignees were directed to pay the costs. Ibid.

The 137th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), does not authorize the sale of the books of a solicitor who has become bankrupt. *Ex parte Roberts, in re Holden*, 33 Law J. Rep. (N.S.) Bankr. 8.

The interest of a bankrupt in property given to him contingently on his obtaining his certificate passes to his assignees in like manner as any other contingent interest. *Davidson* v. *Chalmers; Perry* v. *Chalmers*, 33 Law J. Rep. (N.S.) Chanc. 622; 33 Beav. 653.

A testatrix gave real and personal estate to trustees, upon trust during the life of her nephew, then an uncertificated bankrupt, at their uncontrolled discretion, to apply the income for the benefit of him, or his wife, or his children, and as to the income which should not be applied, upon trust to invest the same; but should he at any time obtain his certificate so as to enable him to hold and enjoy real and personal estate for his own personal use, enjoyment and benefit, then the testatrix directed that thenceforth during his life and so long as he shall be able to hold and enjoy real and personal estate for his own personal use, enjoyment and benefit, the

whole income should be paid to him for his own use. The nephew never married, and after several years he obtained his discharge:—Held, that the will conferred on the nephew a contingent interest in the income, which passed to the assignees, and, upon his obtaining his discharge, vested in them absolutely. Ibid.

Whether payments made by the executors for the benefit of the bankrupt out of the income accruing previously to his obtaining his discharge were valid —*quære*. Ibid.

By a marriage settlement real estate was vested in trustees for a term of 500 years, upon trust, after the death of the survivor of H and his wife, to raise, by sale or mortgage, 2,000*l.* for the portions of their younger children. T, one of such younger children, assigned, by way of mortgage, his interest in the 2,000*l.*, and notice of the mortgage was given to the surviving trustee of the settlement. Afterwards he executed a deed of further charge, of which, until after his bankruptcy, no notice was given to the trustee, and subsequently he became bankrupt. At the date of the deed of further charge the 2,000*l.* had not become raiseable:—Held, as between the owner of the further charge and the assignees in bankruptcy claiming under the reputed ownership clause, that T's interest under the settlement was a chose in action only, and not an interest in land; and that the claim of the assignees were entitled to priority. *In re Hughes*, 33 Law J. Rep. (N.S.) Chanc. 725; 2 Hem. & M. 89.

A & Co. contracted with B & Co. for the purchase of a large quantity of railway sleepers, to be delivered at intervals at the wharf of A & Co., and to be paid for on delivery. The sleepers arrived at the wharf of B & Co., in timbers of length sufficient when sawn asunder to make each two sleepers. After several deliveries had taken place, one of the firm of B & Co. called at the office of A & Co., and obtained from A an advance of 600*l.* on account of the last cargo of timber, which he represented to be, and which then was at the wharf of B & Co., and a portion of which had already been sawn into sleepers:—Held, that this was such a specific appropriation of the timber and sleepers to A & Co. (who had possessed themselves of them) as to entitle them to retain them as against the assignees of B & Co., who had become bankrupt after the advance. *Langton* v. *Waring*, 18 Com. B. Rep. N.S. 315.

(2) *Order and Disposition and Reputed Ownership.*

By a bill of sale A B conveyed all his goods to the plaintiff for the sum of 100*l.* It was provided that if A B, on a certain day named, or on such earlier day as the plaintiff, by notice in writing, should appoint, should repay the 100*l.* and interest, then the conveyance was to be void. Provided also, that, after default in payment of principal or interest, the plaintiff should have power to sell the goods and pay himself all that was due for principal, interest and costs, and pay the balance to A B in the usual way. Provided further, that, until default, A B should hold, make use of and possess the goods. A B continued in possession of the goods until he became a bankrupt. After A B had committed an act of bankruptcy, but before he was adjudicated bankrupt, the plaintiff served him with a notice to repay the 100*l.* within two days, in accordance with the bill of sale; but before the notice had expired A B had been adjudicated a bankrupt, and the messenger of the Court of Bankruptcy had taken possession of the goods:—Held, that the plaintiff was not entitled to recover the goods from the assignees, for that they were in the possession, order and disposition of the bankrupt with the consent of the true owner within the meaning of the 12 & 13 Vict. c. 106. s. 125. *Spackman* v. *Miller*, 31 Law J. Rep. (N.S.) C.P. 309; 12 Com. B. Rep. N.S. 659.

Writs of *fi. fa.* on judgments recovered by R against M were issued on the 22nd of January; the sheriff seized the goods of M under these writs on the 23rd, and advertised a sale for the 30th; M filed his petition for adjudication of bankruptcy in the district court, was duly adjudged a bankrupt, and the goods were claimed by the messenger of the Court on the 24th of the same month:—Held, that M's assignee was entitled to the goods as against R. *Young* v. *Roebuck*, 32 Law J. Rep. (N.S.) Exch. 260; 2 Hurls. & C. 296.

Section 103. of the Bankruptcy Act, 1861,—which enacts that "every adjudication against any prisoner for debt, so brought up as aforesaid, shall, unless the Court otherwise direct, have relation back to the date of his commitment or detention,"—has reference to sections 98. and 99; and therefore where a debtor was arrested under a *ca. sa.* and lodged in prison, and he afterwards petitioned *in forma pauperis* and was brought before the county court and adjudicated a bankrupt under sections 98. and 99, the adjudication relates back to the date of the committal to prison, and goods which were then in the order and disposition of the bankrupt with the consent of the true owner, though taken possession of by him before the adjudication, passed to the bankrupt's assignees. *Bramwell* v. *Eglington*, 33 Law J. Rep. (N.S.) Q.B. 130; 5 Best & S. 39.

As section 103. makes the adjudication relate back to the commitment or detention absolutely and not merely as an act of bankruptcy, section 133. of the 12 & 13 Vict. c. 106. affords no protection in such a case. Ibid.

Goods were assigned by S to the defendant by a bill of sale under seal in consideration of 50*l.* advanced by the defendant, with a proviso that if S paid the 50*l.* upon demand in writing given to him, or left at his last place of abode, the deed should be void, but in default of payment contrary to the proviso, "then at any time thereafter" it was to be lawful for the defendant to take possession of the goods, which were to remain in S's possession until default. At the same time S accepted and gave the defendant a bill of exchange at four months for 50*l.* to secure the same debt, and the defendant at once indorsed it over for value. On the 16th of February, the bill being still current, the defendant, knowing S to be in gaol under a *ca. sa.*, left a demand in writing at his house, and took possession of the goods the same evening; S was adjudicated a bankrupt on the 23rd of February:—Held, assuming the 23rd of February to be the material date, that on that day the goods were not in the order and disposition of the bankrupt with the consent of the defendant, the true owner; for that, if the defendant had been premature in taking the goods the same day as the demand, yet that did not prevent his taking possession in proper time before the 23rd; and that the mere taking of

the bill of exchange did not suspend his remedy under the bill of sale. Ibid.

*Quære*—Whether section 103. applies to an adjudication made by the Registrar under section 101. Ibid.

To make a valid verbal contract for the sale of goods above the value of 10*l.* where nothing has been given to bind the bargain or by way of part payment binding upon the vendee, there must be an acceptance and actual receipt, and such acceptance must be made with the consent of the vendor; and until such acceptance, the property in the goods is not changed and the vendor may exercise his right to rescind the contract. And if under such circumstances the contract has been rescinded, no act on the part of the vendee, or of his assignees in case of his subsequent bankruptcy, can effect an acceptance so as to change the property in the goods. *Smith* v. *Hudson*, 34 Law J. Rep. (N.S.) Q.B. 145; 6 Best & S. 431.

Goods purchased under such a contract and sent by the vendor to a railway station, consigned to the order of the vendee, are not, whilst lying at the station, waiting the order of the vendee, and before any order given or other act done by him constituting an acceptance of the goods, in his "possession, order or disposition," with the consent of the true owner, so as, upon his bankruptcy, to give his assignees any right to them under the 12 & 13 Vict. c. 106. s. 125, notwithstanding the goods were no longer *in transitu*, and the right of stoppage therefore did not exist. Ibid.

A, an innkeeper at Sheerness, being indebted to B, under what the jury thought sufficient pressure, on the 30th of May employed his own attorney to prepare a bill of sale of all his effects in favour of B, to secure an existing debt and a small further advance (the amount being about a fair equivalent for the value of the goods), and sent it to B. On the 10th of July B. sent a man to A's premises to paint out A's name, and on the 15th went down to Sheerness and took possession, leaving A there to manage the concern on his behalf. On the 15th A filed a petition in bankruptcy, and on the 16th was duly adjudged bankrupt. In an action by the assignees to recover the value of the goods thus conveyed, the jury having found that the transaction was *bona fide*, and that possession was really and notoriously taken by B prior to the bankruptcy,—Held, that the transaction could not be avoided, either as an act of bankruptcy (there being no relation) or as a fraudulent preference; and that the goods were not in the order and disposition of A at the time of his bankruptcy. *Shrubsole* v. *Sussams*, 16 Com. B. Rep. N.S. 452.

A transfer of shares in a joint-stock company was executed by a shareholder, a blank being left for the name of the transferee and for the date. On the day on which the transfer was executed by the transferor, the assistant secretary certified on the transfer, on the application of the purchaser, that the certificates for the shares were at the company's office, the certificates not having yet been issued to the shareholders. Before the name of a purchaser was inserted in the transfer, the transferor became bankrupt. The assistant secretary of the company in his evidence said that after the certificate which he had made on the transfer, a transfer of the shares would not have been permitted except under the above transfer or upon the production of that transfer cancelled:—Held, by one of the Vice Chancellors, that the shares were in the order and disposition of the transferor at the date of his bankruptcy; but, upon appeal, this decision was reversed, it being considered that the shares were neither in the order and disposition nor in the reputed ownership of the transferor at that time. *Morris* v. *Cannan*, 31 Law J. Rep. (N.S.) Chanc. 425.

A having a contract with the Admiralty to deliver coals at certain foreign ports at stipulated prices, shipped coals in performance of the contract, and in pursuance of the terms of the contract, deposited three parts of the bills of lading with the Admiralty, retaining a fourth part himself, which he deposited, together with the policies on the ships, with B, to secure an advance. The deposit was accompanied by a letter, stating that it was made to secure the amount of the advance, and undertaking, in case of default in repayment at maturity or on demand, to enable B to receive the value of the cargoes. B having giving no notice to the Admiralty until after he, B, was aware of an act of bankruptcy by A, on which an adjudication was afterwards founded,—Held, that the moneys which became due from the Admiralty passed to the assignees, under the order and disposition clause of the Bankrupt Law Consolidation Act. *North* v. *Gurney*, 1 Jo. & H. 509.

Held, also, that the goods having been delivered, the owners from whom the ship had been chartered had no claim against the said moneys for unpaid freight. Ibid.

Costs being given against all the defendants, a direction was added, that this should be without prejudice to any question as to contribution between them. Ibid.

The order of the Court of Bankruptcy for sale of goods, as in the reputed ownership of a bankrupt is *ex parte;* and, *semble*, it cannot be appealed against by the true owner. *Mather* v. *Lay*, 2 Jo. & H. 374.

But the Court of Chancery has jurisdiction, notwithstanding such order, to restrain a sale and determine the rights of the parties. Ibid.

An application by the true owner to the Court of Bankruptcy for a stay of proceedings held not to be a bar to a subsequent bill for injunction to stay a sale. Ibid.

A mortgaged a policy of insurance, and also a share in his father's estate to B. The executors under the father's will paid their trust funds into court under the Trustees' Relief Act. B, the mortgagee, gave notice of his incumbrance upon the policy to the insurance company, and gave notice of his mortgage upon the estate to the executors, and obtained a stop-order upon the fund in court. He then submortgaged both the policy and the estate to C, who gave notice of his incumbrances to the executors, but did not give notice to the insurance company, nor did he obtain a stop-order upon the fund in court. B became bankrupt:—Held, that the policy remained in the order and disposition of the bankrupt, but that the notice to the executors was sufficient to take the interest in the estate out of his order and disposition without any stop-order upon the fund in court. *Thompson* v. *Tomkins*, 31 Law J. Rep. (N.S.) Chanc. 633; 2 Dr. & Sm. 8.

It was also decided that the costs which had arisen out of the litigation between the assignees and the

mortgagee were not to be borne by the general estate; and as each party had been successful in one part, neither of them would be entitled to any costs as to the controversy. Ibid.

By agreement dated the 11th of April, 1862, B & B, shipbuilders at Sunderland, contracted to build a vessel for F, who agreed to pay for the same upon certain terms therein mentioned. On the 12th of April, 1862, B & B, by deed, assigned the contract to S, to secure an antecedent debt, and an advance then made (amounting together to 500*l.*), and also future advances; and by the assignment it was declared that, subject to F's right, S should be entitled to a lien on the vessel for the above sums. On the 19th of May, 1862, the agreement of the 11th of April, 1862, was cancelled, and by memorandum of agreement, dated the 20th of May, 1862, B & B contracted to complete the vessel for, and to sell it to, S for 1,150*l.*, of which the 500*l.* already advanced was to be taken in part payment. Neither the deed of the 12th of April, 1862, nor the agreement of the 20th of May, 1862, was registered under the Bills of Sale Registration Act (17 & 18 Vict. c. 36). On the 2nd of June B & B became bankrupt: and the vessel was then incomplete. Upon a bill filed by S against the assignees in bankruptcy of B & B, for the purpose of obtaining a declaration that S was entitled to a lien or charge on the vessel, or for specific performance of the agreement of the 20th of May, 1862, one of the Vice Chancellors decided that S was entitled, under the deed of the 12th of April, 1862, to a lien or charge upon the vessel, and a sale thereof was ordered. Upon appeal, the Lords Justices held that the lien under the deed of the 12th of April was destroyed, either by the cancellation of the agreement with F, or by the fact that the 500*l.* thereby secured was merged into and taken as part payment of the purchase-money under the agreement of the 20th of May; but that under the latter instrument the plaintiff was entitled to a lien on the unfinished ship for the 500*l.* actually advanced. Their Lordships also held, that no registration of the instrument of the 20th of May was necessary, under the Bills of Sale Act, and that the vessel was not in the order and disposition of the builders as reputed owners at the time of their bankruptcy within the meaning of the Bankrupt Act. *Swainston* v. *Clay*, 32 Law J. Rep. (N.S.) Chanc. 503; 4 Giff. 187.

Until the Court has made an order for the payment of costs out of a fund in court, the solicitor has no lien on such fund for such costs; therefore, where the solicitor to a party in a suit assigned the costs due and to become due to him in the suit, and subsequently became insolvent, and an order was afterwards made for the payment of the costs out of a fund in court, and the official assignee in insolvency of the solicitor claimed the costs as against the person to whom they had been assigned as being under the order and disposition clause, on the ground that (though notice had been given to the solicitors for the plaintiff in the suit) no stop order had been obtained on the fund in court:—Held, that it was not necessary to get a stop order on the fund in court, and therefore that the person taking under the assignment was entitled to the costs. *Lord* v. *Colvin*, 2 Dr. & S. 82.

In December 1861 the bankrupt contracted with W to build a barge for him, to be paid for in bricks; the barge to be completed on the 5th of June 1862. The bankrupt hired a yard for a certain number of months, for the purpose of completing the contract, which period expired before the completion of the work, and W then hired the yard. In June it was agreed by the bankrupt in writing that the barge should be held by W as a security for advances made by him. In July the bankruptcy took place. The advances made by W exceeded the amount of work done and materials supplied by the bankrupt:—Held (reversing the decision of the County Court Judge sitting in Bankruptcy), that W had a lien upon and was entitled to hold the barge, unless the assignees chose to complete the contract. *Ex parte Watts, in re Attwater*, 32 Law J. Rep. (N.S.) Bankr. 35.

The object of the 19th section of the Joint-Stock Companies' Act, 1856, enacting that "no notice of any trust, express or implied or constructive, shall be entered on the register or receivable by the company," was that the company itself should not be bound by any notice of any trust, but the section does not prevent an equitable mortgage by deposit of shares from being so far completed by notice as to be valid as against the assignees in bankruptcy of the mortgagor, claiming them under the reputed ownership clause of the Bankruptcy Act. *Ex parte Stewart, in re Shelley*, 34 Law J. Rep. (N.S.) Bankr. 6.

The directors and secretary of a joint-stock company joined in depositing the certificates of shares belonging to them with a banking company, as a security for money advanced:—Held, that this transaction amounted to a sufficient notice to the company of an equitable assignment of the shares belonging to the secretary, so as to support the title of the equitable mortgagees against his assignees in bankruptcy. *Ex parte Boulton, in re Sketchley* (1 De Gex & J. 163; Ibid. Bankr. App. Cas. 37; 26 Law J. Rep. (N.S.) Bankr. 45) distinguished. Ibid.

(3) *Book Debts.*

The 137th section of the 24 & 25 Vict. c. 134, which empowers a bankrupt's assignees to sell the book debts of the bankrupt, is not confined to debts entered in a book, but applies to all such debts as would, in the ordinary course of the bankrupt's business, be entered in his books. *Shipley* v. *Marshall*, 32 Law J. Rep. (N.S.) C.P. 258; 14 Com. B. Rep. N.S. 566.

A bankrupt who, in addition to the trade of a saddler, had been engaged in the purchase and sale of copyrights of newspapers, sold, shortly before his bankruptcy, the copyright of a newspaper of which he was the proprietor, but made no entry of the sale in any book, except his diary. One of the terms of the sale was, that the purchase-money should be secured by a mortgage on the newspaper:—Held, *(Williams, J. dubitante)*, that the purchase-money due to the bankrupt at the time of his bankruptcy was a book debt within the meaning of the 24 & 25 Vict. c. 134. s. 137, the right to sue for which would pass on a sale of such debts by the assignees under that section, though the right to insist on the mortgage would not so pass. Ibid.

(4) *Chose in Action of Bankrupt's Wife.*

Where a right of action of the wife of a bankrupt

or insolvent is of such a nature that if vested in the bankrupt or insolvent it would pass to his assignees, the interest of the bankrupt or insolvent in such right of action passes to his assignees. *Richbell* v. *Alexander*, 30 Law J. Rep. (N.S.) C.P. 268; 10 Com. B. Rep. N.S. 324.

A right of action for the conversion, before the marriage, of the wife's goods falls within this rule. Ibid.

An action brought to enforce such a right must be brought in the names of the wife and of the assignees, who are necessary parties; and an action by husband and wife must fail. Ibid.

(5) *Lease.*

The assignees of a bankrupt are bound to exercise their option of accepting a lease in which the bankrupt is lessee within a reasonable time; and, in ejectment, where title is traced through a bankrupt's assignees, it is a question for the jury whether, under all the circumstances of the case, the assignees accepted the lease within a reasonable time. *Mackley* v. *Pattenden*, 30 Law J. Rep. (N.S.) Q.B. 225; 1 Best & S. 178.

To a declaration for breaches of covenants contained in a lease, in writing, of certain premises from the plaintiffs to the defendant, the defendant pleaded his discharge in bankruptcy, a refusal by the creditors' assignee to accept the lease, his own execution of a surrender of the lease to the plaintiffs, his tender of the deed of surrender, and offer to deliver up possession to them, without, however, alleging that the lease was lost or destroyed, or that he was prevented from giving it up:—Held, that the plea was bad. *Colles* v. *Evanson*, 34 Law J. Rep. (N.S.) C.P. 320; 19 Com. B. Rep. N.S. 372.

(6) *Sequestration.*

If a judgment creditor of a beneficed clergyman, issue a sequestration, and, the clergyman becoming bankrupt, his assignee under the bankruptcy issue a second sequestration, the former sequestration will remain valid and have priority, even though it were not published till after the filing of the petition in bankruptcy. *Hopkins* v. *Clarke* (Ex. Ch.), 33 Law J. Rep. (N.S.) Q.B. 334; 5 Best & S. 753—affirming the judgment below, 33 Law J. Rep. (N.S.) Q.B. 93.

(7) *Under Second Bankruptcy.*

The plaintiffs were assignees in bankruptcy of one K who, at the time of the adjudication under which the plaintiffs were appointed, was already an uncertificated bankrupt. The plaintiffs sued the defendant in trover for goods which K had acquired after his first bankruptcy, and which he had fraudulently assigned to the defendant. The assignees under the first bankruptcy did not in any manner interfere:—Held, that the second bankruptcy was not void; that the title of the bankrupt to the property after acquired, which was good against every one except the assignees under the first bankruptcy, was transferred to the assignees under the second, and that the first assignees not having interfered, the second assignees were entitled to maintain this action. *Morgan* v. *Knight*, 33 Law J. Rep. (N.S.) C.P. 168; 15 Com. B. Rep. N.S. 669.

(c) *Landlord's Right to Arrears of Rent.*

On the 27th of March, 1861, J P being then a trader, committed an act of bankruptcy by a fraudulent conveyance of all his goods; on the 11th of October his landlord levied a distress for four years' arrears of rent; on the same day the 24 & 25 Vict. c. 134. came into operation, and on the 17th of October, J P, being then a non-trader, was adjudicated a bankrupt upon his own petition, under the 75th section of that act. The 129th section of the 12 & 13 Vict. c. 106. enacts, that no distress for rent made and levied *after an act of bankruptcy*, whether before or after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, shall be available for more than one year's rent accrued prior to the date of the fiat or filing of the petition:—Held, that to bring the case within that section the act of bankruptcy must be one to which the title of the assignees could relate; that no such relation existed to the act of bankruptcy of the 27th of March; and that, therefore, the landlord was entitled to retain the four years' rent against the assignees. *Paull* v. *Best*, 32 Law J. Rep. (N.S.) Q.B. 96; 3 Best & S. 537.

(d) *Rights and Liabilities.*

Since the custody and possession of a bankrupt's estate has been vested in the official assignees, the mere relative position of trade assignees and messenger will no longer suffice to create a liability in the trade assignees to pay the messenger, without an express promise to pay, or an express employment of the messenger; for the messenger, in receiving the property, and taking care of it, *prima facie* represents the official assignee. *Stubbs* v. *Twynam*, 30 Law J. Rep. (N.S.) C.P. 8.

An official assignee of a district court of bankruptcy having given his assent to the bringing of an action in his name jointly with that of the trade assignee for the recovery of part of the bankrupt's estate, and, the action proving unsuccessful, the trade assignee having paid the costs,—Held, that he was entitled to sue the official assignee for contribution. *Bevan* v. *Whitmore* (Ex. Ch.), 19 Com. B. Rep. N.S. 763—affirming the judgment below, 15 Com. B. Rep. N.S. 438.

M in March, 1859, consigned oats to the correspondents of the plaintiffs at Melbourne for sale, the proceeds to be remitted to the plaintiffs, and against this consignment the plaintiffs accepted in favour of M a bill at four months for 600*l.*, it being agreed that the plaintiffs should be repaid that sum out of the proceeds of the sale of the oats,—any deficiency to be made good by M, who was also to pay interest to the plaintiffs on the 600*l.* from the time the bill came due till the arrival in this country of the proceeds of the oats. In June, 1859, M became bankrupt, the plaintiff's acceptance remaining in his hands unnegotiated. The assignees of M took possession of the bill, and paid it into the Bank of England, to the credit of the accountant in bankruptcy for the estate of M; and the bill was presented to the plaintiff's bankers at maturity (July, 1859), and paid by them, the plaintiffs being in ignorance of the fact of its having remained in M's hands unnegotiated. The account sales of the shipment were received from Melbourne in March, 1860, shewing that M's estate had been overpaid to the extent of 270*l.*:—Held, that the plaintiffs were not entitled to recover back that money from the assignees. *De Pass* v. *Bell*, 10 Com. B. Rep. N.S. 517.

(e) *Actions by.*

A notice to the effect that A has committed an act of bankruptcy by filing a petition for a private arrangement with his creditors, and that the sheriffs must not sell the goods of A seized under a writ of *fi. fa.* delivered to the sheriff on the day of the filing the petition (such petition having been subsequently dismissed and A adjudged a bankrupt on a creditor's petition), is notice of an act of bankruptcy committed by A at the date of filing the petition. *Edwards* v. *Gabriel,* 30 Law J. Rep. (N.S.) Exch. 245; 6 Hurls. & N. 701.

The defendant, a creditor, obtained a judgment and issued a *fi. fa.*, under which the sheriffs seized the debtor's goods on the 6th of July; on the 9th the debtor filed a petition for an arrangement with his creditors under section 211. of the 12 & 13 Vict. c. 106; on the same day notice of this was given to the sheriffs, by the solicitors to the petition; the sheriffs sold to the execution creditor on the 13th; on the 7th of August the petition for arrangement was dismissed by the Court of Bankruptcy, and A was, the same day, adjudged bankrupt on the petition of another creditor:—Held, in an action of trover by the assignees of A, against the sheriffs and the execution creditor, that the assignees were entitled to recover the proceeds of the sale. Ibid.

The defendant, a merchant at Hull, kept an account with the Hull Bank, upon the terms that they should procure P & Co., their London agents, to accept on their credit bills drawn by the foreign correspondents of the defendants against their consignments to him, and of which P & Co. were advised by the Hull Bank. The defendants paid the Hull Bank a quarter per cent. on the amount of the acceptances, and they paid P & Co. a fixed annual sum for transacting their London business. When a bill was accepted by P & Co. the Hull Bank debited the defendant with the amount, and they charged him interest from the time the bill was due. The Hull Bank became bankrupt, and P & Co. paid all bills accepted by them which were due after the bankruptcy:—Held, in the Exchequer Chamber (reversing the decision of the Court of Exchequer), that the assignees of the Hull Bank, and not P. & Co., were entitled to recover from the defendant the amount of such bills. *Barkworth* v. *Ellerman,* 6 Hurls. & N. 605.

(H) Of the Bankrupt.

(a) *Protection from Arrest and other Process,*

A bankrupt having surrendered, his examination was commenced, and adjourned to a subsequent day. Before that day the Commissioner granted a certificate—under the 12 & 13 Vict. c. 106. s. 257. and Schedule (B, a.)—withdrawing protection, at the instance of a creditor, and a *ca. sa.* was sued out of the Court of Exchequer, under which the bankrupt was arrested by the sheriff, before the day to which the examination had been adjourned. After that day another certificate was granted, and a *ca. sa.* under it from this Court was lodged with the sheriff as a detainer against the bankrupt:—Held, assuming the bankrupt to have been absolutely privileged from arrest by the 112th section until he had finished his examination, and the original arrest consequently to be illegal, that the detainer was good, being lodged after the privilege had ceased; for that the principle applicable to such a case is, that whenever an arrest by the detaining party would have been good, a detainer by him, being equivalent to an arrest, is good also, unless it appears that the first arrest was a wrongful act of the sheriff himself, or that there was some collusion between the detaining party and the creditor making the arrest, or between the detaining party and the sheriff. *Bateman* v. *Preston,* 30 Law J. Rep. (N.S.) Q.B. 133; 3 E. & E. 578.

A bankrupt after adjudication, and up to final examination, is protected from arrest under the 12 & 13 Vict. c. 106, without the Commissioner's indorsement of protection on the summons. The Commissioner has no authority to deprive him of protection up to that time. *Ockford* v. *Freston;* and *Chapman* v. *Freston,* 30 Law J. Rep. (N.S.) Exch. 89; 6 Hurls. & N. 466.

A Commissioner's certificate, under section 257. in the Form given in Schedule (B, a.), certifying that the bankrupt is not protected by the Court from process, granted by the Commissioner before the day to which the final examination of the bankrupt has been adjourned, is void; a *ca. sa.* sued out on it is invalid, and an arrest on such *ca. sa.* illegal; and this Court, although it has no jurisdiction over the Commissioner's certificate, will set aside the writ and discharge a bankrupt arrested on such writ from custody. Ibid.

A *ca. sa.* issued on a (B, a.) certificate granted on the day to which the final examination has been adjourned, but after the termination of such examination, though valid, will not operate as a detainer against a bankrupt already in custody under a writ founded on a void certificate; for, whether the circumstances under which the sheriff arrested would render him liable to an action or not, if the custody under the original arrest be illegal, no subsequent writ, though valid, can operate as a detainer. Ibid.

Per *Pollock, C.B.* and *Wilde, B., dubitante Martin, B.,* the principle of the decision in *Hooper* v. *Lane* embraces this case. Ibid.

A petition and order for protection of a debtor's property from all process under section 211. of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), did not affect property levied and seized under a writ of *fi. fa.* previous to the petition and order; and the sheriff was therefore bound to proceed to a sale notwithstanding notice of such order. *Bottomley* v. *Heyward,* 31 Law J. Rep. (N.S.) Exch. 500; 7 Hurls. & N. 562.

The defendant in August, 1860, presented a petition to the Court of Bankruptcy, under the Bankrupt Law Consolidation Act, 1849, s. 211, and obtained the usual order for the protection, which was from time to time renewed until the 5th of June, 1861, and his proposal (to pay 10*s.* in the pound by certain instalments) was assented to by the requisite number of creditors, and approved and confirmed by the Commissioner. On the 5th of March and 4th of April, 1861, the plaintiffs obtained two judgments against the defendant; on the 21st of April, 1861 (and whilst his protection was in force), they commenced an action against him upon those judgments. The Court refused to stay the proceedings therein. *Naylor* v. *Mortimore,* 10 Com. B. Rep. N.S. 566.

A bankrupt having surrendered, his examination was commenced on the 6th of November and adjourned to the 3rd of December. On the 29th of November the Commissioner, at the instance of a creditor, granted a certificate, under the 12 & 13 Vict. c. 106. s. 257, and Schedule (B, a.), and a *ca. sa.* was sued out of the Court of Exchequer, under which the bankrupt was, on the 1st of December, arrested. On the 4th of December another certificate was obtained, and another *ca. sa.* was sued out of the Court of Exchequer at the instance of another creditor, and lodged with the sheriff. On the 15th of January another certificate was obtained, and another *ca. sa.* was sued out of the Court of Queen's Bench, at the instance of another creditor, and lodged with the sheriff. The Court of Exchequer held that the first *ca. sa.* was invalid and the arrest upon it illegal; and that although the second *ca. sa.* was valid, the bankrupt could not be detained in custody, the original arrest being illegal. The Court of Queen's Bench, however, held, that the detainer upon the *ca. sa.* from that Court was good. A writ of *habeas corpus* having been obtained from the Court of Chancery, it was held, that both the original arrest and the subsequent detainers were illegal, and that the bankrupt was entitled to his discharge. *Ex parte Freston*, 30 Law J. Rep. (N.S.) Chanc. 460; 3 De Gex, F. & J. 612.

Three partners were sued upon a promissory note given by them for a partnership debt, and judgment was recovered against all. After suit, but before judgment, C, one of the partners, executed a deed under section 192. of the 24 & 25 Vict. c. 134, by which he assigned all his estate to trustees for the benefit of his creditors, no reference being made to the partnership or its assets or liabilities. The deed was registered under section 198. of the same act, and a certificate obtained and notice given. C was arrested under the judgment, and on application for his discharge one of the Commissioners refused to release him; but, on appeal, held, that C was protected from arrest as well from joint as from separate creditors. *In re Castleton*, 31 Law J. Rep. (N.S.) Bankr. 71.

The discretionary power given to the Court of Bankruptcy by the 112th section of the Bankruptcy Law Consolidation Act, 1849, of releasing from prison a bankrupt who has been arrested for debt, is only to be exercised for the purpose of advancing the interests of the creditors under the bankruptcy, and is not given for the benefit of the bankrupt. *Ex parte Stuart, in re Waugh*, 33 Law J. Rep. (N.S.) Bankr. 4.

Therefore where a bankrupt, who had left England shortly before the adjudication of bankruptcy, failed to surrender at the day appointed and remained abroad for about five years, making occasional visits to England under a false name, and only applied for leave to surrender after he had been arrested on mesne process,—Held, that the mere circumstance that his discharge might afford some additional facility in reference to the accounts, was not a sufficient ground, under the other circumstances of the case, for discharging the bankrupt. Ibid.

Whether the 112th section applies to the case of a bankrupt in custody upon mesne process—*quære*. Ibid.

The first part of the 112th section of the Bankrupt Law Consolidation Act, 1849, empowering the Court of Bankruptcy to give protection from arrest to a bankrupt not in prison at the date of the adjudication has no retroactive operation; and the Court has no power under that part of the section to release from prison a bankrupt who was in custody under final process at the time of obtaining his protection. *Ex parte Kimberley, in re Kimberley*, 34 Law J. Rep. (N.S.) Bankr. 28.

And, *semble*, the latter part of the same section giving the Court a discretionary power to order the release of a bankrupt who having surrendered and obtained his protection, is in prison for debt at the time of obtaining such protection, does not apply to the case of a bankrupt who has passed his last examination, and has been taken in execution upon final process while without protection. Ibid.

A bankrupt passed his final examination, and obtained his order of discharge, suspended for twelve months, with protection for three months renewable from time to time on giving notice to the assignees and opposing creditors. After the expiration of the three months the bankrupt was taken into custody under an execution, and he then applied, upon notice, for a renewal of his protection and a release from custody. He obtained a renewal of the protection; but upon the application for a release from custody, it was held, affirming the decision of one of the Commissioners, that the Court had no power under the first part of the above-mentioned section to grant the application, and that whether it had or had not a discretionary power under the latter part of the same section, it was not a case for the exercise of that discretion. Ibid.

(*b*) *Indictable Offences.*

The prisoner, a bankrupt, having failed duly to surrender himself, and having thereby committed a felony under the statute 12 & 13 Vict. c. 106. s. 251, a warrant of a Bankruptcy Commissioner issued for his apprehension. An information also for the offence was laid before a Magistrate, who issued his warrant thereon to arrest the prisoner. All these proceedings took place before the 11th of October, 1861, on which day the new Bankruptcy Act, 1862, 24 & 25 Vict. c. 134, came into operation. Section 230. of that act repeals the former act, but provides that that repeal shall not affect any proceeding pending or any penalty incurred for anything done prior to the commencement of the new act:—Held, that there were proceedings pending against the prisoner, and also a penalty incurred by him, for an act done by him prior to the new act, and therefore that he might be indicted subsequently to the 11th of October 1861, for the felony under the provisions of the old act; though as to these matters the act was repealed, and though the new act made a similar offence committed after the 11th of October 1861 a misdemeanor only. *R. v. Corss Smith*, 31 Law J. Rep. (N.S.) M.C. 105; 1 L. & C. 131.

An indictment against a bankrupt for embezzling part of his estate with intent to defraud his creditors, alleged that he committed an act of bankruptcy "by being unable to meet his engagements with his creditors, and by filing his petition in the Court of Bankruptcy for the B district, for adjudication of bankruptcy against himself"; and that afterwards, on the said petition being so filed, he was

adjudged a bankrupt. It did not state that he had filed a declaration of insolvency:—Held, that the indictment was bad. *R.* v. *Massey*, 32 Law J. Rep. (N.S.) M.C. 21; 1 L. & C. 206.

A count of an indictment, laid under the 221st section of the Bankruptcy Act, 1861, charged that the defendant was adjudged bankrupt in the Liverpool District Court of Bankruptcy, and that, upon his examination in the said court, with intent to defraud his creditors, he did not fully and truly discover to the best of his knowledge and belief all his property, to wit, all his personal property in money and goods; and did not, as to part of his property, fully and truly discover, to the best of his knowledge and belief, how and to whom and for what consideration and when he had disposed of, assigned or transferred such part thereof, to wit, 1,000*l.*, 1,000 sacks of corn, 10 horses, &c. The defendant having been found guilty on this count, and having brought a writ of error,—Held, that, at all events after verdict, the count was good; that the offence being charged in the words of the statute, any want of particularity was cured, after verdict, by the 7 Geo. 4. c. 64. s. 21; and that if the count charged two offences, duplicity was not ground of error. *Nash* v. *the Queen, in error*, 33 Law J. Rep. (N.S.) M.C. 94; 4 Best & S. 935.

*Quære*—Whether the count charged two offences. Ibid.

(c) *Evidence.*

If a person adjudicated bankrupt take no steps within the prescribed period to annul the adjudication, the *London Gazette* containing the advertisement of his bankruptcy is conclusive evidence of the bankruptcy in criminal as well as in civil proceedings taken against him. *R.* v. *Levi*, 34 Law J. Rep. (N.S.) M.C. 174; 1 L. & C. 597.

(I) Arrangements under the Control of the Court.

The defendant petitioned the Court of Bankruptcy for protection, under section 211. of the 12 & 13 Vict. c. 106, and made a proposal for the benefit of his creditors. The Commissioner declared the defendant a bankrupt, and adjourned the proceedings into open court. There was an appeal against this order, which was reversed, and a further order of adjournment was then made by the Commissioner in order that a fresh proposal might be made by the defendant, which proposal was eventually accepted by a resolution assented to by more than three-fifths in number and value of the creditors, and the Commissioner granted a certificate of conformity under section 221. The plaintiffs were creditors of the defendant upon three bills of exchange at the time the latter petitioned the Court of Bankruptcy for protection, and they proved their debt at the sitting appointed for that purpose. Subsequently, they commenced two actions on the above three bills of exchange and recovered judgment therein, and upon these two judgments the present action was brought:—Held, that the certificate, if a bar at all, was as complete a bar to the action on the judgments as to an action to recover the original debts on which those judgments were founded. *Naylor* v. *Mortimore*, 33 Law J. Rep. (N.S.) C.P. 273; 17 Com. B. Rep. N.S. 207.

In respect of a debt owing by the defendant to the L Company, an unincorporated bank, the assent to the above proposal was given by a person professing to hold a letter of attorney, as required by section 217. This letter of attorney was itself under seal, but it was executed by the manager of the company, who was not authorized by any instrument under seal. The company had ratified the act of their manager, and accepted the composition:—Held, that the letter of attorney under which assent was given on behalf of the L company was sufficient. Ibid.

The proposal accepted by the creditors provided that payment of the composition should be made on a certain day, partly in cash and partly in promissory notes; and that payment of the promissory notes should be guaranteed by the bond of one H. In carrying out this arrangement, some of the creditors were paid wholly in cash, instead of being paid partly in cash and partly in promissory notes; others were paid after the time stipulated for, and the bond which was executed was subject to a condition, that if proceedings in bankruptcy were taken against the defendant it should be void. But all the creditors except the plaintiffs, who refused to receive it, were paid the full amount of their composition in accordance with the proposal:—Held, that the arrangement had been carried out in conformity with the proposal; that it was competent for the defendant to pay some of the creditors their instalments in a manner otherwise than provided for, provided all were satisfied; and that the condition in question did not vitiate the bond, for that, under the circumstances, there was not at any time any means by which the bond could have been avoided under the condition, by any person whatever. Ibid.

Held, also, that the proceedings subsequent to the appeal were rightly continued. Ibid.

A B was in trade for thirty years, and was also a farmer. He never took stock. A London firm, with whom he principally did business, were in the habit of drawing bills upon him, in the nature of accommodation bills, which he accepted. The London firm failed, and A B then stopped payment; and it appeared that he had been insolvent two years before, but he did not then know the extent of his debts and liabilities. He presented a petition for arrangement, but upon the opposition of a small number of his creditors, the Commissioner, under the 223rd section of the Bankrupt Law Consolidation Act, 1849, adjudged him a bankrupt as having postponed the presentation of his petition longer than was excusable. This order was, however, reversed on appeal. *Ex parte Mortimore, in re Mortimore*, 30 Law J. Rep. (N.S.) Bankr. 17; 3 De Gex, F. & J. 599.

Observations as to accommodation bills. Ibid.

(K) Arrangements by Deed.

[See title Debtor and Creditor.]

(L) Certificate and Order of Discharge.

(a) *Grant of, in general.*

A trader was adjudged bankrupt in 1851, and his certificate was wholly refused by one of the Commissioners; and, on appeal, the judgment was affirmed, on the ground that the bankrupt had engaged in

gambling in stock within the 201st section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), which section is repealed by the act of 1861). After a lapse of ten years, during which he had lived abroad, but had there been sued by a creditor holding a security provable under the bankruptcy, and was imprisoned at his suit for a period of nine months, he applied to one of the Commissioners for his discharge under the 160th section of the act of 1861 (24 & 25 Vict. c. 134), but his Honour refused to order the same, principally on the ground of his going and remaining abroad after the refusal of his certificate:—Held, on appeal, that he was entitled to an absolute and unconditional discharge. *In re Matheson*, 31 Law J. Rep. (N.S.) Bankr. 23.

The Court will not lay down any general rule as to the granting an order of discharge under the above act of 1861, but each case must depend upon its own individual circumstances. Ibid.

In the inquiry into the circumstances, acts which, under the 201st section of the act of 1849, would constitute offences disentitling a bankrupt to any certificate are not to be taken into the consideration of the Court, that section having been repealed. Ibid.

Where a bankrupt had omitted certain contracts and property from his statement of accounts, one of the Commissioners had adjourned the further hearing of an application for his discharge *sine die*, with limited protection under the 110th section of the Bankruptcy Act, 1861, but the Lords Justices (without expressing any opinion on the bankrupt's right to an order of discharge) gave him leave to appear again before the Commissioner. *In re Delamere*, 31 Law J. Rep. (N.S.) Bankr. 35.

A bankrupt applied for his order of discharge under the 158th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), when one of the Commissioners suspended the order for eighteen months without protection, on the ground that the bankrupt had falsely represented an accommodation bill as a trade bill. The bankrupt denied the false representation, and appealed. The Lords Justices considered that the fact of the falsehood of the representation was doubtful, and that it was also doubtful whether there was any power to suspend the discharge of a bankrupt the proceedings in whose bankruptcy were pending at the time the act of 1861 came into operation, on account of offences punishable under the repealed 256th section of the Consolidation Act, 1849 (12 & 13 Vict. c. 106), and therefore they thought it best and the right course to issue an immediate discharge. *In re Bond*, 31 Law J. Rep. (N.S.) Bankr. 47.

*Quære*—Whether there is any power to suspend the discharge of a bankrupt, the proceedings in whose bankruptcy were "pending" at the time the act of 1861 came into operation, by reason of his having been guilty of offences punishable under the repealed section of the act of 1849, but for which no punishment is provided by the act of 1861. Ibid.

D and B, partners, borrowed, in 1854, 1,000*l.* on their joint personal security. B, in 1859, retired from the partnership, but the debt continued upon the security of D only, and was made payable in 1869. In 1861, D, being sued for arrears of interest, petitioned for adjudication, and was adjudged bankrupt, and the only debt proved was the 1,000*l.* The bankrupt's examination shewed insolvency for a period of ten years before the adjudication. One of the Commissioners having granted an unconditional order of discharge, the Lords Justices, on the appeal of the assignee, suspended the order and granted another protecting the bankrupt from molestation in respect of debts under the adjudication, but leaving after-acquired property liable for all debts proved or provable under it. *Ex parte Hewitt, in re Drinkwater*, 31 Law J. Rep. (N.S.) Bankr. 83.

Where proceedings under the bankruptcy have been suspended under the 110th section of the 24 & 25 Vict. c. 134, and the bankrupt has not made a full discovery of his estate, it is doubtful whether under the above section, he is entitled, as of right, to an order of discharge, or only entitled to apply for the order which may be granted or withheld on consideration of his general conduct. *In re Delamere*, 31 Law J. Rep. (N.S.) Bankr. 67.

The discretion of the Court as to refusing or suspending a certificate to the bankrupt which existed under the Bankrupt Law Consolidation Act, 1849, is not continued by the act of 1861 as to the order of discharge, but the bankrupt is entitled to an order of discharge unless he be guilty of any of the offences mentioned in the latter act. *In re Mew and Thorne*, 31 Law J. Rep. (N.S.) Bankr. 87.

The bankrupt's father was a manufacturer living at G, and having a mill at M, four miles distant. The bankrupt was in the employ of his father, and also carried on business on his own account at M, where he slept during five nights of the week, returning to his father's house at G on Saturday, and remaining with him as part of his family till Monday. In his petition the bankrupt described himself merely as "of G, manufacturer." Whether this was a misdescription upon which the adjudication might be annulled, *quære*; but held, that it was no ground for reversing an order of discharge. *Ex parte Crabtree, in re Taylor*, 33 Law J. Rep. (N.S.) Bankr. 33.

An action founded on tort is not an action to recover money due within the meaning of the 159th section of the Bankruptcy Act, 1861, and a vexatious defence to such an action is therefore no ground for refusing the order of discharge. Ibid.

*In re Mew and Thorne* (31 Law J. Rep. (N.S.) Bankr. 87) adhered to. Ibid.

For a malicious injury done before the act of 1861 came into operation a verdict with damages was returned by a jury against B. He afterwards was adjudicated bankrupt upon his own petition; and one of the Commissioners granted him an order of discharge. On appeal, the Lords Justices differed in opinion, the *Lord Justice Knight Bruce* considering that it is not within the power of the Court to refuse or suspend the order of discharge when the bankrupt has not been guilty either of conduct amounting to a misdemeanor under the act of 1861, or of one or more of the offences enumerated in the third paragraph of its 159th section; but the *Lord Justice Turner* dissented, being of opinion that as the act nowhere makes it obligatory upon the Court to grant the order of discharge, it must have been intended that the Court should have a discretion to suspend or refuse such an order. The appeal of the plaintiffs in the action was therefore dismissed. *Ex*

*parte Glass and Elliot, in re Boswall*, 31 Law J. Rep. (N.S.) Bankr. 73.

The words "order of discharge" in the Bankruptcy Act, 1861, denote two different things: first, the order made by the Court on the application of the bankrupt, and which is made and pronounced by the Commissioner, subject to appeal, and is recorded in the proceedings; and, secondly, that further document or certificate which is formally drawn up and handed over to the bankrupt after the time allowed for appealing has elapsed. The order of discharge referred to by the 1st rule of the 159th section is the first of these, and the date from which it takes effect is the time when it is pronounced by the Court. Consequently, where, after the making of the order of discharge by the Commissioner, but before the expiration of the time required by the 170th section to elapse before the order of discharge should be drawn up, property devolved upon the bankrupt, it was held that he, and not the assignees, was entitled to it. *Ex parte Bell, in re Laforest*, 32 Law J. Rep. (N.S.) Bankr. 50.

The 159th section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, is not retrospective, and an offence created by that clause must, in order to justify the refusal or suspension of the order of discharge, have been committed subsequently to the passing of the act. *Ex parte White, in re White*, 33 Law J. Rep. (N.S.) Bankr. 22.

It is the duty of the Commissioner when applied to by a bankrupt for his discharge under the circumstances mentioned in the 110th section of the Bankruptcy Act, 1861, to be judicially satisfied, before granting it, that the bankrupt has made a full discovery of his estate. *Ex parte Jones, in re Wilson and Slater*, 33 Law J. Rep. (N.S.) Bankr. 11.

The power given to the Court by the 162nd section of the Bankrupt Law Consolidation Act, 1849, to adjourn a bankrupt's last examination *sine die*, is not to be used for the purpose of indirectly defeating the bankrupt's right to an order of discharge in cases where the order could not be directly refused under the 159th section of the act of 1861. *Ex parte Grummitt, in re Grummitt*, 33 Law J. Rep. (N.S.) Bankr. 43.

A Registrar acting as the deputy of the Commissioner, under the 27th section of the Bankrupt Law Consolidation Act, 1849, has power to grant orders of discharge in unopposed cases; and this power is not taken away by implication by the 52nd section of the Bankruptcy Act, 1861, nor by the 159th section of the same act. *Ex parte Lees, in re Emberton*, 33 Law J. Rep. (N.S.) Bankr. 25.

The order of discharge in such a case ought to be signed by the Registrar, and not by the Commissioner. Ibid.

P, carrying on business in Australia, was proceeded against in the Insolvency Court there, and being unable to get his certificate, left the colony, and came to this country, where he was sued by an Australian creditor who had not proved his debt under the proceedings in insolvency. Judgment was recovered against him, and he was shortly afterwards adjudicated bankrupt on his own petition. The Commissioner was afterwards applied to on behalf of the creditor to dismiss the petition, but he refused to do so, and this decision was not appealed from. Subsequently the Commissioner made an order granting the bankrupt his discharge after suspension for eight calendar months, with protection. Upon the matter coming before the Lord Chancellor, upon appeal from the order of discharge, it appearing that the bankrupt had contracted debts without reasonable ground of expectation of being able to pay, the order was suspended (with intermediate protection) for twelve months, for the purpose of gaining information as to any future property of the bankrupt, the Lord Chancellor at the same time intimating that the order of discharge would be granted ultimately only upon the terms of the future property being made available for the creditors. *Ex parte Gibson, in re Pattrick*, 34 Law J. Rep. (N.S.) Bankr. 31.

*Semble*—If the adjudication had been appealed against in due time, it would have been annulled. Ibid.

*(b) Conduct as a Trader.*

A trader obtained money on the discount of bills of exchange drawn by him and his firm, representing to the discounters that the bills were ordinary trade bills, and not accommodation bills, and on that footing they were discounted. The trader became bankrupt, and one of the Commissioners, for the above misconduct and other reasons, refused him any certificate, and also refused him liberty to apply for his discharge, if taken in execution, until he should have been in prison six months. The bankrupt appealed from this judgment; but the Lords Justices, being of opinion that the representations amounted substantially to obtaining money by untrue pretences and fraudulent misrepresentations, refused to mitigate the sentence, and dismissed the appeal. *Ex parte Laurence, in re Laurence*, 30 Law J. Rep. (N.S.) Bankr. 33.

A trader purchased goods of a manufacturer, and after the invoice had been made out, he added to the invoice an amount more than double that of the sum charged by the manufacturer as the cost price of the goods, and upon the invoice so added to, or fabricated, he procured a loan of money to two-thirds of the fabricated price. The custom of the trade was to "salt" invoices to the extent of 5*l.* per cent. on the amount charged as cost price, to meet the incidental expenses of shipment, and the trader represented to the lender that this invoice had only been so "salted." The goods were shipped to Australia, and sold for an amount less than the true cost price. The trader became bankrupt, and for this and other acts of misconduct one of the Commissioners refused him his certificate; and, on appeal, the Lords Justices affirmed the decision, and dismissed the bankrupt's petition with costs. *Ex parte Johnson, in re Johnson*, 30 Law J. Rep. (N.S.) Bankr. 38.

A father, a solicitor in practice, took his son, aged twenty-four, into partnership. The son never investigated the affairs of the firm, but though he lived with and was maintained by the father, he drew out of the concern annually 300*l.* for his own purposes. The father became bankrupt, and subsequently also the son. On the latter applying to one of the Commissioners for his discharge, his Honour suspended it for twelve months, three months to be without protection. On appeal, the Lords Justices mitigated the sentence by a suspension for three months only, with protection. *Ex parte Holden, in re Holden*, 31 Law J. Rep. (N.S.) Bankr. 86.

*Semble*—A speculation is not "rash and hazardous" within the meaning of the 159th section of the Bankruptcy Act, 1861, unless it is not only dangerous, but such as no reasonable man would enter into. *Ex parte Downman, in re Downman*, 32 Law J. Rep. (N.S.) Bankr. 49.

A bankrupt accepted accommodation bills without consideration, to an amount far beyond his means or expectations, for a firm in large business, to whom he was under considerable obligations, and whom he believed to be perfectly solvent:—Held, affirming the decision of the Commissioner, that his conduct amounted to a contracting of debts without reasonable or probable ground of expectation of being able to pay the same within the 159th section of the Bankruptcy Act, 1861, and his order of discharge was absolutely refused. *Ex parte Barker, in re Barker*, 33 Law J. Rep. (N.S.) Bankr. 13.

The primary consideration of the Court of Bankruptcy should be for the benefit and satisfaction of the civil rights of the creditors, and not the satisfaction of any personal injury; and no moral consideration not belonging to the jurisdiction of the Judge ought to influence the nature or amount of a sentence passed by him on the bankrupt. *Ex parte Griffiths, in re Griffiths*, 33 Law J. Rep. (N.S.) Bankr. 44.

Though the bankrupt may have committed acts for which he is liable to imprisonment, under the 159th section of the Bankruptcy Act, 1861, yet if they are not acts for which the Court is in the habit of awarding imprisonment, no amount of moral misconduct not coming within that section can be called in aid to justify such a sentence. Ibid.

*Semble*—Where a debt originates in special circumstances, and is contracted with a view to a special emergency, and is not attributable to the ordinary expenditure and style of living of the bankrupt (as where the bankrupt has borrowed money for his defence to a suit in the Divorce Court), it ought not to be taken into account in estimating whether he has contracted debts without reasonable ground of expectation of being able to pay the same. Nor can damages recovered against the bankrupt in the Divorce Court be considered as a debt so contracted. Ibid.

### (c) *Fraud.*

A solicitor was co-trustee under a settlement of a sum of 3,000*l.* charged upon certain property. He borrowed a sum of 300*l.*, and, as security, deposited the title-deeds of the above-named property, without the knowledge of his co-trustee, and without informing the lender of the fact of the 3,000*l.* charge. The solicitor was adjudicated bankrupt, and one of the Commissioners refused him any certificate, on the ground that the above was fraud both on the *cestuis que trust* and on the lender of the 300*l.* On appeal, the Lords Justices, considering that wilful fraud could not necessarily be implied from the facts of the case, mitigated the sentence by the grant of a certificate of the second class, after a suspension of two years from the date of the adjudication, and said that their invariable rule was never to alter an order of a Commissioner refusing a certificate, where fraud was established. *In re Preston*, 31 Law J. Rep. (N.S.) Bankr. 1.

During a period of unquestionable solvency, but shortly before bankruptcy, a trader purchased goods for, as he alleged to the seller, home trade. The goods were very soon after consigned to a relative in America, and when sold were disposed of at very great loss. After his bankruptcy he applied for his discharge, but was opposed on the ground of having made misrepresentations, and that the consignment of the goods to America was a rash and hazardous speculation within the meaning of paragraph 3. of section 159. of the statute, 24 & 25 Vict. c. 134. The Court, affirming the view of one of the Commissioners, held that this paragraph of the 159th section was not applicable to the case, the bankrupt at the time of the venture being possessed of property beyond the amount of his liabilities, and the representations, though erroneous, not being fraudulent. *Ex parte Evans, in re Barnard and Rosenthal*, 31 Law J. Rep. (N.S.) Bankr. 63.

### (d) *Fraudulent Preference.*

One of the Commissioners had refused the bankrupt any certificate for, amongst other offences, a fraudulent preference; but the Lords Justices, on appeal, on hearing further evidence, were of opinion that there had not been a fraudulent preference, and, the assignees not opposing, granted a certificate of the second class. *In re Shotter*, 31 Law J. Rep. (N.S.) Bankr. 5.

A trader, when involved in difficulties and hopelessly insolvent, deposited the title-deeds of property, of which he was surviving trustee, with his brother, who was entitled to the same property for life, under the will of which the bankrupt was trustee as a security for a debt owing to the brother. The certificate was refused on the ground that this was a fraudulent preference, but protection was granted *valeat quantum*. *In re Barton*, 31 Law J. Rep. (N.S.) Bankr. 7.

### (e) *Misdemeanor.*

[See *ante*, (H)·(*b*).]

A bankrupt had been guilty of acts which amounted to a misdemeanor within the 221st section of the statute, 24 & 25 Vict. c. 134; and one of the Commissioners, under section 159. of the same act, granted him an order of discharge with a suspension of twelve months. On appeal, the Lords Justices considered that the Commissioner had jurisdiction to direct a prosecution before a Court of Criminal Justice, and that it was not incumbent on him, with or without a jury, to try the case himself; and they discharged the order, and directed a prosecution by the assignees at the next assizes. *Ex parte Dobson, in re Wilson*, 32 Law J. Rep. (N.S.) Bankr. 1.

Subsequently friends of the bankrupt subscribed money in order to provide a dividend, if the order made by the Court should be discharged. Their Lordships discharged their order, and permitted the money to be accepted by the assignees. Ibid.

Reasonable evidence of the guilt of parties is necessary before a prosecution by indictment, under the 221st section of the act, 24 & 25 Vict. c. 134, can be directed. It cannot be so on a case of mere suspicion. *Ex parte William and George Strickland, in re Still*, 32 Law J. Rep. (N.S.) Chanc. 12.

An order for the prosecution of a bankrupt may be made before the appointment of a creditors' assignee, and notwithstanding the bankrupt has not

been examined or had any opportunity of explanation afforded him; and it is a matter for the discretion of the Commissioner whether a previous inquiry or an examination of the bankrupt shall be directed. *Ex parte Levi, in re Levi*, 34 Law J. Rep. (N.S.) Bankr. 23.

An order for prosecution, reciting that there is reason for supposing that the bankrupt has been guilty of some one or more of the offences set forth in the 221st section of the Bankruptcy Act, 1861, is properly framed without specifying the particular offences with which the bankrupt is charged. Ibid.

(*f*) *Allowance to.*

The 109th section of the Bankruptcy Act, 1861, giving power to the creditors to determine whether any, or what, allowance shall be made to the bankrupt up to the time of passing his last examination, does not repeal the 194th section of the Bankrupt Law Consolidation Act, 1849, by which that power is given to the Court; but the power still remains in the Court, subject to the control of the creditors under the later act. *Ex parte Ellerton, in re Leech*, 33 Law J. Rep. (N.S.) Bankr. 32.

The time of "passing the last examination," up to which a bankrupt's allowance is to be paid under the 109th section of the Bankruptcy Act, 1861, is the time appointed under the 140th section for passing the last examination, and not the time when the last examination is actually passed. *Ex parte Osborn, in re Jowett*, 34 Law J. Rep. (N.S.) Bankr. 15.

(*g*) *Effect of.*

The 154th section of the Bankruptcy Act, 1861, discharges the bankrupt from liability to a surety in respect of payments of premiums on a policy of insurance becoming due subsequently to the date of the adjudication. *Saunders* v. *Best*, 17 Com. B. Rep. N.S. 731.

(M) PRACTICE.

One of the Commissioners pronounced an order, and one of the parties affected by it appealed within twenty-one days. Another party affected also appealed after the twenty-one days had expired, but before the first petition of appeal was heard:—Held, that the order of the Commissioner in these circumstances was not "final," and that the second petition of appeal was presented in time. *Ex parte M'Kenna, in re Streatfeild, Laurence & Co.; Ex parte the Bank of England, in re Same*, 30 Law J. Rep. (N.S.) Bankr. 24.

A prisoner who had been adjudicated bankrupt by a registrar was allowed, on appeal, to examine witnesses to prove that his arrest was illegal by reason that the debt was not of sufficient amount to justify arrest; but the Court being of opinion that he was legally in custody on an execution issued by a Court of competent jurisdiction, and which execution that Court had refused to set aside,—Held, that the appeal must be dismissed. *In re Hayward*, 31 Law J. Rep. (N.S.) Bankr. 33.

The date of an order is the day when it was made, and the time for appealing under the 12 & 13 Vict. c. 106. s. 12. runs from that day, and not from the day when the order was drawn up. *Ex parte the Dudley and West Bromwich Banking Co., in re Hopkins*, 32 Law J. Rep. (N.S.) Bankr. 68.

*Ex parte Heslop* (1 De Gex, M. & G. 477) not followed. Ibid.

The effect of the Bankruptcy Act, 1861, transferring the jurisdiction of the Insolvent Debtors' Court to the Court of Bankruptcy, is to give the same right of appeal in insolvency cases as is given by the 12th section of the Bankrupt Law Consolidation Act, 1849, in bankruptcy cases. *Ex parte Perkins, in re Perkins*, 34 Law J. Rep. (N.S.) Bankr. 37.

Motions by way of appeal under No. 32. of the General Orders pursuant to the act 24 & 25 Vict. c. 134, are to be placed in the paper in the same way as appeal petitions were formerly. *Ex parte Lewis, in re Hollier*, 31 Law J. Rep. (N.S.) Bankr. 11.

The 32nd General Order of 1861 having directed that all appeals to the Court of Appeal shall be brought on by motion, the 12th section of the Bankrupt Law Consolidation Act, 1849, requiring all appeals to be entered within twenty-one days from the date of the decision or order of the Court, is no longer applicable, and it is sufficient if the notice of motion is given within the twenty-one days. *Ex parte Bromley, in re Redfearn*, 34 Law J. Rep. (N.S.) Bankr. 33.

Notwithstanding the repeal of the 18th section of the Bankrupt Law Consolidation Act, 1849, by the 24 & 25 Vict. c. 134, the discretionary power of the Lords Justices as to appeals to the House of Lords remains. There is no right of appeal by common law to the House of Lords. *In re Newton*, 31 Law J. Rep. (N.S.) Bankr. 81, 82.

An order having been made in July, 1861, granting a bankrupt his discharge, with a condition as to his after-acquired property, the Lords Justices refused an application by the bankrupt for leave to appeal to the House of Lords, and determind to rehear the case themselves, directing that a new deposit of 20*l.* should be made. *Ex parte Drinkwater, in re Drinkwater*, 32 Law J. Rep. (N.S.) Bankr. 20.

After the case had been so re-heard, an order was made, varying the former order by suspending it for a certain time, giving the bankrupt protection in the mean time, and an unconditional discharge at its termination. Ibid.

Application to receive fresh evidence on appeal refused. *In re Potts*, 31 Law J. Rep. (N.S.) Bankr. 34.

The 32nd Order in Bankruptcy must be construed with reference to evidence on the matters in issue, and does not preclude the introduction of fresh evidence for the purpose of informing the Court of Appeal of what has taken place in the Court below. *Ex parte Page, in re Neal*, 32 Law J. Rep. (N.S.) Bankr. 14; 1 De Gex, J. & S. 283.

In the former case some ground must be shewn for the admission of the new evidence. Ibid.

It is not necessary that the notice of motion by way of appeal, upon the ground, among others, of rejection of evidence, should state that ground. Ibid.

The Court of Appeal has jurisdiction to allow fresh evidence in addition to that adduced before the Commissioner; and, when produced, will entertain the question, and not send it back to the Commissioner. *Ex parte Miller, in re Miller*, 32 Law J. Rep. (N.S.) Bankr. 45.

The time for appeal against an adjudication does not expire until two calendar months after the

advertisement of the bankruptcy, under the 233rd section of the Bankrupt Law Consolidation Act, 1849, varied by the 24th section of the 17 & 18 Vict. c. 119, notwithstanding that the former section uses the word "commenced" proceedings. Ibid.

A creditor who intended to oppose the discharge of a bankrupt was misinformed as to the case being not to come on before a particular Commissioner, and did not therefore attend. The bankrupt was discharged by another Commissioner, and on appeal the case was remitted back as being a surprise on the creditors and a proper subject for appeal under the 171st section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134). *Ex parte Johnstone, in re Newton*, 31 Law J. Rep. (N.S.) Bankr. 63.

A creditor who has not opposed a bankrupt's order of discharge before the Commissioner is not thereby precluded from appealing against it. *Ex parte Burgess, in re Monk and Brooks*, 33 Law J. Rep. (N.S.) Bankr. 51.

A creditor who has not proved his debt when an order of discharge is granted cannot appeal against the order. *Ex parte Greenwood, in re Monk and Brooks*, 33 Law J. Rep. (N.S.) Bankr. 50.

An order made by a Registrar sitting for the Commissioner under the 27th section of the Bankrupt Law Consolidation Act, 1849, must shew, on the face of it, the nature of the circumstances under which the Registrar was authorized so to sit. *Ex parte Morgan, in re Pennell*, 32 Law J. Rep. (N.S.) Bankr. 61.

One trader had been solely, and afterwards he and his partner had been jointly, adjudicated bankrupt: the Lord Chancellor, discharging an order made by the Registrar, gave leave to apply to the senior Commissioner as to the consolidation of the proceedings. *Ex parte Churchill, in re Griffiths, and in re Thorneycroft and Griffiths*, 32 Law J. Rep. (N.S.) Bankr. 48.

An official assignee who has no other duty than to assent will not be allowed his costs out of the estate. Ibid.

It is not necessary to the validity of a resolution to suspend proceedings in a bankruptcy passed by a meeting of creditors, under the 110th section of the Bankruptcy Act, 1861, that previous notice of the meeting should be advertised in the *Gazette*. *Ex parte Boldero, in re Rodenhurst*, 34 Law J. Rep. (N.S.) Bankr. 34.

Where by a resolution of the creditors the proceedings in bankruptcy have been suspended under the 110th section of the Bankruptcy Act, 1861, the bankrupt is not, on making a full discovery of his estate, entitled as of course to his order of discharge, but in granting such order the rules laid down by the 159th section must be observed. *Ex parte M'Kerrow, in re M'Kerrow*, 34 Law J. Rep. (N.S.) Bankr. 37.

By a Bankruptcy Act (1849) notice of disputing the requisites on bankruptcy must be given "within ten days after rejoinder." Rejoinders having been abolished in equity, the Court, eight weeks after replication, allowed ten days to the defendants to give the notice which they had previously neglected to do. *Lee* v. *Donnistoun*, 29 Beav. 465.

Trustees of a deed of assignment for benefit of creditors were allowed out of the estate the costs they had *bona fide* incurred, although the debtor was afterwards adjudicated bankrupt. *Ex parte Tomlinson, in re Boyce*, 30 Law J. Rep. (N.S.) Bankr. 41.

An action, by direction of a Commissioner, was brought with the assent of the creditors, to try a disputed point. The action failed, and some creditors objected to the allowance of the assignees' costs on the ground that the Commissioner had no jurisdiction to order the action to be brought, as not being an action within the meaning of the 153rd section of the Bankrupt Law Consolidation Act, 1849, but the Lords Justices ordered the costs to be paid out of the bankrupt's estate, on the ground that the objection ought to have been made earlier, that is, before the result of the action was known. *Ex parte Edmondson, in re Thomson*, 31 Law J. Rep. (N.S.) Bankr. 32.

## BARON AND FEME.

[See DIVORCE—DOWER—EXECUTOR AND ADMINISTRATOR — FINE AND RECOVERY — FREE BENCH—MARRIAGE—SETTLEMENT—SLANDER.]

(A) JOINT ESTATE OF AND CONTRACTS BETWEEN.
(B) HUSBAND.
  (*a*) *Rights and Liabilities in respect of Wife's Property.*
  (*b*) *Liability for Necessaries supplied to Wife.*
  (*c*) *Rights and Liabilities in respect of Wife's Acts.*
  (*d*) *Liability for Wife's Costs in Divorce Court.*
  (*e*) *Liability for Wife's Funeral.*
  (*f*) *Gift to Wife.*
(C) WIFE.
  (*a*) *Rights in respect of Husband's Property.*
  (*b*) *Property of.*
  (*c*) *Equity to a Settlement.*
(D) SEPARATE ESTATE OF WIFE.
  (*a*) *How acquired.*
  (*b*) *Power over and Disposition of.*
  (*c*) *Liability in respect of.*
(E) SEPARATION DEEDS.
(F) WIFE'S PROTECTED PROPERTY.
(G) ACTIONS AND SUITS: PLEADING AND EVIDENCE IN.
(H) OFFENCE OF DESERTION OF WIFE.

### (A) JOINT ESTATE OF AND CONTRACTS BETWEEN.

A testator, by his will, made before the act (20 & 21 Vict. c. 85.) establishing the Divorce Court, vested property in trustees, upon trust, out of the rents and profits, to pay an annuity to his son G and E, his (the son's) wife, jointly, and further, out of the rents and profits of "the property so left in trust for his son G," to pay to the wife, if she survived, 50*l.* annually, so long as she continued unmarried; but if G survived, to pay him 100*l.* annually. G was divorced from E on account of her adultery:—Held, that G was entitled to the whole annuity. *Knox* v. *Wells*, 34 Law J. Rep. (N.S.) Chanc. 150; 2 Hem. & M. 674.

Stock invested in joint names of husband and wife held to belong to the wife as survivor. *In re Gadbury*, 32 Law J. Rep. (N.S.) Chanc. 780.

It is against public policy to compromise a suit for a divorce; and the Court will not entertain a bill for specific performance of a contract founded on such compromise. *Gipps* v. *Hume*, 31 Law J. Rep. (N.S.) Chanc. 37; 2 Jo. & H. 517.

## (B) HUSBAND.

### (*a*) *Rights and Liabilities in respect of Wife's Property.*

A testator having bequeathed the dividends of a fund to his niece for life, remainder to her children, by a codicil reciting that her husband was dead, declared that in case she married again without the consent of the trustees, she should forfeit the legacy and take only 50*l.* a year. The niece, without the consent or knowledge of the trustees, married, received the dividends for some time, and died. On a bill by the trustees against the husband (who denied knowledge of the clause of forfeiture), the Court declared the husband subject to the liabilities that affected the wife. *Charlton* v. *Coombes*, 4 Giff. 382.

A lady, three months before her marriage, but after she was engaged to be married to her future husband, executed a voluntary settlement of a fund upon herself for life, and after her death upon such trusts as she should by deed or will appoint, and in default of appointment upon trust for such persons as under the Statutes of Distribution would be entitled thereto at her death, as if she had died possessed thereof intestate and without having been married. The settlement also empowered the trustees, notwithstanding the trusts aforesaid, to transfer the trust fund as the lady should, whether covert or sole, by request in writing, direct. The husband, prior to the marriage, was told by the lady that she had executed a document affecting the above fund, but he did not then make any inquiries as to the nature of such document. The lady died about two years and a half after the marriage, without having made any appointment or disposition of the fund; and the husband, shortly after her death, for the first time ascertained that the settlement was to the effect above stated. The husband thereupon filed a bill to have the fund transferred to him. It appeared that his wife, during her lifetime, had stated to him that she had been informed by her solicitor that he would be entitled to the fund if he survived her:—Held, that, as the information which the husband received as to the nature and effect of the settlement was incorrect, he was entitled to have it declared that it was invalid, and ought to be set aside. *Prideaux* v. *Lonsdale*, 32 Law J. Rep. (N.S.) Chanc. 317; 1 De Gex, J. & S. 433.

A law-stationer, who was an executor of the person who had bequeathed the above fund to the lady, advised and framed the settlement, and although he was not a party thereto, he was made a defendant to the suit:—Held, that, as his conduct had been mainly the occasion of the litigation, the husband was entitled to a decree against him, together with the other defendants, with costs. Ibid.

### (*b*) *Liability for Necessaries supplied to Wife.*

In an action against a husband for necessaries supplied to a wife while living apart, the plaintiff's case being, that the wife had originally left the defendant with his consent, had been since, by his instrumentality, wrongfully temporarily confined in a lunatic asylum, and after her discharge, had for a time received from him a weekly allowance wholly inadequate for her support, and had been compelled to accept this inadequate allowance in preference to returning to live with him, in consequence of his threat that if she did return, he would send her to a lunatic asylum,—Held, that the form of question to be left to the jury was—"Was the wife justified in leaving her husband, without his consent, by his conduct? If not so justified—Did he agree she might pledge his credit?" *Biffin* v. *Bignell*, 31 Law J. Rep. (N.S.) Exch. 189; 7 Hurls. & N. 877.

Held also, that the nature of the threat which would justify her in refusing to return to her husband, ought to have been explained to the jury. *Johnston* v. *Sumner* discussed. Ibid.

A husband and wife were living together; she had a separate income of her own, over which the husband exercised no control; the husband also agreed to make her a certain allowance for her expenditure on herself and their children, with an express stipulation that she should contract no debts whatever. The husband did not pay the stipulated allowance in full, and what he did pay was not sufficient to supply to his wife and children such articles as the jury thought were suitable to their estate and degree:—Held (per *Erle, C.J.*, *Williams, J.* and *Willes, J.*), that the husband was not liable for goods supplied to the wife on credit, although such goods were suitable to the estate and degree of herself and the children, for that having power to draw inferences of fact, they did not infer that the husband had held out that the wife had authority to bind him to that extent. Held (per *Byles, J.*), that the husband was liable; for that the wife had an apparent authority to pledge her husband's credit, and the plaintiff had no notice, under the circumstances, that such authority was revoked. *Jolly* v. *Rees*, 33 Law J. Rep. (N.S.) C.P. 177; 15 Com. B. Rep. N.S. 628.

Where a husband by his cruelty compels his wife to live apart from him, he is liable upon contracts made by her for necessaries, notwithstanding she in fact receives from him an allowance, if the jury find the allowance insufficient, regard being had to his means and position in life. *Baker* v. *Sampson*, 14 Com. B. Rep. N.S. 383.

Where a debtor has advanced moneys for necessaries supplied to the deserted wife of the creditor, he is entitled in equity to set off such moneys against the creditor's legal demand. *Jenner* v. *Morris*, 30 Law J. Rep. (N.S.) Chanc. 361; 3 De Gex, F. & J. 45.

A wife, after divorce, is entitled for her sole benefit to such of her property and effects as were not reduced into possession by her husband during coverture. *Wells* v. *Malbon*, 31 Law J. Rep. (N.S.) Chanc. 344; 31 Beav. 48.

T W having become lunatic, was taken to an asylum in London. His wife, who at the time of her marriage was entitled to separate property, removed to London in order to be near her husband, and borrowed money on his credit to meet the expense of such removal of herself and husband, and to provide herself with necessaries. T W died, and a bill was filed for the administration of his estate. The persons who had made the advances to the wife carried in their claim for the amount against T W's

estate:—Held, by one of the Vice Chancellors and affirmed on appeal, that the claim must be allowed. *Davidson* v. *Wood*, 32 Law J. Rep. (N.S.) Chanc. 400; 1 De Gex, J. & S. 465.

*Semble*—That a woman possessed of separate estate is entitled to maintenance by her husband, although he be lunatic, and is not bound to pledge her separate estate in order to provide herself with necessaries. Ibid.

The costs of a solicitor employed by a married woman to institute proceedings on her behalf against her husband to obtain a decree of judicial separation, are not necessaries for which the husband is liable, unless there was at least great probability of ultimate success; and to entitle a solicitor so employed to recover the costs from the husband, or to prove for them against the husband's estate, he must, in the absence of actual success, be at least able to shew that he made proper investigation and inquiry into all the circumstances of the case before he commenced the proceedings. *In re Hooper, Baylis* v. *Watkins*, 33 Law J. Rep. (N.S.) Chanc. 300; 2 De Gex, J. & S. 91.

Whether previous inquiry and the existence of reasonable grounds for instituting such a suit would entitle the solicitor to recover from the husband if, in the result, the wife failed—*quære*. Ibid.

### (c) *Rights and Liabilities in respect of Wife's Acts.*

A contract entered into and paid for by a wife, without the knowledge, but for the benefit of the husband, is valid and binding when ratified by the husband. *Millard* v. *Harvey*, 34 Beav. 237.

A wife, unknown to her husband, requested her father to sell her husband a field to be paid for out of her savings. The father at first refused, but he received the money, and shortly afterwards put the husband into possession. For ten years the money was retained by the father without payment of interest, and the field by the husband without payment of rent. The father then attempted to eject the husband, who being made acquainted with the circumstances, insisted on retaining the field:—Held, that the father was bound to convey it to the husband. Ibid.

During coverture probate was granted to a feme executrix. The husband died insolvent, leaving the wife surviving, who died leaving assets:—Held, that the wife's assets were not liable to make good the joint receipts of herself and her husband during the coverture. *Soady* v. *Turnbull*, 34 Law J. Rep. (N.S.) Chanc. 539.

*Semble*—Where probate is granted to a feme covert during marriage the husband and his estate are alone liable in equity for *devastavits* committed by him, or by him and his wife, during the coverture. Ibid.

### (d) *Liability for Wife's Costs in Divorce Court.*

The husband is liable to an action, at the suit of his wife's solicitor, for costs necessarily incurred by her in filing a petition in the Divorce Court for a judicial separation on the ground of cruelty and adultery, although the petition is not proceeded with, and the course prescribed by the practice of the Divorce Court for obtaining the wife's costs has not been pursued. *Rice* v. *Shepherd*, 12 Com. B. Rep. N.S. 332.

### (e) *Liability for Wife's Funeral.*

Where the wife dies when living apart from her husband, and is buried by the person in whose house she dies in a manner suitable only to her rank, the husband is liable to repay the funeral expenses, although he has never been asked to bury his wife; if he has not been prevented from discharging that duty by any fraud or misconduct of the person who is at the expense of such funeral. *Bradshaw* v. *Beard*, 31 Law J. Rep. (N.S.) C.P. 273; 12 Com. B. Rep. N.S. 344.

### (f) *Gift to Wife.*

A wife with the knowledge and approval of her husband, invested money belonging to the latter in the purchase of Government stock in their joint names. Subsequently, under the authority of a power of attorney given to her by the husband, she sold a portion of the stock and kept the money in her custody, and it so remained at the husband's death:—Held, that the stock remaining in the joint names of the husband and wife survived to her, but there being no evidence of an intention on the part of the husband to make an absolute gift to the wife, that the proceeds of sale of the stock formed part of the husband's general assets. *In re Gadbury*, 32 Law J. Rep. (N.S.) Chanc. 780.

In order to constitute a gift by a husband to his wife, the husband must use words which clearly indicate that he has divested himself of all beneficial interest in the subject-matter of the gift. Such words need not be technical, and may be spoken either at the time of the gift or afterwards. *Grant* v. *Grant*, 34 Law J. Rep. (N.S.) Chanc. 641; 34 Beav. 623.

A husband may constitute himself a trustee for his wife; the declaration need not be in writing, but the words must be clear, unequivocal and irrevocable. Ibid.

The Court will not act upon the unsupported testimony of a claimant upon the estate of a deceased person. Ibid.

## (C) WIFE.

### (a) *Rights in respect of Husband's Property.*

A woman who under the old practice had been divorced *a mensa et thoro* on the ground of adultery, and had not since been reconciled to her husband,—Held, upon his dying intestate, to be entitled, as his widow, to a share of his personal estate, under the Statutes of Distribution. *Rolfe* v. *Perry*, 32 Law J. Rep. (N.S.) Chanc. 149.

### (b) *Property of.*

Where a marriage settlement was valid when executed the wife does not, by adultery, lose any benefit which it conferred upon her; and the Court of Chancery has no power to set aside the settlement, although the marriage has been dissolved by the Divorce Court. *Evans* v. *Carrington*, 30 Law J. Rep. (N.S.) Chanc. 364; 2 De Gex, F. & J. 489; 1 Jo. & H. 598.

Where there was a fund in court, to which a married woman was entitled absolutely under a will, the Court directed that she should attend and give her consent, and sign a separate receipt for the money; her husband appearing by counsel and con-

senting to the payment. *Mawe* v. *Heaviside*, 30 Law J. Rep. (N.S.) Chanc. 937.

A husband and wife having a joint power of appointment over an estate the ultimate limitations of which in default of appointment were to the use of the husband and wife in moieties in fee, executed the power by way of mortgage to secure the husband's debt:—Held, that this was no mortgage of the wife's estate, and, consequently, that she was not entitled to have her moiety exonerated out of the estate of the husband. *Scholefield* v. *Lockwood*, 33 Law J. Rep. (N.S.) Chanc. 106; 32 Beav. 434.

T D, being entitled to three estates, the first unincumbered, the second mortgaged for 1,400*l.*, and the third for 3,000*l.*, settled them to the use of himself for life, remainder to such uses as he and his wife should jointly appoint, with an ulterior limitation as to one moiety to himself in fee, and as to the other moiety as his wife should appoint. Subsequently, T D and his wife appointed the first and second estates to A B, by way of mortgage to secure 1,000*l.* borrowed by T D. Subsequently A B entered into possession of the first and second estates, kept down the interest, and paid off part of the principal moneys out of the rents. T D and his wife died, and upon A B selling under a power of sale contained in his mortgage deed, there remained a net surplus in his hands after satisfying the 1,400*l.* and his own debt:—Held, first, that as between a judgment creditor of T D and the appointees of T D's wife, the principal debt of 1,400*l.* must be borne equally by the respective moieties of the husband and wife of the proceeds of sale, so as to restore to the husband's estate the rents and profits applied by A B in satisfaction of principal moneys; and, secondly, that a counter equity existed on the part of the appointees of the wife to have the surplus rents and profits applied in discharging the interest upon the 3,000*l.*; and in case of loss to the appointees of the wife through the neglect of the tenant for life to keep down the interest, they would have a right of set-off to the extent of this loss against the judgment creditor, and an inquiry was directed to ascertain the value at the death of the tenant for life of the estate comprised in the 3,000*l.* mortgage. Ibid.

A, with the concurrence of B, his wife, who was entitled to certain stock for her separate use during the joint lives of herself and A, applied to an insurance office for a loan of 700*l.*, of which 302*l.* was needed to pay off a previous mortgage on the wife's separate interest, and the residue for the husband's necessities. A policy was thereupon, with a view to the loan, effected in the same office, insuring the payment of 800*l.*, on the death either of A or of B, to the survivor; and, by an indenture of the same date, the policy was assigned by A, and the dividends of B's separate estate both by A and B, to trustees for the office, to secure the loan. B also joined A, "so far as she could bind her separate estate," in covenanting, with the trustees, for title, and for payment of premiums. A having died, B as survivor, claimed the policy moneys as a reversionary interest to which she was entitled at the date of the mortgage, and neither assignable nor assigned thereby; and the Master of the Rolls decided in favour of her claim: but, on appeal,—Held, by the Lords Justices, reversing the decision of the Master of the Rolls, that the loan, policy, and indenture of mortgage together constituted one transaction; that B's interest under the policy was, from the first, subject to a paramount charge in favour of the lenders, and that, consequently, it was unnecessary to decide whether B could have assigned, or had in fact assigned, her interest in the policy. *Winter* v. *Easum*, 33 Law J. Rep. (N.S.) Chanc. 665; 2 De Gex, J. & S. 272.

Whether B's interest in the policy was assignable as being in the nature of an accretion to her separate estate—*quære*. Ibid.

Agreement, in contemplation of marriage, to settle a money fund of the wife's for her separate use, to revert to the husband if he should survive:—Held, that the wife's reversionary interest in the fund was taken under the agreement and not as a resulting use, and that she could not dispose of the fund under the powers of the statute. *Clarke* v. *Green*, 2 Hem. & M. 474.

Where an estate L had been contracted to be purchased by a woman who married leaving part of the purchase-money unsatisfied, which was paid by her husband who took the conveyance to himself and devised the estate,—Held, that the estate was the property of the wife subject to a charge in favour of her husband for the amount of purchase-money contributed by him. *Maddison* v. *Chapman*, 1 Jo. & H. 470.

The husband having devised all his lands, houses, tenements, real and personal property at L and elsewhere, and died, leaving no real property to L other than the charge aforesaid and having given benefits by his will to his widow,—Held, that he had a sufficient interest to satisfy the words of the will without attributing an intention to devise his wife's property, and that the widow was not put to her election. Ibid.

A deed relating to a reversionary interest in a fund was executed by some married women and their husbands. One having survived her husband, who died before the fund fell into possession,—Held, that the deed was not binding on her, and that therefore it was not binding on any of the other parties to it. *Bolitho* v. *Hillyar*, 34 Beav. 180.

A married woman under a general power of appointment exercisable during coverture, by deed of appointment executed after marriage, appointed the property to trustees in trust during the joint lives of herself and her husband for her sole and separate use, and, if she should survive her husband, on trust for herself absolutely, but in case she predeceased him, as she should appoint, and, in default of her appointment, to her next-of-kin. There were no children, and the marriage having been dissolved by a final decree of dissolution on account of the husband's misconduct,—Held, that the wife was absolutely entitled. *Jessop* v. *Blake*, 3 Giff. 639.

Money of a wife was, by the direction of her husband, paid to the trustees of a post-nuptial settlement, which was not binding on the wife:—Held, that her right by survivorship was destroyed, the property having by these means been reduced into possession. *Hamilton* v. *Mills*, 29 Beav. 193.

A husband deserted his wife two days after their marriage. She became entitled to an annuity of 100*l.* a year; but as the trustee refused to pay it without the receipt of her husband, she was left without means of support, and was wholly maintained by her sister. After a decree for judicial separation,

upon the petition of the wife and sister,—Held, upon the request of the wife, that the accumulations of the annuity must be paid to the sister, and that nothing should be paid to the husband. *In re Ford*, 33 Law J. Rep. (N.S.) Chanc. 180; 32 Beav. 621.

In a foreclosure suit against a husband and wife, the agreement for the mortgage having been entered into by the wife when a feme sole, and part of the moneys paid to her, but the mortgage executed by both husband and wife, the Court made a decree against both. *Lewis* v. *Poole*, 3 Giff. 636.

On a Tuesday, an intended husband, who was an infant, wrote to the trustee of the intended wife, "that he especially wished his wife's property entirely settled on herself," and that the wedding was to take place on the Saturday. They married, unknown to the trustee, on the Wednesday, without any settlement:—Held, that this letter contained no settlement or agreement for a settlement binding on the husband or wife. *Beaumont* v. *Carter; Carter* v. *Beaumont*, 32 Beav. 586.

(c) *Equity to a Settlement.*

A testator devised his real estate to his son, subject to an annuity of 50*l.* to his wife for life, and to the payment of a sum of 1,000*l.* to his daughter A E at the end of six months after his wife's death; and the testator declared that if default should be made in payment of the said sum of 1,000*l.*, it should be lawful for A E to enter upon the lands, and by receipt of the rents, or by demise, sale or mortgage of the same, or any part thereof, or by any other ways and means to raise the said sum of 1,000*l.*, &c. The wife died in 1853. The husband of A E assigned to the F society the 1,000*l.*, and afterwards took the benefit of the Insolvent Act. A E filed a bill against the owner of the lands and the F society to have the legacy raised by sale or mortgage, and her right to a settlement thereout declared, and to restrain the F society from proceeding against the owner of the land upon his paying the 1,000*l.* into court, &c. The F society demurred to the bill, on the ground of the right to the 1,000*l.* being a legal chattel interest in the husband in right of his wife, and assignable by him, and therefore not the subject of equitable jurisdiction, or one upon which the wife's right to a settlement could attach; but the demurrer was overruled by the Master of the Rolls, and afterwards upon appeal. *Duncombe* v. *Greenacre*, 30 Law J. Rep. (N.S.) Chanc. 413.

Where a husband was an uncertificated bankrupt, and had become entitled in right of his wife to a sum of about 13,000*l.*, the Court, having regard to the circumstances of the case, directed the whole amount to be settled, as against the assignees in bankruptcy, on the wife and children, there being no other provision for them except a sum of 150*l.*, to which the wife was entitled under her father's and mother's marriage settlement. *Smith* v. *Smith*, 30 Law J. Rep. (N.S.) Chanc. 637; 3 Giff. 121.

A reversionary interest of a wife in a legacy of 1,000*l.* was, upon becoming payable, settled upon herself and children, though it had been mortgaged by her husband for value. *Duncombe* v. *Greenacre*, 30 Law J. Rep. (N.S.) Chanc. 882; 29 Beav. 578.

A married woman became entitled to a legacy of 200*l.* and applied for a settlement. The Court, in consideration of the husband having already spent some portion of the wife's property, and now living apart from her, and being unable to support her and her children, directed that the whole amount should be settled on the wife and her children. *In re Merriman's Trust*, 31 Law J. Rep. (N.S.) Chanc. 367.

A husband assigned his interest in his wife's property for value, and afterwards took the benefit of the Insolvent Act:—Held, that the wife was entitled to a settlement of the whole corpus, but not to the arrears of income. *Newman* v. *Wilson*, 31 Beav. 34.

A married woman, being equitable tenant in tail in remainder of an undivided share in lands to be purchased with a sum of trust money, she and her husband joined in mortgaging her interest. The fund was misappropriated. Proceedings having been taken for its recovery, the husband and wife succeeded in obtaining the restoration of her share of the fund which was brought into court, with arrears of interest since the time when her estate came into possession. The mortgagee did not concur in any steps to recover this share. The husband, when the mortgage was made, was maintaining his wife, but had become a bankrupt before her interest came into possession, and was uncertificated:—Held, that the wife had no equity to a settlement out of the capital, nor, as against the mortgagee, out of the future income of the fund. But held that the mortgagee had no claim to the arrears of income of the mortgaged property, which he had taken no steps to recover; and that the assignees of the husband could only take, subject to the wife's equity to a settlement, and that the whole arrears ought to be settled. *The Life Association of Scotland* v. *Siddal*, 3 De Gex, F. & J. 271.

The mere filing of a bill by a married woman to enforce her equity to a settlement is not sufficient to confer upon her children a right to a settlement in the event of her death. *Wallace* v. *Auldjo*, 32 Law J. Rep. (N.S.) Chanc. 748; 1 De Gex, J. & S. 643; 2 Dr. & S. 216.

A married woman filed a bill to enforce, for the benefit of herself and children, her equity to a settlement out of property to which she was equitably entitled; but she died before decree. The children filed a bill after her decease claiming a settlement:—Held, by the Lords Justices, affirming a decree of one of the Vice Chancellors, that all benefit of the wife's suit was lost by her death; that the rights of the husband were the same as if she had never instituted it; and that the bill in the suit of the children must be dismissed with costs (overruling *Steinmetz* v. *Halthin*, 1 Gl. & J. 64). Ibid.

Where a husband is unable to maintain his wife, and the fund is small, the Court will order the whole to be settled; but in a case where the husband was in good circumstances, the Court directed one-half the fund to be settled on the wife. *In re Grove's Trusts*, 3 Giff. 575.

Where a married woman, who, prior to her marriage, was entitled under a will to a debt payable after the death of her sister, secured on land by the deposit of title-deeds, by deed acknowledged, joined her husband in assigning her share and interest in the said debt and the said real security, in order to secure moneys due by her husband,—Held, in a suit to administer the testator's estate, that she was not entitled to a settlement out of the proceeds of the real estate. *Williams* v. *Cooke*, 4 Giff. 343.

A married woman has no equity to a settlement

out of her fee-simple estates, as against the mortgagee of her husband's life interest therein. *Durham* v. *Crackles*, 32 Law J. Rep. (N.S.) Chanc. 111.

Distinction between property of the wife which the husband takes absolutely and that in which he only takes a life interest. Ibid.

*Semble*—A married woman is not entitled to a settlement out of her fee-simple estates—*Sturgis* v. *Champneys* (5 Myl. & Cr. 97; 9 Law J. Rep. (N.S.) Chanc. 10) disapproved of. *Gleaves* v. *Paine*, 32 Law J. Rep. (N.S.) Chanc. 182; 1 De Gex, J. & S. 87.

A wife, suing *in forma pauperis*, without a next friend, held to be entitled as against the assignees in insolvency of her husband to a settlement for her separate use for life of the rents of real property, the legal estate in which was vested in trustees for her benefit for life. *Barnes* v. *Robinson*, 32 Law J. Rep. (N.S.) Chanc. 143.

A trustee is always justified in refusing to pay over the wife's fund to the husband, even at her request, and insisting on affording her an opportunity of asserting her equity to a settlement. And where a trustee has paid into court a fund to which a married woman is absolutely entitled, he is entitled as of course to his costs as between solicitor and client, unless his conduct has been simply capricious or vexatious. *In re Swan*, 2 Hem. & M. 34.

## (D) SEPARATE ESTATE OF WIFE.

### (*a*) *How acquired.*

A gift to the testator's widow "for her sole use and benefit" does not give her a separate estate, so as to entitle her on marrying again to sue by her next friend. *Gilbert* v. *Lewis*, 32 Law J. Rep. (N.S.) Chanc. 347; 1 De Gex, J. & S. 38.

A trust only for a married woman, her executors, administrators and assigns, is not a trust for her separate use. *Spirett* v. *Willows*, 34 Law J. Rep. (N.S.) Chanc. 365.

By a marriage settlement, 2,000*l.*, part of a mortgage debt of 4,000*l.* due to the wife, was settled upon trust for her for her separate use, and the residue was left unsettled. The husband having become bankrupt, an inquiry was directed whether, having regard to the marriage settlement and to the present circumstances of the husband, any and what additional settlement ought to be made out of the unsettled portion of the property on the wife and children of the marriage. Ibid.

### (*b*) *Power over and Disposition of.*

A married woman is entitled to dispose of her separate property when living apart from her husband by sentence of judicial separation without alimony. *In re Andrews*, 19 Com. B. Rep. N.S. 371.

Stock was settled to the separate use of a married woman for life and after her decease as she should appoint by will, and in default of appointment for her next-of-kin. The married woman died in her husband's lifetime, having exercised her power, and a suit being instituted in chambers to administer her estate, her separate creditors took out a summons, and sought to prove under the decree:—Held, that the married woman did not by exercising her power of appointment constitute the property appointed separate estate. *Blachford* v. *Woolley*, 32 Law J. Rep. (N.S.) Chanc. 534; 2 Dr. & S. 204.

If freeholds of inheritance be vested in trustees upon trust for a married woman for her separate use, she does not thereby acquire any additional power of disposing of the equitable fee, and cannot do so otherwise than by a deed duly acknowledged under the 3 & 4 Will. 4. c. 74. *Lechmere* v. *Brotheridge*, 32 Law J. Rep. (N.S.) Chanc. 577; 32 Beav. 353.

*Secus*—as respects an estate in lands limited for the separate use of a married woman during her life: this she may alienate, in equity, by deed unacknowledged. Ibid.

*Adams* v. *Gamble* (12 Irish Chanc. Rep. 102) dissented from. Ibid.

A married woman having property settled to her separate use, and not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos* (not acknowledged under the Fines and Recoveries Act), or by will. And there is no distinction in this respect between an equitable fee and other property. *Taylor* v. *Meads*, 34 Law J. Rep. (N.S.) Chanc. 203.

A testator, by his will, bequeathed his residuary estate to trustees, upon trust to pay the income "when and as the same should be due and received," to S C (a married lady), for her separate use, without power of anticipation. The residue comprised a bond on which interest was payable yearly on the 31st of October. On the 23rd of May, 1860, S C assigned to A B all interest and moneys comprised in the bequest which had "accrued and become payable." On an appeal from a decision of the Master of the Rolls,—Held, by the Lords Justices, differing from his Honour, that the interest on the bond debt between the 31st of October, 1859, and the 23rd of May, 1860, did not pass by the assignment; as well because the interest was not at the date of assignment "due and received" within the meaning of the clause restraining anticipation, as also because it had not "accrued and become payable" within the meaning of the deed of assignment. *In re Brettle; Jollands* v. *Burdett*, 33 Law J. Rep. (N.S.) Chanc. 471; 2 De Gex. J. & S. 79.

A married woman S was entitled to a gross sum, payable on the death of her father, for her separate use, subject to a restraint on anticipation. During her father's life she promised, by letters, to repay to D out of the fund, when it fell in, advances made by him to her and her husband. After the death of her father the fund was paid into court, and S still being under coverture, verbally promised D that he should be paid out of the fund if he would offer no opposition to her application for payment out of court; and it was accordingly paid to her:—Held, that D had no charge on the fund, the letters being ineffectual by reason of the restraint on anticipation, and the subsequent parol promise being void for want of consideration and under the Statute of Frauds. *In re Sykes's Trust*, 2 Jo. & H. 415.

Upon the evidence that a married woman, desiring to execute a voluntary settlement, transferred stock, to which she was entitled for her separate use, into the names of trustees, and approved of a draft declaration of trust,—Held, that there was a *locus pœnitentiæ*, and that the trusts did not attach unless the draft had been finally authorized before the transfer to the trustees; and an inquiry to that effect being answered in the negative, the fund was ordered,

on the petition of a married woman, to be retransferred for her separate use. Ibid.

Where personal property was bequeathed to a woman upon trust, for her separate use, but without the intervention of any trustee, and she afterwards, being *discoverte* and *sui juris*, sold the stock, spent a portion of the proceeds and invested the rest in shares of a joint-stock bank and Canada Bonds,—Held, that by so doing she had determined the trust for her separate use. *Wright* v. *Wright*, 2 Jo. & H. 647.

A married woman, to whom alimony has been granted by the Ecclesiastical Court, may dispose by will, as against her husband, of her savings thereout, in the same manner as if she was a feme sole. *Moore* v. *Barber*, 34 Law J. Rep. (N.S.) Chanc. 667.

(c) *Liability in respect of.*

The Court will not order the discharge of a married woman arrested on a *ca. sa.*, if it appears that she has property settled to her separate and inalienable use. After the refusal of the Court to discharge a married woman under the above circumstances, her husband obtained his discharge under the Bankruptcy Act, 1861. On a second application, on that ground, for the discharge of the wife, the Court refused to order the discharge on a rule, but gave the applicant leave to bring a writ of *audita querela*. *Ex parte Butler, in re Jay* v. *Amphlett*, 32 Law J. Rep. (N.S.) Exch. 176; 1 Hurls. & C. 637.

A married woman, who had property settled upon her in the usual way to her separate use, in 1837 made a joint promissory note with her husband for 950*l.*, and delivered the same to his bankers as a security for his overdrawn account; from time to time the note was renewed until the death of the husband, in 1855, the last renewal bearing date 1848. At the time of his death the debt due by the husband to the bankers was 2,340*l.* 16*s.* 4*d.*, which was reduced by the realization of certain other securities they held to 917*l.* 11*s.*, for which sum, on the 28th of August, 1856, she, after her coverture had determined, made and delivered her promissory note:—Held, that there was a good consideration for the last-mentioned note, as the note made in 1848, although made during coverture, was binding on her separate estate in equity, and that it was immaterial whether it was barred by the Statute of Limitations or not. *Latouche* v. *Latouche*, 34 Law J. Rep. (N.S.) Exch. 85; 3 Hurls. & C. 576.

J G, a married woman living apart from her husband, carried on business on her own account between the years 1849 and 1855. Messrs. B & W, upholsterers, who were aware of her being married and separated from her husband, supplied her with goods and furniture used in her business during those years, for which she paid out of the money produced by that business. In 1856 T G, the husband, executed a deed of separation made by himself, J G, his wife, and W S C, a trustee for her, by which deed T G assigned to W S C all the moneys, securities for money, household chattels, stock-in-trade and personal estate which J G had acquired or then possessed, or which might be then due to her in respect of her business, and all the estate and interest of him, the said T G, therein, to be held in trust for such persons and purposes as she should, notwithstanding coverture, appoint, and, in default, in trust for her for her separate use T G covenanted that it should be lawful for J G to live apart from him; that she might carry on any business; and that any real or personal estate she might acquire might be held and disposed of by her as she pleased. W S C covenanted to indemnify T G against all debts of J G while living apart from him. B & W, in 1856, after the date of this deed, continued to supply her with goods to the amount of above 600*l.*, for which she from time to time paid money on account; and finally, in January, 1858, a balance of above 372*l.* was due. T G died in October in the last-mentioned year; and Messrs. B & W having become bankrupt, their assignees filed a bill in the Chancery Court of the County Palatine of Lancaster against J G and W S C for the purpose of enforcing their claim against the property which, during the coverture of J G, constituted her separate estate. After the institution of this suit, J G executed a bill of sale to W S C of the whole of her separate estate for securing money due to him and further advances. The bill in the suit was then amended; and, as amended, prayed a declaration of the priority of the plaintiffs' claim over the bill of sale. The Vice Chancellor of that Court made a decree declaring that the separate estate of J G at the time of her husband's death, and J G personally to the value of that estate at that time, were liable to the plaintiffs; and that W S C took no higher interest in the separate estate than J G had therein at the date of the bill of sale:—Held, on appeal, overruling that decision,—the *Lord Justice Knight Bruce* considering that as the goods had not been obtained by fraud, but without the knowledge, on the part of B & W, of the position of J G, the circumstances of the case were insufficient to charge either herself personally, or her separate estate (the *Lord Justice Turner*, however, differing as to the ground of decision),—that the decree could not be supported; and that the bill must be dismissed, but without costs. *Johnson* v. *Gallagher*, 30 Law J. Rep. (N.S.) Chanc. 298; 3 De Gex, F. & J. 495.

General review, per the *Lord Justice Turner*, of the law relating to the rights and remedies of creditors of married women against their separate estates. Ibid.

(E) SEPARATION DEEDS.

A deed of separation between husband and wife contained a covenant by the trustees of the wife that she would not molest or disturb her husband:—Held, that a suit in the Divorce Court for a judicial separation was no breach of the covenant. *Thomas* v. *Everard*, 30 Law J. Rep. N.S.) Exch. 214; 6 Hurls. & N. 448.

By a deed, executed before the Divorce Act (20 & 21 Vict. c. 85), on the separation of the defendant from Ann his then wife, on the ground of the wife's adultery, which was recited in the deed, the defendant covenanted with the plaintiff that he, the defendant, his executors or administrators, or some or one of them, would, during the natural life of the said Ann, pay her a certain annuity; and in consideration thereof the plaintiff covenanted with the defendant that the said Ann should not sue for alimony, and also that the plaintiff would indemnify the defendant from all

debts which might be contracted by the said Ann. After the passing of the Divorce Act, the marriage between the defendant and the said Ann was dissolved by a decree of the Divorce Court by reason only of the adultery recited in the deed:—Held, that such dissolution of the marriage was no defence even on equitable grounds, to an action against the defendant for breach of his covenant to pay the annuity. *Goslin* v. *Clark*, 31 Law J. Rep. (N.S.) C.P. 330; 12 Com. B. Rep. N.S. 681.

To an action on a covenant by the husband, contained in a deed of separation, to pay the plaintiff, his wife's trustee, a yearly sum for her maintenance, it is no defence at law or in equity that the deed contains a coveoant of licence to the wife to live as if she was sole and unmarried, in such way as she might think fit, free from all restraint in her way of living; nor, if the deed has been acted upon, is it any defence to such an action, that at the instance of the plaintiff the wife concealed from the husband the fact of her pregnancy, in order that he might be induced by such ignorance to execute the deed, and that he was induced by such ignorance to execute it. *Kendall* v. *Webster*, 31 Law J. Rep. (N.S.) Exch. 492; 1 Hurls. & C. 440.

A husband, in a separation deed, covenanted with his wife's trustees, who indemnified him against her debts, that he would not compel or endeavour to compel her to cohabit or live with him by any legal proceedings, or otherwise howsoever:—Held, by the Master of the Rolls, upon a bill filed by the wife and her trustees, that she was not entitled to an injunction to restrain the husband from proceeding in a suit he had commenced in the Divorce and Matrimonial Court to obtain a restitution of conjugal rights, &c.; but this decision was reversed, upon appeal, and the injunction was granted. *Hunt* v. *Hunt*, 31 Law J. Rep. (N.S.) Chanc. 161.

A husband who, by his misconduct, had proved himself unfit to have the custody of his children, executed a separation deed, by which he covenanted that his wife should live separate, and that his children should at all times be under her sole care and management, and that he would pay her certain annuities for her own maintenance and that of the children:—Held, by the *Lord Justice Turner*, that, under the circumstances, the covenant excluding the paternal right was not void as opposed to public policy, and by the *Lord Justice Knight Bruce*, that it did not vitiate the rest of the deed; and accordingly a decree made by the Master of the Rolls, at the suit of the wife, for payment of the annuities, and restraining the husband from removing or interfering with the children, was affirmed, on appeal, with a variation, however, making the injunction operate until further order only. *Swift* v. *Swift*, 34 Law J. Rep. (N.S.) Chanc. 394; 34 Beav. 266.

### (F) Wife's protected Property.

Under the 20 & 21 Vict. c. 85. s. 21. no police magistrate or Justices, other than those by whom the order was made, can discharge an order of protection given to a married woman. *Ex parte Sharpe*, 33 Law J. Rep. (N.S.) M.C. 152.

*Quære*—Whether the Court for Matrimonial Causes has not power in all cases to discharge such an order. Ibid.

The protection of an order granted to a wife under the 21st section of 20 & 21 Vict. c. 85. is confined to the lawful earnings of lawful industry, and does not extend to earnings (or property purchased with earnings) acquired by her as keeper of a brothel. *Mason* v. *Mitchell*, 34 Law J. Rep. (N.S.) Exch. 68; 3 Hurls. & C. 528.

Under statute 20 & 21 Vict. c. 85. s. 21, the application to discharge an order for the protection of a wife's property must be made to the magistrate by whom it was granted; or, *semble*, to the Court for Divorce and Matrimonial Causes. *R.* v. *Arnold*, 5 Best & S. 322.

### (G) Actions and Suits: Pleading and Evidence in.

The provision of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 40, that in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as a co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, is not imperative, and therefore does not affect the husband's legal right to maintain a separate action for such claims. *Brockbank* v. *the Whitehaven Junction Rail. Co.*, 31 Law J. Rep. (N.S.) Exch. 349; 7 Hurls. & N. 834.

A married woman seeking to set aside an appointment made by herself under a power should sue by her next friend, and not be joined as co-plaintiff with her husband. *Hope* v. *Fox*, 30 Law J. Rep. (N.S.) Chanc. 272; 1 Jo. & H. 456.

### (H) Offence of Desertion of Wife.

To constitute the offence of desertion, under 5 Geo. 4. c. 83. s. 4, there must be a chargeability of the wife or children consequent on the running away, and the offence is not completed until chargeability: therefore it is sufficient, under 11 & 12 Vict. c. 43. s. 11, if the information be laid within six months of the chargeability—*dissentiente Bramwell, B.* *Reeves* v. *Yeates*, 31 Law J. Rep. (N.S.) M.C. 241; 1 Hurls. & C. 435.

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## BASTARDY.

(A) Proof of Illegitimacy.
(B) Order of Affiliation.
  (*a*) *Jurisdiction to make the Order.*
  (*b*) *Evidence in Support of.*
  (*c*) *Time for Appeal and Recognizance.*
(C) Maintenance.

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### (A) Proof of Illegitimacy.

On a question of the legitimacy of the child of a married woman, the onus lies upon the person alleging illegitimacy to shew that the husband and wife never were together, or that the interview took place under circumstances which rendered sexual intercourse impossible. The evidence to prove illegitimacy must be not only sufficient to raise strong doubts, but such as will produce conviction in the mind of Judge or jury, and there is no onus upon the party whose legitimacy is in question to shew opportunities of access. *Plowes* v. *Bossey*, 31 Law J. Rep. (N.S.) Chanc. 681; 2 Dr. & S. 145.

(B) Order of Affiliation.

(*a*) *Jurisdiction to make the Order.*

J M, a single woman, made application on the 15th of June 1858 to S, a Justice of the Peace, for a summons against P, as being the father of her bastard child. The application was within twelve calendar months of the birth of the child. S issued the summons, but it was not served, owing to P absenting himself. On the 3rd of August 1859, S died. On the 14th of July 1860 J M made application to W (who was also a Justice) for another summons. W issued such summons, and after a hearing of the case, the Justices in petty sessions made an order adjudging P to be the putative father of the child, and ordering him to pay, &c.:—Held, that such order was bad, as W had no power to issue a summons upon the application which had been made to S, and as the application which was made to himself was after the expiration of twelve months from the birth of the child. *R.* v. *Pickford*, 30 Law J. Rep. (N.S.) M.C. 133; 1 Best & S. 77.

A woman, having applied on two occasions for an order of affiliation to the Justices of the petty sessional division in which she had been residing with her parents, and been refused after a hearing on the merits, took lodgings in a neighbouring borough, "because," as she deposed, "people said if she came there, she would have a better chance," and when she had been there nearly a month, she applied to the borough Justices and obtained an order of affiliation:—Held, that the object of the woman's removal was to obtain a new tribunal, and therefore she did not "reside" within the borough so as to give the borough Justices jurisdiction under 7 & 8 Vict. c. 101. s. 2. *R.* v. *Hughes* distinguished. *R.* v. *Myott*, 32 Law J. Rep. (N.S.) M.C. 138.

(*b*) *Evidence in Support of.*

If, upon the hearing of a bastardy summons against A, the mother deny that B has had connexion with her at a particular time, evidence may be given to shew that B had such connexion with her, supposing that the effect of such evidence is not merely to contradict her, but also to shew that B might by means of that connexion have been the father of the child; such evidence being material to the issue. *R.* v. *Gibbons* distinguished. *Garbutt* v. *Simpson*, 32 Law J. Rep. (N.S.) M.C. 186.

Upon a complaint by a married woman, who was living apart from her husband, charging a third party under the 7 & 8 Vict. c. 101. with being the father of a bastard child of which she had been delivered, evidence having been given which justified the magistrates in presuming non-access of the husband,—Held, that it was no ground of objection to their decision that the magistrates allowed the wife to be asked a question tending to prove non-access of her husband, the magistrates certifying that they found the non-access independently of her evidence. *Yates* v. *Chippindale*, 11 Com. B. Rep. N.S. 512.

(*c*) *Time for Appeal and Recognizance.*

Under the 7 & 8 Vict. c. 101. s. 4, which requires notice of appeal by the putative father against an adjudication in bastardy to be given to the mother within twenty-four hours after the adjudication and making of the order, and recognizances to be entered into within seven days,—the time runs from tht verbal adjudication at the petty sessions, and noe from the time the formal order is drawn up and signed by the Justices. *R.* v. *the Justices of Flintshire* overruled. *Ex parte Johnson*, 32 Law J. Rep. (N.S.) M.C. 91; 3 Best & S. 947.

Where, therefore, at petty sessions holden on the 17th of February, the Justices adjudged W J to be the putative father of a bastard child, and ordered him to pay a weekly sum for its maintenance, and a formal order, as of the 17th of February, was afterwards drawn up, and signed by one of the Justices on the 1st of March, and by the others on the 3rd of March; and a verbal notice of appeal was given immediately on the adjudication, but a written notice was also given on the 2nd of March, and recognizances entered into on the 4th of March,—Held, that the recognizances were too late, and the appeal could not be heard. Held, also, that the irregularity in signing the order was not such as to vitiate it. Ibid.

*Quære*—Whether the formal order must be signed by all the Justices at the same time? and whether a verbal notice of appeal is sufficient under the 4th section? Ibid.

(C) Maintenance.

There is no obligation upon the personal representative of the mother of a bastard child to expend the money or property which belonged to the mother in the maintenance of such child. *Ruttinger* v. *Temple*, 33 Law J. Rep. (N.S.) Q.B. 1; 4 Best & S. 491.

## BENEFIT BUILDING SOCIETY.

[See Friendly and other Societies. Also, Attorney and Solicitor (G) (*b*) (1)—*In re Page.*]

## BILL OF SALE.

[See Bankruptcy—Ship and Shipping.]

(A) Validity of, in general.
(B) Assignment of after-acquired Property.
(C) Construction of.
(D) Registration of.
(E) Filing of.
(F) Affidavit of Attesting Witness.
(G) Description of Assignor and of Attesting Witness.

(A) Validity of, in general.

B executed a bill of sale, by way of mortgage, of household goods to D (the plaintiff), as a security for a debt of 130*l.*, then due from him to D, and for a further advance of 160*l.* then to be made, the receipt of which was acknowledged, and the execution purported to be attested, on the day the bill was dated, the 9th of January. The 160*l.* was not in fact paid till two days after; and the signature of the attesting witness was affixed on the latter day. The bill of sale was registered as of the 9th of January, the day it bore date. The goods mortgaged remained in the possession of B, and were so

when seized under a writ of *fi. fa.*, at the suit of T (the defendant) against B. At the trial of an interpleader issue of *D* v. *T*, there was evidence that, before the mortgage was executed, D was aware that an execution might be expected against B's goods. The Judge left to the jury the question whether the transaction between B and D was *bona fide* or a mere sham. The jury having found that the transaction was *bona fide*, the plaintiff had a verdict; and the Court, on a motion for a new trial on the ground of misdirection, held, approving *Wood* v. *Dixie*, that inasmuch as the mortgage, even if made with the intention of defeating an execution creditor, was not necessarily void, that the direction was sufficient; and that, the consideration-money having been paid two days after the execution of the bill of sale, the registration was not informal. *Darvill* v. *Terry*, 30 Law J. Rep. (N.S.) Exch. 355; 6 Hurls. & N. 807.

Under the Bills of Sale Act (17 & 18 Vict. c. 36.) ss. 2 and 3, it is not necessary that the vendee should state on the bill of sale the name of the person who really advances the money, unless there be some trust in favour of the vendor, although the circumstances be such that a Court of equity would hold the vendee to be a trustee only. *Robinson* v. *Collingwood*, 34 Law J. Rep. (N.S.) C.P. 18; 17 Com. B. Rep. N.S. 777.

E, by an agreement in writing, sold certain timber lying partly on his private wharf and partly on a public wharf, to G for 300*l.*, E agreeing to pay all rent and other charges upon the timber for six months, within which time G was to remove it. G took possession of the key of the private wharf and sold some of the timber lying there, but he did nothing with reference to the timber on the public wharf (the key of which remained in the hands of the wharfinger), except taking persons to look at it with a view to its sale. E, by another written agreement, sold to G for 50*l.* some furniture lying in a house, the property of E, and part of which house E had previously used as an office and occasionally slept in, but of which apartments E had the use. By the agreement G out of the 50*l.* was to pay the wages due to E's servant, who remained in the house, and the rates and taxes. E did not use the house after the agreement:—Held, that on these facts there was no possession or apparent possession of the timber, either at the private or public wharf, or of the furniture, by E within the Bills of Sale Act, 17 & 18 Vict. c. 36, so as to render them liable to seizure under an execution against E. *Gough* v. *Everard*, 32 Law J. Rep. (N.S.) Exch. 210; 2 Hurls. & C. 1.

*Quære*—Whether the agreements were "bills of sale" within the meaning of the statute. Ibid.

(B) ASSIGNMENT OF AFTER-ACQUIRED PROPERTY.

A, by deed, assigned to B all the machinery in and about a certain mill, upon trust for securing a sum of money; and it was thereby provided, that all the machinery which, during the continuance of the security, should be fixed or placed in the mill, in addition to or substitution for the former machinery, should be subject to the trusts of the assignment, and A undertook to do all that was necessary to vest the substituted and added machinery in B. The assignment was duly registered as a bill of sale, and, after the date of it, A placed other machinery in the mill, in addition to that which was there at the date of the assignment, and gave notice to B of each substitution and addition. A continued in possession according to the terms of the assignment. *Vice Chancellor Stuart* held, that the machinery being in A's possession, as agent of B, B was entitled, as against a judgment creditor of A who had sued out execution against A, to the additional machinery; but this decision was reversed by *Lord Chancellor Campbell*, on the ground of A's possession not being sufficient to support B's claim, and on the ground that to give B the complete title to the substituted and added machinery, it was necessary that there should be a *novus actus interveniens*. *Holroyd* v. *Marshall* (House of Lords), 33 Law J. Rep. (N.S.) Chanc. 193; 10 H.L. Cas. 191; in the Court below, 30 Law J. Rep. (N.S.) Chanc. 385.

After-acquired chattels may be assigned in equity, and words of agreement to assign, or of licence to seize, may, in equity, operate as an actual assignment; but if according to the proper construction of the words used, a mere licence to seize is intended, they will have no effect until actual seizure. *Reeve* v. *Whitmore; Martin* v. *Whitmore*, 32 Law J. Rep. (N.S.) Chanc. 497; 33 Law J. Rep. (N.S.) Chanc. 63.

The lessee of a brick-field executed to G a bill of sale of the bricks, plant, &c. then in and upon the premises, to secure 3,000*l.*, with interest, to be repaid on a specified day, with a proviso that the lessee should have the use and enjoyment until default, or the expiration of one day after notice in writing by G requiring possession, when possession should be given, with a power of entry and sale. And the lessee gave and granted to G, his executors, administrators and assigns, or his or their agents or servants, licence at all times during the continuance of the security to enter on the premises and there remain, and seize and hold possession of the property then on the premises, as if the same formed part of the chattels thereby assigned. The lessee subsequently executed other bills of sale to R in a similar form. G, who assisted the lessee in the management of his business, deposited his bill of sale and the papers relating to the brick-field with his private bankers by way of equitable mortgage. Subsequently, the lessee fell into difficulties and R took possession, and shortly afterwards G having become bankrupt, the assignee in bankruptcy of G also took possession by the messenger, and refused to withdraw. The bankers had omitted to give notice to the lessee, who swore that he was not, until G's bankruptcy, aware of the deposit having been made:—Held, that the bill of sale to G operated as an assignment only of the property then on the brick-field, with a licence to seize future property. Also, that the bankers could only claim what was due from the lessee to G at the date of his bankruptcy, the business relations between the lessee and G not being sufficiently intimate to warrant the Court in inferring that the former had notice of the deposit. Ibid.

*Quære*—Whether the entry by the messenger was an exercise of the right of seizure conferred by G's security. Ibid.

A receiver having been appointed and put into possession by the Court of Chancery, and the exercise of the licences to seize having been thus prevented,—*Semble*, That the rights of the mortgagees in reference to after-acquired property must be

determined by reference to what they might have done under their powers to seize at the time when the Court interfered. Ibid.

G K, who was a trader, by a bill of sale, assigned to the defendant "all his household furniture, plate, linen, china, glass, all his stock, cattle, horses, farming implements, crops, book-debts, and all other his personal estate and effects whatsoever then being or hereafter to be upon or about his dwelling-house, farm and premises." The bill of sale also empowered the defendant, "in case the sum of 300*l.* and interest should not be paid on demand, to enter upon the premises which might be in the occupation of the debtor, and there distrain the goods and chattels there found for the sum of 300*l.* and interest." After the execution of the bill of sale, G K purchased goods from time to time in the way of his trade, some of which were upon and about his premises on the 8th of January, 1862, on which day a formal demand of the sum of 300*l.* was made on G K's wife, and on non-payment of the same, on the same day, the defendant entered and seized all the furniture, goods, chattels and effects found upon the premises:—Held, that the demand on the wife was not a sufficient demand, and that the property acquired by G K after the execution of the bill of sale did not pass to the defendant. *Belding* v. *Read*, 34 Law J. Rep. (N.S.) Exch. 212; 3 Hurls. & C. 955.

### (C) Construction of.

A receipt in the following form: "Received of J D and C J, the trustees under the deed of settlement, for the benefit of my wife, the sum of 93*l.* 6*s.* 6*d.* for the purchase of my household goods and effects mentioned in the inclosed inventory and valuation as purchased this day by J D and C J, as trustees named in the deed of settlement, and empowered to purchase by such deed," is not a bill of sale within the statute 17 & 18 Vict. c. 36. *Allsop* v. *Day*, 31 Law J. Rep. (N.S.) Exch. 105; 7 Hurls. & N. 457.

*Semble*—A bill of sale within that act must be an instrument by which property was intended to pass. Ibid.

By a deed, in consideration of 410*l.* money advanced, the present and future stock, &c. of the plaintiff were assigned to the defendant, subject to a proviso that if the money were repaid at the end of ten years, or at such earlier day or time as the defendant should appoint by notice in writing, sent by post, or delivered to the plaintiff, or left at his house or last place of abode, the deed should cease and be void: provided that if default should be made in payment contrary to the proviso, then and immediately thereupon it should be lawful for the defendant to enter upon the plaintiff's premises and seize and sell the goods, &c. The defendant served a notice on the plaintiff at noon to pay the money due at half-past twelve p.m. of the same day, and then, on default, seized and sold the goods on the plaintiff's premises:—Held, that the notice, under the deed, must be a reasonable notice, and that half-an-hour's notice was not reasonable. *Brighty* v. *Norton*, 32 Law J. Rep. (N.S.) Q.B. 38; 3 Best & S. 305.

By a bill of sale the plaintiff covenanted to pay to the defendants the sum secured, with interest, immediately on demand in writing being made to him or left at his place of abode. If he did not immediately on such demand pay the money the instrument authorized the defendants to break and enter the plaintiff's house, and seize and sell the goods conveyed, but until default in payment on such written demand the plaintiff was to use and enjoy the goods as his own. By the defendants' directions, their attorney wrote a paper demanding from the plaintiff immediate payment of the sum and interest (not stating the amount of interest), and gave it to J to give it to the plaintiff, and the attorney authorized J to receive the money. J gave the paper to the plaintiff, but did not tell him that he had authority to receive payment. The defendants, by their agent, seized the plaintiff's goods before reasonable time had been allowed the plaintiff to pay the money to the defendants or to their attorney:—Held (affirming the decision below, 32 Law J. Rep. (N.S.) Q.B. 33; 4 Best & S. 442), that there had been a due demand of payment, but that there had been no default in payment on the part of the plaintiff, as a reasonable time for making payment had not expired before his goods were seized; that, consequently, the plaintiff was entitled to maintain an action for taking his goods, but that the measure of damages should be, not the value of the goods, but the value of the plaintiff's interest in them at the time of seizure. *Toms* v. *Wilson* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 382; 4 Best & S. 455.

B, who was yearly tenant of the dwelling-house which he occupied, being indebted to the plaintiff, executed a bill of sale, by which he assigned to the plaintiff "all the household goods, furniture, stock-in-trade and other household effects, and all other goods, chattels and effects in or about the said dwelling-house," "*and all other the personal estate whatsoever*," of the said B, with power to the plaintiff to sell the same in case of default in payment of the debt due to him from B, and to stand possessed of the moneys to arise from such sale, upon trust to satisfy the expenses and debt, and to account for the surplus, if any, to the said B:—Held, that notwithstanding the general words used, B's term or interest in the said dwelling-house did not pass under such bill of sale to the plaintiff. *Harrison* v. *Blackburn*, 34 Law J. Rep. (N.S.) C.P. 109; 17 Com. B. Rep. N.S. 678.

Held, also, that even if the term did pass, the plaintiff could not before entry maintain an action of trespass in respect of such dwelling-house. Ibid.

### (D) Registration of.

The 24 & 25 Vict. c. 91. s. 34,—which enacts that no copy of any bill of sale of personal chattels shall be filed unless the original be produced to the officer duly stamped,—does not invalidate the registration, otherwise regular, of a bill of sale not duly stamped; but on payment of the penalty and stamp duty required, the bill of sale is available under the 17 & 18 Vict. c. 36. s. 1. *Bellamy* v. *Saull*, 32 Law J. Rep. (N.S.) Q.B. 366; 4 Best & S. 265.

A debtor, unable to meet his engagements with his creditors, entered into a deed commencing as follows: "To all to whom these presents shall come, we, whose names and seals are hereunto subscribed and set, being severally and respectively creditors of V, &c., greeting." The deed then recited that V. was indebted to the said several creditors in the several sums set opposite to their names

in the schedule to the deed, and that V, being unable to pay his debts in full, had offered a composition of 7*s.* 6*d.* in the pound, payable by instalments, guaranteed by D B, which sum the said creditors covenanted to accept in full satisfaction of their claims. Then followed a release in the usual form. The deed then stated that D B having agreed to become security for the due payment of two sums of 3*s.* and 3*s.* in the pound to the said several creditors whose names are mentioned in the said schedule, "hereby guarantees the due payment of the said respective sums of 3*s.* and 3*s.* in the pound to the said creditors of V, and whose names and claims are mentioned in the said schedule; and we, the said several creditors, agree to accept the said D B as security for the due payment of the said sums," &c.; and V hereby covenants with the said D B, that in consideration of the said D B having become security as hereinbefore mentioned, he, V, has granted and assigned unto the said D B all his stock-in-trade," &c. "for the payment of the said respective sums of 3*s.* and 3*s.* in the pound as hereinbefore mentioned, in trust for the said creditors": —Held, that the deed appeared on the face of it to be a deed for the benefit of all the creditors of V; and that it was exempt from registration by the 7th section of the 17 & 18 Vict. c. 36, as an assignment for the benefit of the creditors of a person making or giving the same. *The General Furnishing and Upholstery Co.* v. *Venn*, 32 Law J. Rep. (N.S.) Exch. 220; 2 Hurls. & C. 153.

### (E) FILING OF.

The filing of a copy of a bill of sale of personal chattels is valid and effectual under the statute 17 & 18 Vict. c. 36, although the original bill of sale has been previously altered or destroyed. The property in the chattels will remain in the person to whom they were conveyed by the deed on its execution. *Green* v. *Attenborough* (Ex. Ch.), 34 Law J. Rep. (N.S.) Exch. 88; 3 Hurls. & C. 468.

By section 1. of 17 & 18 Vict. c. 36, every bill of sale of personal chattels, if not filed within twenty-one days after the making or giving of such bill of sale, shall, as against all assignees, &c., and as against all sheriff's officers and other persons seizing any property comprised in such bill of sale, be null and void so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at the time of executing such process, and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale:—Held, that such a bill of sale is not invalid by reason of its not having been filed, if the effects comprised in it are seized before the expiration of the time within which it might have been so filed, and, therefore, that when a bill of sale was given on the 27th of June, and a writ of *fi. fa.* was issued, under which the sheriff seized on the 5th of July, the person claiming under the bill of sale was not prevented from setting it up, and asserting that the effects were his, although at the time of seizure it had not been filed. *Marples* v. *Hartley*, 30 Law J. Rep. (N.S.) Q.B. 92; 3 E. & E. 610.

### (F) AFFIDAVIT OF ATTESTING WITNESS.

It is no objection to the affidavit required by section 1. of the Bills of Sale Act (17 & 18 Vict. c. 36.) that it is entitled in the Queen's Bench, and is stated to be sworn before a Commissioner of the Exchequer, if that Commissioner be, as is generally the case, also a Commissioner of the Queen's Bench; the test being, whether the party making the affidavit could be convicted of perjury if it were false; which, *semble*, he might be under the above circumstances. *Cheney* v. *Courtois*, 32 Law J. Rep. (N.S.) C.P. 116; 13 Com. B. Rep. N.S. 634.

### (G) DESCRIPTION OF ASSIGNOR AND OF ATTESTING WITNESS.

G & H carried on the business of printers in partnership, at New Street, Blackfriars, in the city of London. They were described in a bill of sale given by them, and in the affidavit filed pursuant to the 17 & 18 Vict. c. 36. s. 1, as residing in New Street, Blackfriars, in the county of Middlesex, and as printers and copartners:—Held, that the description of residence was sufficient under the statute; for that the description of G & H as "residing at New Street, Blackfriars" (without adding "in the city of London"), "printers and copartners," would have been sufficient information for the purpose of identification to persons dealing with G & H, and the addition of "in the county of Middlesex" could not have misled them. *Hewer* v. *Cox*, 30 Law J. Rep. (N.S.) Q.B. 73; 3 E. & E. 428.

The affidavit, required by the 17 & 18 Vict. c. 36. s. 1. to be filed with the bill of sale, must contain a description of the residence and occupation of the maker of such bill of sale at the time of making such bill, and not at the time of filing the affidavit. *London and Westminster Loan Co.* v. *Chace*, 31 Law J. Rep. (N.S.) C.P. 314; 12 Com. B. Rep. N.S. 730.

Where however the affidavit described the maker of the bill of sale as "a gentleman," which was a correct description at the time of making the bill of sale, but not at the time of filing the affidavit, the Court held, that the word related back to the time of making the bill of sale, so as to satisfy the requirements of the statute. Ibid.

One who up to and at the time of the execution of a bill of sale has never been actually engaged in any trade or occupation, is properly described therein (or in the affidavit filed therewith) as a "gentleman." *Gray* v. *Jones*, 14 Com. B. Rep. N.S. 743.

In a bill of sale the grantor was described as "James Robert Veal, of No. 25, Bernard Street, Russell Square, in the county of Middlesex, gentleman." In the affidavit filed therewith, pursuant to 17 & 18 Vict. c. 36. s. 1, he was described in the same way. The description of his residence was correct, but he was in reality at the time of giving the bill of sale in the employ of C & Co. of Watling Street, in the city of London, as a buyer of silk:— Held, that the bill of sale was invalid by reason of the description being incorrect. *Adams* v. *Graham*, 33 Law J. Rep. (N.S.) Q.B. 71.

Where goods are seized under a *fi. fa.* within twenty-one days of the making of a bill of sale, the Bills of Sale Act, 17 & 18 Vict. c. 36, does not apply, although the form of registering the bill of sale has been gone through, but in a defective manner. *Banbury* v. *White*, 32 Law J. Rep. (N.S.) Exch. 258; 2 Hurls. & C. 300.

The attesting witness to the bill of sale was in the attestation truly described as an attorney. The affidavit filed with the bill of sale was made by the attesting witness, who there described himself as "gentleman," and deposed that the bill of sale, a true copy whereof and of the attestation of the execution thereof was thereunto annexed, was made by, &c., in the presence of and duly attested by the deponent, and then proceeded, "and I further say that my residence and occupation hereinbefore set forth is the true description of my residence and occupation." *Quære*—Whether there was a sufficient compliance with the Bills of Sale Act? Ibid.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

[Certain restrictions on the negotiation of promissory notes and bills of exchange under a limited sum removed by 26 & 27 Vict. c. 105.—'The Summary Procedure on Bills of Exchange (Ireland) Act (1861),' amended by 25 & 26 Vict. c. 23.—The law relating to bills of exchange and promissory notes in Ireland amended by 27 Vict. c. 7.]

(A) Form and Operation of.
  (*a*) *In general.*
  (*b*) *Payee.*
  (*c*) *Imperfect Instrument.*
(B) Stamp: Cancelling on Foreign Bill.
(C) Acceptance.
  (*a*) *By Partners.*
  (*b*) *Per Pro.*
(D) Transfer.
  (*a*) *In general.*
  (*b*) *Bill drawn in several Parts.*
  (*c*) *Indorsement of Bill payable to Order by Discounter.*
  (*d*) *After Maturity.*
(E) Discharge from Liability on.
  (*a*) *By Payment.*
  (*b*) *By giving Time.*
(F) Consideration.
(G) Notice of Dishonour.
(H) Actions and Suits.
  (*a*) *In general.*
  (*b*) *In respect of lost Bill or Note.*
(I) Summary Procedure on.
(K) Cheques.

### (A) Form and Operation of.

#### (*a*) *In general.*

An instrument in the form of a bill of exchange, drawn by A S, was accepted by the defendant for a debt due from A S to the plaintiff. The plaintiff's name was in the body of the instrument as the payee, and in the corner at the foot of it the plaintiff's name and address were written by the defendant as follows: "To Mrs. Emma Fielder, Nelson Lodge, Trafalgar Square, Chelsea":—Held, that the instrument was not addressed to any one, and might be treated as a promissory note. *Fielder* v. *Marshall*, 30 Law J. Rep. (N.S.) C.P. 158; 9 Com. B. Rep. N.S. 606.

The defendant, intending to become surety to the plaintiffs for A, put his name at the back of a blank bill stamp, on which A wrote his name as acceptor, and the plaintiffs then drew upon it a bill of exchange payable to their (the drawers') order:—Held, that the defendant was liable to the plaintiffs on this instrument as the drawer of a bill, payable either to bearer or to the plaintiff's order. *Matthews* v. *Bloxsome*, 33 Law J. Rep. (N.S.) Q.B. 209.

A proviso in a bill of exchange drawn by a joint-stock company, limiting the liability thereunder, is repugnant and void. *In re the State Fire Insurance Co., ex parte Meredith's and Convers's claims*, 32 Law J. Rep. (N.S.) Chanc. 300.

#### (*b*) *Payee.*

The defendant, the secretary of a benefit building society, was sued on a promissory note in this form: Midland Counties Building Society, No. 3, Birmingham, 1st September 1856. One month after demand, we jointly and severally promise to pay Mr. John Bottomley the sum of one hundred and twenty pounds, with interest thereon, after the rate of six pounds per centum per annum, (payable half-yearly) for value received. W. R. Heath, S. B. Smith, Directors; W. D. Fisher, Secretary:—Held, that the defendant was personally liable on the note. *Bottomley* v. *Fisher*, 31 Law J. Rep. (N.S.) Exch. 417; 1 Hurls. & C. 211.

A document, "On demand, I promise to pay J W, T S, and D M, or to their order, or the major part of them, 100*l.*," is a promissory note, on which the three payees can maintain an action. *Watson* v. *Evans*, 32 Law J. Rep. (N.S.) Exch. 137; 1 Hurls. & C. 662.

The acceptor *supra* protest of a bill of exchange, for the honour of the drawer, is, like the drawer himself, estopped from denying that the bill is a valid bill; and, consequently, it is not competent to him to set up as a defence to an action against him by an indorsee, that the payee is a fictitious person, and that he was ignorant of that fact at the time he accepted the bill. *Phillips* v. *Im Thurn*, 35 Law J. Rep. (N.S.) C.P. 220; 18 Com. B. Rep. N.S. 694.

#### (*c*) *Imperfect Instrument.*

An instrument in the form of a bill of exchange, addressed to and accepted by the defendant, but without the names of either a payee or drawer, is neither a bill of exchange nor a promissory note, but only an incohate instrument. *M'Call* v. *Taylor*, 34 Law J. Rep. (N.S.) C.P. 365; 19 Com. B. Rep. N.S. 301.

### (B) Stamp: Cancelling on Foreign Bill.

The duty of cancelling the stamp affixed to a foreign bill of exchange is equally imposed both on the holder and the transferee of such a bill, by the 17 & 18 Vict. c. 83. s. 5. *Pooley* v. *Brown*, 31 Law J. Rep. (N.S.) C.P. 134; 11 Com. B. Rep. N.S. 566.

Where, therefore, the defendant sold to the plaintiff a number of foreign bills of exchange, of which the stamps were not cancelled, both parties being ignorant of the deficiency at the time of the transfer, —Held, per *Erle, C.J.* and *Keating, J.* (*dissentiente Williams, J.*), that on discovering the mistake the plaintiff could not recover from the defendant the price paid for the bills as upon a failure of consideration, both parties being equally in fault. Ibid.

The claim to have the money returned was not made till more than a year after the sale of the bills took place:—Held, per *Curiam*, that even had the action lain, the plaintiff had lost his right to maintain it, by reason of the delay. Ibid.

*Semble*, per *Williams, J.*, that if the bills had been returned to the defendant, he might, as holder, have sued the acceptors, though he might have been unable to transfer the bills so as to have made them available in the hands of another person. Ibid.

(C) Acceptance.

(*a*) *By Partners.*

If a member of a trading firm accept a bill in the name of the firm, drawn upon him by his separate creditor, on account of his separate debt, the presumption is that the bill is so accepted without the concurrence of the other members of the firm, and that the creditor knows it; and in an action by the creditor upon the bill against the firm the jury ought so to be directed—*Ripley* v. *Taylor* distinguished. *Levieson* v. *Lane*, 32 Law J. Rep. (N.S.) C.P. 10; 13 Com. B. Rep. N.S. 278.

In an action by an indorsee against the members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the partnership articles, the onus is cast on the plaintiff of shewing that he gave value. *Hogg* v. *Skeen*, 34 Law J. Rep. (N.S.) C.P. 153; 18 Com. B. Rep. N.S. 426.

(*b*) *Per Pro.*

The acceptance of a bill of exchange "per pro." acts as an express notice to the party taking the bill, that the authority of the agent is limited, and the holder of such a bill cannot maintain an action against the principal, if the agent has exceeded his authority. *Stagg* v. *Elliott*, 31 Law J. Rep. (N.S.) C.P. 260; 12 Com. B. Rep. N.S. 373.

(D) Transfer.

(*a*) *In general.*

J P, having died possessed of certain goods on which the plaintiff had some claim, the defendant was allowed by the plaintiff to take possession of the goods on giving an acceptance for the value; and, by arrangement between them, a bill was drawn and indorsed to the plaintiff by procuration in the name of the deceased J P, and accepted by the defendant. The plaintiff having brought an action on the bill,—Held, that the defendant was precluded from setting up as a defence that the indorsement was not J P's. *Ashpitel* v. *Bryan*, 32 Law J. Rep. (N.S.) Q.B. 91; 3 Best & S. 474.

The payee of three promissory notes executed the following indorsement, preceded by the delivery of them to the indorsee: "I bequeath—pay the within contents to Simon Smith or his order at my death." There was a single witness to the payee's signature. In the act of delivery of the notes, the payee expressed an intention to be "master of them as long as he lived":—Held, that the transaction constituted a testamentary gift, and was, as such, void, there being only one witness. *In re Patterson, Mitchell* v. *Smith*, 33 Law J. Rep. (N.S.) Chanc. 596.

*Semble*, by the *Lord Justice Turner*, that, but for the payee's expressed intention to keep the ownership for life, the disposition might have been construed as a gift *inter vivos*, in trust for him for life, and then for the indorsee absolutely. Ibid.

(*b*) *Bill drawn in several Parts.*

A foreign bill of exchange was made in four parts by A, and was indorsed by the payee to B, who indorsed to the defendants, who indorsed to C, who indorsed to the plaintiff. The first of the four parts only came into the possession of the plaintiff, and he having lost that part brought an action against the defendants for not delivering over the other parts. Only the first part had ever come into the possession of the defendants, nor were they able to obtain possession of the others:—Held, that no action would lie against them, as there was no obligation upon them to hand the other parts to the plaintiff. *Pinard* v. *Klockman*, 32 Law J. Rep. (N.S.) Q.B. 82; 3 Best & S. 388.

(*c*) *Indorsement of Bill payable to Order by Discounter.*

The drawer of a bill payable to his order discounted it, and gave it to the discounter with intent to transfer to him all his rights in respect of the bill, but did not indorse it, though he would have done so if asked:—Held, that the discounter had no authority to put the drawer's name on the back of the bill. *Harrop* v. *Fisher*, 30 Law J. Rep. (N.S.) C.P. 283; 10 Com. B. Rep. N.S. 196.

The discounter having put the drawer's name on the back of the bill, the acceptor offered a composition for the bill, but afterwards withdrew his offer:—Held, that on the above facts the discounter could not maintain an action in his own name against the acceptor on the bill. Ibid.

(*d*) *After Maturity.*

Declaration on a bill of exchange, drawn by L to his own order, accepted by the defendant, and indorsed by L to the plaintiff. Plea that A, being the holder of the bill, commenced an action against the defendant under the Bills of Exchange Act, 1855, and from the indorsement on the writ it appeared, as the fact was, that L had indorsed the bill, which action is still pending; and that the plaintiff afterwards commenced his action; and that the plaintiff took and became the holder of, and L indorsed the bill, as in the declaration mentioned, to the plaintiff after the same became due, and without consideration, and with notice of the pendency of the first action:—Held, a bad plea. *Deuters* v. *Townsend*, 33 Law J. Rep. (N.S.) Q.B. 301; 5 Best & S. 613.

(E) Discharge from Liability on.

(*a*) *By Payment.*

A & Co., B & Co. and the defendant had all drawn bills largely upon each other, and certain of these bills, which had been accepted by the defendant, were in the hands of the plaintiffs, as *bona fide* holders for value, having been indorsed to them by A & Co. and B & Co. respectively. The plaintiffs had received from A & Co., from B & Co. and from the defendant certain payments on account of these bills, and they now sued the defendant upon the same bills, giving him credit for the payments made by himself only, and not for those made by A & Co. and B & Co., claiming to hold the excess for the use of

the drawers. The defendant offered to pay to the plaintiffs, in full, all principal, interest and expenses due upon the bills, after taking credit for the payments already made by him, and also for the above payments by A & Co. and B & Co., and he now paid that amount into court:—Held, that, though these were not strictly accommodation bills, it was not a case in which the holder could sue for and on account of the drawers; that the defendant was entitled to take credit for all these payments, and that the sum paid into court was sufficient. *Cook* v. *Lister*, 32 Law J. Rep. (N.S.) C.P. 121; 13 Com. B. Rep. N.S. 543.

(*b*) *By giving Time.*

If one maker of a promissory note signs as surety only for the other, and the payee has notice of this when he takes the note as security for money advanced to the principal, he cannot give time to the principal without the consent of the surety. If he does, the surety is discharged in equity, although the payee has never agreed to treat him otherwise than as a principal party liable upon the note, for an equity arises from the relation of principal and surety and notice thereof to the payee; and if the surety is sued on the note after such time given, he may set up the defence by way of plea on equitable grounds. *Greenough* v. *M'Clelland* (Ex. Ch.), 30 Law J. Rep. (N.S.) Q.B. 15; 2 E. & E. 429.

(F) Consideration.

The plaintiffs, trustees under a local act, called on the defendant, who was agent of the owner of certain houses, to pay certain expenses chargeable under the act on the owner. The defendant told the plaintiffs that he was not owner, but that B was, and that B, and not he, the defendant, was liable. The plaintiffs, *bona fide* believing the defendant to be personally liable, threatened to take proceedings against him to enforce payment; on which the defendant, notwithstanding he knew that he was not really liable, the plaintiffs consenting to take a less amount than their claim by instalments, gave them promissory notes to meet the instalments. The plaintiffs having sued the defendant on the notes,—Held, that there was good consideration for them, and that the plaintiffs were entitled to recover. *Cook* v. *Wright*, 30 Law J. Rep. (N.S.) Q.B. 321; 1 Best & S. 559.

A, a legatee under a will of doubtful validity, was requested by her brother to allow him to inspect the will. She refused, but afterwards agreed to deposit the will with a third person, upon his depositing also with the same person a promissory note, signed by himself and payable to her, for 60*l.*, the amount of her legacy. At the same time she signed an agreement that upon payment of the 60*l.* to her she would deliver up the will. Shortly afterwards, and before the payment of the 60*l.*, at her brother's request, the will was delivered by her to his attorney. Inquiries were then set on foot, which led to the supposition that the will might never have been properly executed, and an arrangement was ultimately entered into by all the members of the family, upon the supposition that the will was an invalid instrument, but the claim of A upon the promissory note was not included in this arrangement, and the will was not returned to A:—Held, in an action by A against her brother upon the note, that there was sufficient consideration for the note by the deposit of the will, and the promise to deliver it up on payment of the note, and that the will had, in substance and effect, been delivered to the brother, by having been delivered to his attorney in compliance with his request. *Smith* v. *Smith*, 32 Law J. Rep. (N.S.) C.P. 149; 13 Com. B. Rep. N.S. 418.

A new security given to a creditor by an insolvent petitioner under the 5 & 6 Vict. c. 116, upon his agreeing not to oppose the granting of the final order for protection, cannot be enforced, although the Commissioner required the insolvent to make an arrangement with the creditor, and adjourned the petition for that express purpose, and intimated that no final order would be made, unless such an arrangement were effected, and was privy to and consented to the new security being delivered on account of the old debt. *Humphreys* v. *Welling*, 32 Law J. Rep. (N.S.) Exch. 33; 1 Hurls. & C. 7.

To a declaration against the defendant as acceptor of bills of exchange, he pleaded that he borrowed 1,500*l.* of the plaintiff, and it was agreed between them that he should pay interest at the rate of more than 5*l.* per cent. per annum, viz. 100*l.*, contrary to the statutes then in force, and that to secure the principal and interest the defendant accepted bills to the amount of 1,600*l.*, that these bills were dishonoured at maturity, and that after the passing of the 17 & 18 Vict. c. 90. the bills sued on were given by way of renewal of the old bills, and to secure the payment to the plaintiff of the money secured by the old bills, including the 100*l.* interest:—Held, by *Pollock, C.B.*, *Channell, B.*, and *Wilde, B.* (*Martin, B.* dissenting), that there was good consideration for the bills, and that the plaintiff was entitled to recover on them. *Flight* v. *Reed*, 32 Law J. Rep. (N.S.) Exch. 265; 1 Hurls. & C. 703.

Notwithstanding the general rule that the onus is on the maker of a negotiable instrument to shew that it has been paid, the holder is bound in the first place (unless he be a derivative indorsee for value during the currency of the bill or note) to shew that the maker received value for it. *Dettmar* v. *the Metropolitan and Provincial Bank*, 1 Hem. & M. 641.

When a bank, with knowledge of the relative position of the parties, places the proceeds of a promissory note, which has been made in their favour by A (a person just come of age) unreservedly in the power of B (a person who stands *in loco parentis* to A), knowing at the time that B claims to be creditor of A to a large amount for necessaries supplied, and B afterwards misappropriates the money, the bank will be restrained from suing on the note. Ibid.

(G) Notice of Dishonour.

In an action, by indorsee, against indorser of a bill of exchange, due notice of dishonour not having been given to the defendant,—Held, that the defendant having suffered judgment by default in a prior action brought against him by a holder on the same bill, had admitted his liability to that person on the bill, and therefore he might be taken either to have dispensed with the necessity of due notice, or to have acknowledged the notice given to be sufficient as against himself. *Rabey* v. *Gilbert*,

30 Law J. Rep. (N.S.) Exch. 170; 6 Hurls. & N. 536.

If the drawer of a bill of exchange, after the time for giving notice of dishonour has expired, promised to pay the bill, that is a waiver of notice; and if there is no plea of waiver, the Court will add such a plea. *Cordery* v. *Colville*, 32 Law J. Rep. (N.S.) C.P. 210; 14 Com. B. Rep. N.S. 374.

Per *Byles, J.*, a promise to pay the bill whether made before or after the time for giving notice has expired is evidence that due notice has been given. A promise to pay the bill before the time for giving notice has expired may also be used as evidence that notice has been dispensed with; and a promise to pay made after the time for giving notice has expired is evidence that notice has been waived. Ibid.

If a creditor takes a bill of exchange from his debtor as collateral security for the payment of his debt, and retains it until it becomes due, his duty is to present the bill for payment, and, if the bill be dishonoured, to give notice of dishonour in the same way as if he were absolute owner of the bill. If he omits to do this, and the bill consequently becomes worthless, he cannot afterwards sue his debtor, either on the bill, or on the original consideration. *Peacock* v. *Purssell*, 32 Law J. Rep. (N.S.) C.P. 266; 14 Com. B. Rep. N.S. 728.

Where an indorser of a bill of exchange, who has had no notice of dishonour, on being told that the holders are about to take proceedings against him on the bill, says he will pay it if they will give him time,—that is evidence from which a jury may infer that he has waived the right to notice. *Woods* v. *Dean*, 32 Law J. Rep. (N.S.) Q.B. 1; 3 Best & S. 101.

A count by indorsee against drawer of a bill of exchange, alleging presentment and dishonour, and due notice thereof to the defendant, is sustained by proof of a subsequent promise by the defendant to pay, notwithstanding it is proved (or admitted) that due notice of dishonour was not given. And the Court will, if necessary, amend the declaration, by alleging a waiver of notice. *Killby* v. *Rochussen*, 18 Com. B. Rep. N.S. 357.

### (H) Actions and Suits.

#### (*a*) *In general.*

The defendant, a British subject resident in Florence, signed two promissory notes there, as joint and several maker with his brother in London, to whom he sent them by post. His brother then also signed them, and delivered them in London to the payees:—Held, in accordance with *Cox* v. *Troy*, that the cause of action arose when the notes were delivered to the payees in this country, and that the defendant could therefore be sued here under the 18th section of the Common Law Procedure Act, 1852. *Chapman* v. *Cottrell*, 34 Law J. Rep. (N.S.) Exch. 186; 3 Hurls. & C. 865.

#### (*b*) *In respect of lost Bill or Note.*

B accepted a bill of exchange drawn by R, who sent it to the plaintiffs; they returned it to R for indorsement; he burned it, and became bankrupt. Upon a bill by the plaintiffs asking that B, as acceptor, might pay the sum for which the bill was drawn,—Held, that the plaintiffs had no claim for relief against the acceptor, and that the bill must be dismissed with costs. *Edge* v. *Bumford*, 31 Law J. Rep. (N.S.) Chanc. 805; 31 Beav. 247.

#### (I) Summary Procedure on.

Where a defendant, sued under the Bills of Exchange Act, has obtained leave from a Judge to appear to the writ and to defend the action, the Court will not set aside the order upon affidavits which, in substance, merely amount to a denial of the matter set up by way of defence, even although the affidavits allege affirmatively a totally different transaction from that which the defendant has represented, setting up that the defendant, in obtaining leave to defend the action, has acted in contravention of an agreement between the parties on which the bill was given, and in breach of good faith. *Febart* v. *Stevens*, 30 Law J. Rep. (N.S.) Exch. 1.

### (K) Cheques.

The general rule, as established by *Rickford* v. *Ridge*, that the holder of a cheque is only bound to send it to his agent for presentment by the post of the day after that on which he has received it, and that the agent has the following day to present it for payment, applies not only as between the parties to the cheque, but as between banker and customer, unless circumstances exist from which a contract or duty on the part of the banker to present earlier, or to defer presentment to a later period can be inferred. Where, therefore, a cheque upon a bank at Lewes was paid on a Friday morning into a bank at Worthing, by a customer of the last bank, to the credit of his account with that bank, presentment of the cheque for payment at the Lewes Bank on the following Monday was held to be in time, as the Worthing bankers were only bound to send it by Saturday's post to their agent at Lewes. *Hare* v. *Henty*, 30 Law J. Rep. (N.S.) C.P. 302; 10 Com. B. Rep. N.S. 65.

A draft payable to order is not rendered void by being post-dated; the provisions of 55 Geo. 3. c. 184. s. 13. and 21 & 22 Vict. c. 20. being applicable only to drafts payable to bearer. *Whistler* v. *Forster*, 32 Law J. Rep. (N.S.) C.P. 161; 14 Com. B. Rep. N.S. 248.

The holder without indorsement of a draft payable to order, though taken by him *bona fide* and for value, has no better title than the person from whom he took it; and such holder is affected by fraud, of which he has notice before he obtains the formal indorsement. Ibid.

A cheque payable to bearer and stamped with a penny stamp, and dated the 22nd of July, was on the 22nd of June drawn by the defendant and given by him to G, who indorsed it to W, who handed it to the plaintiff, and received in return the plaintiff's cheque for the same amount. The plaintiff took the defendant's cheque without notice or knowledge that it had been post-dated:—Held, in accordance with *Williams* v. *Jarrett* and *Whistler* v. *Forster*, that the cheque appearing to be correctly stamped according to its purport, and having been taken by the plaintiff without notice that it was post-dated, and innocently, he was entitled to recover upon it against the defendant. *Austin* v. *Bunyard*, 34 Law J. Rep. (N.S.) Q.B. 217; 6 Best & S. 687.

On Wednesday May 6, A received at Monmouth

a cheque drawn upon M & Co., bankers at Ross, about ten miles distant. On Friday, the 8th, he paid it into his bankers at Monmouth, and they on the same day sent it by post to their London agents (the City Bank), to be passed through the country clearing house there. The drawees' London agents were B & Co. (whose names appesred in a printed memorandum at the foot of the cheque), but their account with them was closed on the 7th. The cheque being refused by B & Co. at the clearing house, the City Bank sent it by post on Saturday, the 9th, for payment to the drawees, who kept it until Friday, the 15th, and then returned it to the City Bank, who received it on Saturday, the 16th, and sent by that day's post to their correspondents, the Monmouth Bank, who (receiving it on Saturday, the 17th) sent notice of the dishonour by the post on Tuesday, the 19th, to the drawer, whom it reached on the 20th. A run upon the bank of M & Co. commenced on Monday, the 11th, and on Wednesday, the 13th, at noon, they finally stopped payment. In an action in the county court by the Monmouth Bank against the drawer, it was proved that the drawees sent cash through the post to country bankers in payment of cheques drawn upon them as late as Monday, the 11th, but did not honour any cheques forwarded to them by London bankers after Thursday, the 7th; that, if the cheque in question had been received by them by post from the City Bank on Friday, the 8th, it would not have been paid; but that, if presented across the counter at any time before the final stoppage on Wednesday, the 13th, it would have been paid. The county court Judge having upon these facts nonsuited the plaintiffs, this Court, upon appeal, affirmed his decision, holding that the presentment was not in due time. *Bailey* v. *Bodenham*, 33 Law J. Rep. (N.S.) C.P. 252; 16 Com. B. Rep. N.S. 288.

*Semble*, also, that the notice of dishonour was too late. Ibid.

Where a cheque is drawn upon a country banker, —*quære*, whether sending it by post from London to the drawee, with a demand of payment, is a good presentment? Ibid.

The mention of the names and address of the London agent in a memorandum at the foot of a country banker's cheque does not make the cheque payable at the place so indicated. Ibid.

## BIRTHS, DEATHS AND MARRIAGES.

[See REGISTRATION.]

## BLEACHING AND DYEING WORKS.

The Bleaching and Dyeing Works Act, 23 & 24 Vict. c. 78. s. 9, excepts from its operation any building used solely for the purposes declared in 8 & 9 Vict. c. 29, which includes an incidental printing process carried on within buildings "lying adjacent to each other, or forming a part or parts of the establishment where the chief process of printing is carried on":—Held, that this is not confined to a building which, by local proximity, forms part of the establishment where the chief process of printing is carried on, but extends to a building which, in a commercial sense, forms part of such establishment. *Hoyle* v. *Oram*, 31 Law J. Rep. (N.S.) M.C. 213.

The process of "finishing" is not within the Bleaching and Dyeing Works Act, 23 & 24 Vict. c. 78, unless it be carried on as incidental to the operation of bleaching or dyeing. *Howarth* v. *Coles*, 31 Law J. Rep. (N.S.) M.C. 262; 12 Com. B. Rep. N.S. 139.

## BOND.

(A) CONSTRUCTION OF.
(B) DISCHARGE: LEGAL IMPOSSIBILITY TO PERFORM.

### (A) CONSTRUCTION OF.

By the condition of a bond, the obligor was to pay the money by monthly instalments, and "when and as often as he should make default in the payment of any of the said monthly instalments, he should pay to the obligees 1*s.* in the pound for each and every pound of the said instalment so left unpaid":—Held, that the obligees were not entitled to anything in respect of fractional parts of a pound. *Three Towns Loan Society* v. *Doyle*, 13 Com. B. Rep. N.S. 290.

### (B) DISCHARGE: LEGAL IMPOSSIBILITY TO PERFORM.

The Corporation of London, under the authority of a local act of parliament, and in consideration of money which they were thereby authorized to raise, executed a bond to the plaintiff, conditioned to pay the plaintiff a certain annuity out of certain tolls levied under several acts for improving the navigation of the river Thames. The annuity was, by the act under which the money was raised, made a charge on such tolls. The Thames Conservancy Act (20 & 21 Vict. c. cxlvii., local and personal) was afterwards passed to carry out an agreement between the Crown and the Corporation as to the said river, and by that act the conservancy of the Thames is vested in a new body, called the "Conservators of the River Thames," and the powers before vested in the Corporation of London of receiving the tolls is transferred to such conservators, who are to appropriate the tolls, first, to paying the expenses of passing the act, and then to the expenses of carrying the act into execution, and to apply the surplus, after a certain time, in paying off any money borrowed on the credit of such tolls:—Held *(Willes, J. dissentiente)*, that as the effect of the Thames Conservancy Act was to take away from the Corporation of London the power to receive the tolls, the plaintiff could not sue the Corporation on their bond; but that his remedy for compelling payment of the annuity out of the tolls was only against the Conservators of the Thames. *Brown* v. *the Mayor of London*, 30 Law J. Rep. (N.S.) C.P. 225; 9 Com. B. Rep. N.S. 726.

## BOROUGH.

[See RATE; County Rate.]

### BOUNDARIES.

Where the boundary between two conterminous parishes is a highway, the presumption is that the half highway on either side of the *medium filum* belongs to the parish on that side. *R.* v. *the Board of Works for the Strand*, 33 Law J. Rep. (N.S.) M.C. 23; 4 Best & S. 526.

An act of parliament, passed for the purpose of creating a new parish of A out of the old parish of M, enacted that "all that precinct included within the bounds hereinafter expressed" should form the new parish. On the northern boundary where the old parish of M was divided from the parish of S by a highway, the precinct was described thus: "with all the houses and grounds abutting on and upon the king's highway or great road":—Held, that this carried the boundary of the new parish to the *medium filum* of the highway. Ibid.

When an order of the Metropolitan Board of Works has been made, under section 140. of the 18 & 19 Vict. c. 120, ordering that the whole of a street situate in more than one district should be under the exclusive management of one particular vestry, and that vestry makes an order, under section 160, upon one of the other districts for contribution towards the expenses, if the order is good on the face of it, the only mode of appeal open to the district is by contesting the propriety of the assessment at the audit, under section 195; and the Court, on a return to a mandamus ordering the payment of the sum assessed, will not go into the matter, but grant a peremptory mandamus. Ibid.

## BRIDGE.

(A) LIABILITY TO REPAIR.
(B) LIABILITY TO LIGHT.

### (A) LIABILITY TO REPAIR.

An act of 20 Geo. 2, after reciting that it would be for the convenience of the inhabitants of the counties of Surrey and Middlesex that a bridge should be built across the Thames from W to S, enacted that it "shall and may be lawful for S D, his heirs and assigns, to build the said bridge." Powers were given to take lands on each side for the purpose. And it was further enacted that, "for and in consideration of the great charges and expenses S D, his heirs, or assigns, would be at, not only in building the bridge, but also in erecting and maintaining other matters necessary to be erected, &c., it shall and may be lawful for the said S D, his heirs and assigns, from time to time to take" certain tolls by way of pontage for every person, carriage, or horse passing the bridge. And after reciting that it may happen that the bridge may receive such damage as to be dangerous or impassable, in such case "it shall and may be lawful" to S D, his heirs and assigns, to set up a ferry across the river as near the bridge as conveniently may be, and take for the passage over the ferry the pontage granted by the act, "provided that the ferry shall not continue longer than is necessary for repairing or rebuilding the bridge." The bridge was made extra-parochial, and was not to be deemed a county bridge so as to make either Surrey or Middlesex liable to repair it. A subsequent act of 20 Geo. 3,—after reciting that by the former act certain tolls and powers had been granted to S D to build the bridge, and that it had been accordingly built and passable for many years, and that it is now in a ruinous condition, and if not effectually repaired or rebuilt would be manifestly to the inconvenience of the public, and that M D S was the sole proprietor, and had proposed to effectually repair or rebuild it, and that the pontage granted under the former act had been found by experience greatly inadequate to the expense of building and keeping in repair the same,—enacted that it should be lawful to M D S, his heirs and assigns, to take, under this and the former act, certain increased tolls. The bridge having been built under the first act, the public constantly used it, and the proprietors for the time being took the tolls and exercised the powers of the two acts, and did all the necessary repairs until the year 1859, when the principal arch fell in, and the bridge became impassable. On this the defendant, the present proprietor of the bridge, set up a ferry, and took, and continues to take, the tolls authorized by the two acts:—Held, upon the true construction of the two statutes, that, although there was no duty expressly imposed, yet, inasmuch as the taking of the tolls was on condition and in consideration of building and maintaining the bridge, the defendant, at least as long as he remained proprietor and took the tolls, was bound to reinstate the bridge and maintain it in a state practicable for passage. When the parties agree that if judgment be given for the plaintiff, a mandamus may issue, this means if the Court think fit that it shall do so. *Nicholl* v. *Allen*, 31 Law J. Rep. (N.S.) Q.B. 43; 1 Best & S. 916: affirmed in Ex. Ch., 31 Law J. Rep. (N.S.) Q.B. 283; 1 Best & S. 934.

### (B) LIABILITY TO LIGHT.

A company built Vauxhall Bridge under a local act (49 Geo. 3. c. cxlii.), by which they were empowered to make (amongst others) a road leading to the bridge in the parish of Lambeth and county of Surrey, and they were required to put up lamp-posts and lamps on the road and bridge, and to keep the road and bridge lighted under pain of being indicted if in default; half the bridge was to be deemed to be in the parish of Lambeth and county of Surrey, but not to be deemed a county bridge so as to subject the county or parish to the repairs of the bridge or road. By a subsequent local act (9 & 10 Vict. c. cccl.) certain Commissioners were empowered to cause (amongst others) the said road to the middle of Vauxhall Bridge to be kept properly lighted, and it was lawful for them to keep lighted such streets as they might think proper; and the "present lamps and posts in the streets within their jurisdiction, and which shall or may hereafter be erected or fixed," were vested in the Commissioners:—Held, that the obligation to light the road and half the bridge and the property in the lamps were transferred from the company to the Commis-

sioners, and from them to the vestry of the parish of Lambeth by "The Metropolitan Local Management Act" (18 & 19 Vict. c. 120), ss. 90, 130. and 250. *R.* v. *the Vestry of Lambeth*, 31 Law J. Rep. (N.S.) Q.B. 252; 3 Best & S. 1.

*Quære*—Whether, if the obligation and property had not been transferred from the company to the Commissioners, they would not have been transferred to the vestry from the company under the 90th section? Ibid.

## BROKER.

[See PRINCIPAL AND AGENT.]

The dealing in or buying and selling for reward of shares in English or foreign joint-stock banks or companies, or the debt, stock, or securities of foreign governments, is an acting and assuming to act as a broker, within the 57 Geo. 3. c. 60. *Scott* v. *Jackson*, 19 Com. B. Rep. N.S. 134.

## BURIAL.

[Improvement Commissioners acting as Burial Boards authorized to mortgage certain rates for the purposes of the Burial Acts by 25 & 26 Vict. c. 100. —The registration of burials in England further provided for by 27 & 28 Vict. c. 97.]

(A) BURIAL BOARDS.
  (*a*) *Election of Members: Vacancies.*
  (*b*) *District Parishes.*
(B) BURIAL GROUNDS.
  (*a*) *For United Parishes.*
  (*b*) *Closing.*
(C) BURIAL FEES.

### (A) BURIAL BOARDS.

#### (*a*) *Election of Members: Vacancies.*

By the 15 & 16 Vict. c. 85. s. 12, any vacancies in a burial board may be filled up by the vestry when and as they shall think fit; by the 18 & 19 Vict. c. 128. s. 4, any vacancy shall be filled up by the vestry within one month after it shall have happened; and in case any vestry shall neglect to fill up such vacancy, it may be filled up by the burial board:—Held, that a vacancy having occurred, the vestry might fill it up after the month, the burial board not having done so. *R.* v. *Overseers of South Weald*, 33 Law J. Rep. (N.S.) M.C. 193; 5 Best & S. 391.

#### (*b*) *District Parishes.*

The mere fact that a parish has been divided into three separate parishes for all ecclesiastical purposes, under the 58 Geo. 3. c. 45, does not prevent the vestry of the old parish from appointing a burial board, under the 15 & 16 Vict. c. 85. s. 10; and a burial board having been appointed for the old parish, and it not appearing that either of the new parishes had appointed a burial board under the 20 & 21 Vict. c. 81. s. 5, the Court granted a peremptory mandamus to the overseers of the old parish to pay to the burial board out of the poor-rates of the entire parish the expenses which they had incurred. *R.* v. *the Overseers of Walcot*, 31 Law J. Rep. (N.S.) M.C. 217; 2 Best & S. 555.

Where a parish has been divided into separate parishes for ecclesiastical purposes under the 58 Geo. 3. c. 45, and the vestry of the old parish collectively has appointed a burial board and established one burial-ground for the whole parish, the vestry of one of the new parishes may also appoint a burial board under the 20 & 21 Vict. c. 81. s. 5; and the Court granted a peremptory mandamus to the overseers of the old parish to levy a rate upon such new parish and to pay the burial board of that parish, pursuant to their certificate, the expenses they had incurred. *R.* v. *the Overseers of Walcot St. Swithin*, 31 Law J. Rep. (N.S.) M.C. 221; 2 Best & S. 571.

*Quære*—How far the powers of the old board are abrogated by the above section. Ibid.

### (B) BURIAL GROUNDS.

#### (*a*) *For United Parishes.*

The parish of A and the hamlet of C constituted one parish for all ecclesiastical purposes. They had one church for their joint use, and, up to January 1860, one burial-ground adjoining the church. A and C respectively maintained their own poor, appointed their own overseers, surveyors of highways, assessors of taxes and constables, and made out their own jury lists and lists of voters. The ratepayers of each were accustomed to meet in one vestry and to transact all business usually performed in a vestry, with the exception of the above separate matters. The vestry of A and C resolved that a burial board should be appointed, and they did in fact appoint one, and obtained the approval of a Secretary of State. The burial board borrowed money on mortgage for the purposes of providing, laying out and inclosing a burial-ground, and charged the future rates of the parish of A with the payment of such money, and the interest thereon. Subsequently, the board required a sum of money for paying the agreed interest upon the said principal money, and also a sum for the purpose of providing a sinking fund in order to pay off the debt, and they made an order upon the overseers of C to pay out of the rates for the relief of the poor of C the sum of —*l.*, which had been ascertained by apportioning the expenses between A and C in proportion to the value of the property in them, as rated to the relief of the poor:—Held, that A and C were united parishes within the meaning of section 11. of the 18 & 19 Vict. c. 120, and that the one burial board was rightly constituted for the two together:—Held, also, that the order upon the overseers of C was good, as the proportion to be paid by A and C respectively ought to be calculated according to the rateable value from time to time as it became necessary to raise the money:—Held, also, that the expenses of providing a burial-ground, of paying the mortgage moneys, and the ordinary expenses of maintaining the burial-ground were to be raised in the same way:—Held, also, that the mortgage-deed was not defective by reason of its charging the sum borrowed upon the future rates of the one parish, and also upon the future rates of the other part of the parish. *R.* v. *the Overseers of Coleshill*, 31 Law J. Rep. (N.S.) Q.B. 219; 2 Best & S. 825: affirmed in Ex. Ch., 34 Law J. Rep. (N.S.) Q.B. 96; 4 Best & S. 667.

(*b*) *Closing.*

The 18th section of the 18 & 19 Vict. c. 128,—which enacts, that in every case in which an Order in Council is issued for the discontinuance of burials in any churchyard or burial-ground, the burial board or churchwardens, as the case may be, shall maintain such churchyard or burial-ground of any parish in decent order and keep its fences in repair, the expenses to be repaid by the overseers out of the poor-rates of the parish or place in which such burial-ground is situate,—applies only to a burial-ground belonging to a parish, and does not extend to a burial-ground the property of private persons. *R.* v. *the Burial Board for St. John, Westgate, and Elswick*, 31 Law J. Rep. (N.S.) Q.B. 15; 1 Best & S. 679: affirmed in Ex. Ch., 31 Law J. Rep. (N.S.) Q.B. 205; 2 Best & S. 703.

(C) Burial Fees.

The Burial Acts do not give or confer upon the vicar of a parish claiming an undefined interest in an adjoining district, of which he is not "incumbent," any right to receive fees for the performance of the burial service over the remains of the inhabitants of such district buried within a cemetery established therein when no fees have ever been paid to the vicar for such service, and their right of sepulture within the parish has always been denied. *Hornby* v. *the Burial Board of Toxteth Park*, 31 Law J. Rep. (N.S.) Chanc. 643; 31 Beav. 52.

An incumbent of a church or ecclesiastical district, to sustain his right to perform the burial service and receive the fees for interment in a cemetery established under the Burial Acts, must shew that the inhabitants of the parish or district from which the person dying came had a right to be interred in the churchyard or burial-ground of the parish or district, and that he would have had a right to the fees had the person dying been interred therein. Ibid.

But an incumbent of a parish or district having neither a churchyard nor burial-ground belonging to the church, or having only a burial-ground in which the right to interment could only be obtained by purchase, is not entitled to perform the burial service in a cemetery over the body of a late inhabitant of his district or to claim any fees for the interment, though the burials in the ground in which interments might be purchased are diminished. Ibid.

A cemetery made under the Burial Acts may in effect convert a district in which a cemetery is established into a distinct parish. Ibid.

In a divided district neither the vicar of the parish nor the incumbents of the churches can claim the fees paid for the burials in a cemetery formed within the district, as none of them collectively or individually fill the character of incumbent within the meaning of the Burial Acts. Ibid.

## BY-LAW.

Under the provisions of a local act, certain persons were empowered to make by-laws for the regulation of the common pastures within the borough of B. Among others, they made a by-law to the following effect: "If any person shall stock or depasture, or attempt to stock or depasture any bull or entire or vicious horse . . . . on any part of the said common pastures, then, and in every such case, the person or persons so offending, and the owner or owners of the said stock or cattle, shall respectively forfeit and pay for every such offence the sum of 5*l.*, to be levied and recovered according to the form of the statute in that behalf":—Held, that this by-law was divisible; and that although the latter part as to the owners of the animal was bad, the former part was good, and therefore that a person who depastured a vicious horse upon the common pastures might be ordered to pay the 5*l.* penalty. *R.* v. *Lundie*, 31 Law J. Rep. (N.S.) M.C. 157.

## CANAL AND CANAL COMPANY.

(A) Construction of Canal Acts.
- (*a*) *Compensation to Mine Owners and others.*
- (*b*) *Right of Mine Owner to work Mines when not prohibited.*
- (*c*) *Rights of Fishing.*

(B) Tolls; Inequality.

(A) Construction of Canal Acts.

(*a*) *Compensation to Mine Owners and others.*

By the 9 Geo. 4. c. 98. the undertakers of the Aire and Calder Navigation were empowered to make a canal, and enter lands for the purpose, making satisfaction to the owners; and in case a difference should arise between the undertakers and the owner of any lands, &c., which might be taken and damaged or prejudiced by the execution of any of the powers granted by the act "touching the purchase-money or recompense to be made," a jury were to be summoned who were "to assess and ascertain the sum to be paid for the purchase of the land, and also what other separate and distinct sum should be paid by way of recompense, either for the damage which might before that time have been sustained as aforesaid, or for the future temporary or perpetual continuance of any recurring damages which should have been so occasioned, and the cause of which should have been only in part obviated or repaired by the undertakers, and which could or would be no further obviated, repaired or remedied by them." All mines and minerals were reserved to the owners of the lands taken or used for the purposes of the act, with power to get them, provided that in working them no injury should be done to the canal; and power was given to the undertakers to enter any lands through or near to which the canal should pass, and to examine any mines worked thereon, and, if they had been worked contrary to the direction of the act, to require the persons so working the mines to desist. There were no clauses in the act obliging the undertakers to purchase the minerals under or near the canal, or to make any compensation to the owners for preventing the working so near to the canal as to injure it. In 1833 certain lands were conveyed under the act to the undertakers. It was known at the time that there were seams of coal under the land conveyed and under the adjoining land of the same owner, but it had not been then ascertained whether the coal could or would be gotten. There was no dispute between the parties as

to the amount to be paid; one sum was agreed on as the purchase-money, and no question was raised as to any other compensation for damage. The canal was constructed through the land; and a tenant, under a lease subsequent to the conveyance, began to work the coal under and near to the canal, when he was stopt by the undertakers under the powers of the act:—Held, that the tenant was not entitled to any compensation frnm the undertakers for this hinderance. *R.* v. *the Undertakers of the Navigation of the Rivers Aire and Calder*, 30 Law J. Rep. (N.S.) Q.B. 337.

The Dudley Canal Act, 16 Geo. 3, provides that no owner of mines shall carry on any work for getting such mines under any tunnel, or within twenty yards of the same, without the consent of the company; and that no owner of any mines shall, without such consent, carry on any work for coal or minerals within twelve yards of the canal, "except as hereinafter mentioned." Then follows a clause which provides that the owners of mines may without consent, get coals and minerals beyond the prescribed limits; and also a clause which provides that the company may enter upon lands and mines for discovering the distance of the canal from the working parts of such mines, and that if any mine shall be worked contrary to the act, they may use all necessary means for making the canal safe. By a subsequent clause it is provided, that when the owner of any mine lying under the canal or within the limited distance shall be desirous of working the same, he shall give the company three months' notice of his intention, and upon the receipt of such notice it shall be lawful for the company to inspect such mines in order to determine what minerals may be gotten without prejudice to the canal; and if upon inspection the company shall refuse to permit the owners of such mines to work them, then the company shall within three months pay to the owners the value thereof. Another clause provides, that nothing in the act contained shall defeat the right of any owner of land through which the canal shall be made, to the mines under the land used for the canal, and that it shall be lawful for such owner to work such mines, provided that no injury be done to the navigation:—Held, in the Exchequer Chamber, that the prohibition against working any mine within twenty yards of a tunnel without the consent of the company, was not absolute, but subject to the same exception as working within twelve yards of the canal, and therefore if the company refuse to permit the owner of a mine to work it within twenty yards of a tunnel they are bound to pay him the value thereof. *The Birmingham Canal Navigation Co.* v. *the Earl of Dudley* (Ex. Ch.), 7 Hurls. & N. 969.

By the 32 Geo. 3. c. 100, "an Act for making a canal from the Cromford Canal in the county of Nottingham to the town of Nottingham and the river Trent," certain commissioners were appointed for carrying out the purposes of the act, who were directed, in case of a dispute between them and the proprietors of land adjoining the canal concerning the amount of compensation to be paid to the latter for damages sustained by the execution of the powers of the act, to take measures for summoning a jury, for whose verdict as to the amount of compensation they should give judgment. It was then declared that the verdict of the jury and the judgment of the Commissioners should be binding and conclusive to all intents and purposes:—Held, that the verdict of the jury was conclusive only as to the amount, and not as to the right of the claimant to compensation, which might be elsewhere contested. *Barber* v. *the Nottingham and Grantham Rail. Co. (Lim.)*, 32 Law J. Rep. (N.S.) C.P. 193; 15 Com. B. Rep. N.S. 726.

In an action for injury caused by the leaking of water from a reservoir belonging to the canal, it was pleaded that the damage was caused by the leaking of water through the banks of the reservoir, and not in any manner whatsoever by reason of the execution of the powers of the act, but by the default of the plaintiffs themselves in sinking shafts and pits in their own land, and so causing large quantities of water which naturally lay in the underground soil in which the pits and shafts were sunk, and which formed the banks and support of the said reservoir, to leak out and flow into the said shafts and pits:—Held, on demurrer, that the plea was bad. Ibid.

*(b) Right of Mine Owner to work Mines when not prohibited.*

A Canal Act provided that no owner of any mines should carry on any work for the getting of coal or minerals within the distance of twelve yards from the canal; nor should any coals or other minerals be got under any part of the canal or towing-paths or under any reservoir to be made by the company, or under any land or ground lying within the distance of twelve yards of either side of the canal, or any reservoir, &c., except as thereinafter mentioned, without the consent of the company. By another clause, it was provided, that when the owner of any coal-mine, &c. lying under the canal, towing-path, reservoir, &c., or within the distance thereinbefore limited, should be desirous of working the same, then such owner should give notice of his intention to the company three months before he should begin to work such mines lying as aforesaid; and upon the receipt of such notice it should be lawful for the company to inspect such mines, in order to determine what coal or other minerals might be come at and actually gotten, &c., and if the company should neglect to inspect such mines within thirty days next after the receipt of such notice, then the owners of such mines were authorized to work such part of the said mines as lay under the canal or reservoir, or within the distance aforesaid; and if upon inspection the company should refuse to permit the owners of the mines to work such parts of the mines lying as aforesaid, or any part thereof, as they might have come at and gotten, then the company should within three calendar months pay to the owners the value thereof. By another clause, it was provided, that nothing in the act contained should defeat, prejudice or affect the right of any owner of lands or grounds upon or through which the canal, &c. should be made, to the mines lying within or under the lands or grounds to be set out or made use of for such canal, but all such mines were reserved to such owners respectively; and that it should be lawful to such owners, subject to the conditions therein contained, to work all such mines, provided that in working such mines no injury be done to the said navigation, anything therein contained to the contrary notwithstanding:—Held, that where notice had

been given by the owner of a coal-mine of his intention to work the same under a reservoir belonging to the canal company, and the latter did not inspect the mines, or prohibit his working, or purchase his rights, the mine-owner, notwithstanding the proviso to the last-mentioned clause, was entitled to work the mine under such reservoir in the usual and ordinary mode; and, the reservoir having been damaged by reason of such working, that no action was maintainable by the company against the mine-owner for such damage. *The Stourbridge Canal Co.* v. *the Earl of Dudley* (Ex. Ch.), 30 Law J. Rep. (N.S.) Q.B. 108; 3 E. & E. 409.

(*c*) *Rights of Fishing.*

A Canal Act provided that the lord of every manor through which the canal and reservoirs thereto belonging should be made, should be entitled to the right of fishery in so much of the canal and reservoirs as should be made in, over or through the common waste lands within his manor, and that the owners of any other lands through which the canal should be made, should also have the like right of fishery of and in so much of the said canal as should be made in, over or through their lands wherein they had the right of fishery before the passing of the act:—Held, that the right reserved to the lord of the manor was confined to common or waste lands where the lord was owner of the soil, and therefore did not extend to open Lammas lands, the soil of which was in various owners, the occupiers intercommoning for a certain part of the year. *The Grand Union Canal Co.* v. *Ashby*, 30 Law J. Rep. (N.S.) Exch. 203; 6 Hurls. & N. 394.

(B) Tolls; Inequality.

A canal company was incorporated by a local and personal act, which provided that the rates charged by the company of proprietors for the carriage of coal and other merchandise should be equal throughout the whole length of the canal. By the 8 & 9 Vict. c. 28, the proprietors of any canal are allowed to alter the tolls, rates or duties granted to them upon the whole or any portion of the canals according to local circumstances, or the quantity of traffic, or otherwise as they may think fit. The act also provides that the tolls levied under its powers are to be charged equally to all persons and after the same rate, whether per mile or per ton per mile. The company having imposed a charge of a penny a ton per mile for all coal conveyed upon their canal, together with an additional rate of one half-penny a ton for all coal conveyed a less distance than five miles,—Held, that they might lawfully impose such charges on the plaintiffs, and at the same time charge only three farthings a ton per mile for coals conveyed by them for others over a distance less than five miles, such persons having agreed to secure to the defendants a fixed minimum of tolls. *Strick* v. *the Swansea Canal Co.*, 33 Law J. Rep. (N.S.) C.P. 240; 16 Com. B. Rep. N.S. 245.

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## CARRIER.

[The term "lace" in the 11 Geo. 4. & 1 Will. 4. c. 68. not to include machine-made lace.—28 & 29 Vict. c. 94 (the Carriers' Act Amendment Act, 1865).]

(A) Rights and Liabilities of Carriers.
- (*a*) *Conveyance of Passengers.*
- (*b*) *Conveyance and Care of Passengers' Luggage.*
- (*c*) *Conveyance of Goods.*
  - (1) *Arrangement with Carrier's Agent.*
  - (2) *Special Contract limiting the Common Law Liability.*
    - (i) *Effect of General Notice.*
    - (ii) *Reasonableness of Conditions.*
- (*d*) *Conveyance of Goods within Carriers' Act*, 11 *Geo.* 4. *&* 1 *Will.* 4. *c.* 68. *s.* 1.
- (*e*) *Conveyance of Dangerous Goods.*
- (*f*) *Conveyance of Live Stock.*
  - (1) *As Common Carriers and under Special Limitations of Liability.*
  - (2) *Declaration of Value.*
- (*g*) *Conveyance beyond their own Railway.*
- (*h*) *Delivery.*
- (*i*) *Right to distrain Goods for Tolls.*

(B) Charges and Traffic Arrangements.
- (*a*) *Undue Preference and Unequal Charges.*
- (*b*) *Allowance for Cost of Collection and Delivery to Carriers.*
- (*c*) *Terminal Charges.*

(C) Damages; Criterion of.

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(A) Rights and Liabilities of Carriers.

(*a*) *Conveyance of Passengers.*

The plaintiff took a ticket from the defendants from C to N; the plaintiff, after waiting a long time, was told by a porter that the train was late in consequence of an accident, and the train eventually arrived an hour and a half late. The consequence was that the plaintiff was late for the train at G, which would have carried him on to N. The train-bill was not put in, but only some correspondence in which the defendants repudiated their liability on the ground that by the train-bills they gave notice they would not be liable for the trains not keeping time:—Held, that there was no evidence of a cause of action. *Hurst* v. *the Great Western Rail. Co.*, 34 Law J. Rep. (N.S.) C.P. 264; 19 Com. B. Rep. N.S. 310.

A by-law of a railway company ran thus:—"Each passenger booking his place will be furnished with a ticket, which he is to shew and deliver up when required to the guard, &c.," and "each passenger not producing or delivering up his ticket when required, is hereby subjected to a penalty not exceeding 40*s.*":—Held, that under this by-law holders of annual tickets for travelling on the line are bound to produce their tickets to the railway officers as much as ordinary passengers. *Woodard* v. *the Eastern Counties Rail. Co.*, 30 Law J. Rep. (N.S.) M.C. 196.

(*b*) *Conveyance and Care of Passengers' Luggage.*

A railway passenger, with knowledge that the railway company, though allowing each passenger to carry free of charge a certain amount of luggage, required all merchandise carried to be paid for, took with him, as if it was personal luggage, a case of merchandise, and did not pay for it as such:—Held, that no contract whatever touching the same arose between him and the company, and therefore

on its being lost he was not entitled to recover the value of it from the company. *The Belfast and Ballymena Rail. Co. and the Londonderry and Coleraine Rail. Co.* v. *Keys*, 9 H.L. Cas. 556.

A declaration, or plaint, alleged that A, at the request of B, a common carrier on a railway, became a passenger by the said railway, and paid his fare in that behalf; that C was a servant of B, and as such servant required A to deliver to him, C, a case which A was then carrying with him, in order that the same might be carried in a certain compartment of the train; that A delivered to C the said case to be safely carried, and to be re-delivered at the end of the journey, then averred the duty of B, as a common carrier, and A's own performance of all the conditions precedent to the discharge of that duty by B, and that the case was not re-delivered, whereby, &c. The defendant pleaded that A had notice of the rule on the said railway, that passengers and their personal luggage were carried at one rate, and merchandise carried at another rate of payment; and that payment was required for all merchandise carried on the railway; that the plaintiff took the case with him as personal luggage, and did not pay for the same as merchandise; and that the case contained merchandise. The plaintiff replied that the case was, in appearance and fact, fit and proper for the conveyance of merchandise, not luggage, and did contain merchandise; that there was no improper concealment on his part, and that the defendant received the same as personal luggage, and without making objection thereto, and without demanding extra remuneration:—Held, that even supposing that the declaration shewed a good cause of action by reason of a contract between A and B, through C, the servant, still the plea was an answer to it, and that the effect of the plea was not got rid of by the replication, which was clearly bad, for not averring, in any way, that the defendants had notice or knowledge that the case contained merchandise. Ibid.

The plaintiff took a ticket as a passenger on a railway, for which he paid the ordinary fare. By the railway company's act of parliament each passenger was allowed to take with him his ordinary luggage not exceeding a certain weight without any charge for the carriage. The plaintiff had no knowledge of this act, and he brought with him on the railway as luggage a box which contained only merchandise, but did not exceed the weight of luggage allowed to passengers. The box had the word "glass" written on the top, but no question was asked by the company's servants or any information given by the plaintiff as to its contents. In an action for the loss of the box,—Held, that as the box contained merchandise and not luggage, there was no contract by the company to carry it, and the company therefore were not liable. *Cahill* v. *the London and North-Western Rail. Co.*, 30 Law J. Rep. (N.S.) C.P. 289; 10 Com. B. Rep. N.S. 154.

*Semble*—Per *Erle, C.J.*, and *Willes, J.*, that the provisions of the act of parliament as to luggage were binding on the plaintiff, who was a passenger, and that therefore he must be taken to have had notice that the company did not carry merchandise gratuitously, but only the ordinary luggage of the passenger. Ibid.

And held, on appeal, by the Exchequer Chamber, that if a railway company, which by the terms of its regulations allows a passenger to take personal luggage free of charge, chooses to let him take as luggage a package which it knows to be merchandise, the company is responsible if the package be lost. But if the passenger takes a package of merchandise as his luggage, and the company does not know that it is merchandise, it is not answerable for the loss. The mere fact that a package looks like merchandise and is marked "glass," is not enough to fix the company with responsibility. Ibid., 31 Law J. Rep. (N.S.) C.P. 271; 13 Com. B. Rep. N.S. 818.

By the 17 & 18 Vict. c. ccxi. s. 39. (local and personal), it was provided that every passenger might take with him his ordinary luggage, not exceeding 150 lb. in weight for first-class passengers, and other passengers in proportion, free of charge. The plaintiff had taken a cheap first-class excursion ticket subject to the express condition, of which he had notice, that no luggage was allowed. He had, nevertheless, put his portmanteau, which weighed less than 150 lb., into the train:—Held, that he had waived the benefit of the above section, and that he was bound to pay for the carriage of the portmanteau. *Rumsey* v. *the North-Eastern Rail. Co.*, 32 Law J. Rep. (N.S.) C.P. 244; 14 Com. B Rep. N.S. 641.

Where a person has, by fraud, induced another to perform a service for him, intending not to pay for the performance of it, still there is a liability implied by the law, which may be enforced in the same way as an obligation arising out of an express contract. Ibid.

The holder of a railway excursion ticket,—expressed to be "issued subject to the conditions contained in the company's time and excursion bills," one of which conditions was, that "luggage under 60 lb." should be carried "free, at passenger's own risk," is bound by the terms of this special contract, which is not void under the Traffic Act; and he has consequently no claim against the company for the loss of his luggage, although it be proved that he did not know the condition on which it was being carried. *Stewart* v. *the London and North-Western Rail. Co.*, 33 Law J. Rep. (N.S.) Exch. 199; 3 Hurls. & C. 135.

An attorney, going by railway to attend a county court, took in his portmanteau documents and banknotes for use in certain causes in which he was engaged as an attorney. The portmanteau was carried under the private act of the railway company without charge as passenger's "ordinary luggage"; it was missing at the end of the journey, and not recovered for some days:—Held, that these articles were not "ordinary luggage" of the plaintiff as a passenger, and that the railway company were not liable in damages for the consequences of the temporary loss of them. *Phelps* v. *the London and North-Western Rail. Co.*, 34 Law J. Rep. (N.S.) C.P. 259; 19 Com. B. Rep. N.S. 321.

The plaintiff, having travelled by the defendants' railway, left a box at their cloak-room, paying 2*d.* for booking, and received a ticket, on the condition that the defendants would not deliver up luggage deposited without the production of the ticket. The plaintiff called on the next (Sunday) evening with

the ticket, but there was no one in attendance at the room; and after waiting some time, the plaintiff went to another part of the station, found an attendant, and so obtained his box: he was thus delayed forty minutes. The cloak-room on week-days was practically open all day, but on Sunday only a few minutes before and after trains arrived; but the defendant was not aware of this. The plaintiff having brought an action for damages caused by this delay,—Held, that the ticket being silent on the subject, the contract by the defendants was to re-deliver the box within a reasonable time after a reasonable demand; but whether there had been unreasonable delay, under the circumstances, was a question for the jury alone, and that there was evidence which ought to be left to them. *Stallard* v. *the Great Western Rail. Co.*, 31 Law J. Rep. (N.S.) Q.B. 137; 2 Best & S. 419.

The plaintiff, after travelling by the line of a railway company, deposited her bag, containing wearing-apparel and jewellery of the value of 20*l.*, at the cloak-room of the railway station. On so depositing the bag, the plaintiff paid the charge of 2*d.*, and received a ticket, on the back of which was printed—"The company will not be responsible for articles left by passengers at the station unless the same be duly registered, for which a charge of 2*d.* per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket or satisfactory evidence of the ownership being adduced. A charge of 1*d.* per diem, in addition, will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The company will not be responsible for any package exceeding the value of 10*l.*" It did not appear whether the plaintiff read this notice on the ticket, but she brought the ticket to the cloak-room when she returned there for the bag. In an action against the company for not safely keeping the bag, — Held, that the Railway Traffic Act (17 & 18 Vict. c. 31. s. 7.) did not apply, as the company did not receive the bag in the capacity of carriers. *Van Toll* v. *the South-Eastern Rail. Co.*, 31 Law J. Rep. (N.S.) C.P. 241; 12 Com. B. Rep. N.S. 75.

Held, also, that the inference from the above facts was, that the plaintiff assented to the terms of the notice on the ticket, and that therefore as the value of the articles exceeded 10*l.* the company were not liable for their loss, although occasioned by the company's negligence. Ibid.

### (c) *Conveyance of Goods.*

#### (1) *Arrangement with Carrier's Agent.*

A, a carrier, was in the habit of carrying goods for B; the ordinary course was to deliver the goods to B immediately on their arrival at M, where B carried on business. B requested A to employ C as his agent, and afterwards, without notice to A, arranged with C not to deliver in due course, but to give him notice of the arrival of the goods, and to keep them till he sent for them. C on one occasion forgot to give notice pursuant to this arrangement, and B brought his action against A for such neglect:—Held, that A was not liable. *Butterworth* v. *Brownlow*, 34 Law J. Rep. (N.S.) C.P. 266; 19 Com. B. Rep. N.S. 409.

#### (2) *Special Contract limiting the Common Law Liability.*

##### (i) *Effect of General Notice.*

The appellant's agent was in the habit of sending goods by the respondents' railway, and had received printed notices from them stating that the company would receive, forward and deliver goods, solely subject to the conditions thereunder stated; and among the conditions thereunder stated was a condition that the company should not be responsible for the loss of or injury to any marbles unless declared and insured according to their value. The agent, by the direction of the appellant, sent certain marbles to one of the company's stations, and instructed the carter to inquire what the insurance would be, who was told by a clerk of the company that he did not know unless the value of the goods was stated. Some correspondence ensued as to the rates of insurance for marbles, and the agent was informed verbally what the respondents' charge for the carriage of the marbles would be at the insured rate and what at the uninsured rate. The agent subsequently, by a letter of the 1st of August, 1857, instructed the company to forward the marbles "not insured," having just before such letter again received notices similar to those before mentioned. The marbles were forwarded as directed, and when delivered were found to be damaged by exposure to rain. In an action for this damage by the appellant against the company as common carriers, the company pleaded, under the 17 & 18 Vict. c. 31. s. 7, fourthly, that the marbles were delivered to be carried by them subject to a certain special contract, whereby it was agreed that they should not be responsible for the loss of or injury to marbles unless declared and insured according to their value, and that the same were not nor was any part thereof so declared or insured; fifthly, that the marbles were delivered and received on the above condition, and that such condition, made by the respondents and assented to by the appellant, was a just and reasonable condition. It having been decided by the Exchequer Chamber (reversing the judgment of the Queen's Bench) that the defendants were entitled to the verdict on these pleas, the House of Lords reversed that decision, and affirmed the judgment of the Queen's Bench; holding that no general notice given by a railway company is valid in law for the purpose of limiting the common law liability of the company as carriers; but that such common law liability may be limited by such conditions as the Court or Judge shall determine to be just and reasonable; and,—per the *Lord Chancellor* and *Lord Wensleydale* (*Lord Cranworth* and *Lord Chelmsford* dissenting),—such conditions must be embodied in a special contract in writing, to be signed by the owner or person delivering the goods. Held, further, *Lord Chelmsford* dissenting, that the condition insisted upon by the company was neither just nor reasonable, as the effect of such a condition would be to exempt the company from responsibility for injury however caused, whether by their own negligence, or even by fraud or dishonesty on the part of their servants. Held, further, *Lord Chelmsford* dissenting, that the letter of the 1st of August, 1857, did not constitute a special contract in writing,

the words "not insured" being insufficient either expressly or by reference to embody the condition itself into the letter. *Peek* v. *the North Staffordshire Rail. Co.* (House of Lords), 32 Law J. Rep. (N.S.) Q.B. 241; 10 H.L. Cas. 473.

(ii) *Reasonableness of Conditions.*

[See *ante*, (i) *Effect of General Notice.* And see *post*, (B) (*a*).].

A railway company were sued as common carriers for the loss of empty packages, which had already traversed the line of railway of the defendants when full, and for the return carriage of which, when empty, it was the custom not to make any further charge. The packages were delivered to the defendants at a station on their line of railway, addressed to a station on another line, to which place the defendants were not carriers. The person who delivered the goods signed the two following, with other conditions:—(1.) The company will not be answerable for the loss, or detention of, or damage to wrappers, or packages of any description charged by the company as "empties." (2.) Nor in respect of goods destined for places beyond the limits of the company's railway; and, as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money which may be received by the company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignors, and for the purpose of being paid to the other carrier." The goods were safely carried by the defendants to the termination of their own line of railway, and there delivered to another company. They were lost on the railway of the latter company:—*Semble*, that, in respect of the empty packages, the defendants were not to be considered as gratuitous bailees, and that the first condition was, therefore, not just and reasonable within the meaning of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31. s. 7). But held, that the second condition was just and reasonable within the meaning of that act, and was a good answer to the plaintiff's claim. *Aldridge* v. *the Great Western Rail. Co.*, 33 Law J. Rep. (N.S.) C.P. 161; 15 Com. B. Rep. N.S. 582.

*Quære*—Whether, without the conditions, the defendants as to forwarding these goods on other lines were liable as common carriers. Ibid.

A railway company gave public notice that fish would only be conveyed on their line by special agreement, and by particular trains; and that the sender should sign the following conditions:—"The company shall not be responsible under any circumstances for loss of market or for other loss of injury arising from delay, or detention of train, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud:—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the conditions were just and reasonable within the meaning of the 17 & 18 Vict. c. 31. s. 7. In the case of a carrier "gross negligence" includes the want of reasonable care, skill and expedition which may properly be expected from him. *Beal* v. *the South Devon Rail. Co.* (Ex. Ch.), 3 Hurls. & C. 337.

(*d*) *Conveyance of Goods within Carriers' Act, 11 Geo. 4. & 1 Will. 4. c. 68. s. 1.*

Where the sender of a parcel by a carrier declares the nature and value of the articles in it at the time of its delivery to the carrier, if the carrier do not demand any increased rate for carriage to which he may be entitled under the Carriers' Act, and only the ordinary charge for carriage be paid, the carrier is not protected by the statute from his common law liability in case of an injury happening to the parcel during its journey: affirming the decision below, 30 Law J. Rep. (N.S.) Exch. 153; 6 Hurls. & N. 366. *Behrens* v. *the Great Northern Rail. Co.* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 299; 7 Hurls. & N. 950.

The question whether an article is of the description mentioned in the 1st section of the Carriers' Act, 1 Will. 4. c. 68. is a question of fact for a jury. *Brunt* v. *the Midland Rail. Co.*, 33 Law J. Rep. (N.S.) Exch. 187; 2 Hurls. & C. 889.

Elastic silk webbing is a woven fabric composed of one-third silk and two-thirds of india-rubber and cotton, the silk being the most valuable of the materials, and this webbing is called in the trade "silk web," as distinguished from cotton web:—Held, the question being reserved for the Court with power to draw inferences, that this webbing is within the definition in the act of "silks wrought up with other materials." Ibid.

(*e*) *Conveyance of Dangerous Goods.*

A person who sends an article of a dangerous nature, to be carried by a carrier, is bound to take reasonable care that its dangerous nature should be communicated to the carrier and his servants who have to carry it; and if he does not do so, he is responsible for the probable consequences of such omission. Where, therefore, the defendant caused a carboy, containing nitric acid, to be delivered to the plaintiff, who was one of the servants of a carrier, in order that it might be carried by such carrier for the defendant, and the defendant did not take reasonable care to make the plaintiff aware that the acid was dangerous, but only informed him that it was an acid, and the plaintiff was burnt and injured by reason of the carboy bursting whilst, in ignorance of its dangerous character, he was carrying it on his back from the carrier's cart, it was held that the defendant was liable in an action for damages. *Farrant* v. *Barnes*, 31 Law J. Rep. (N.S.) C.P. 137; 11 Com. B. Rep. N.S. 553.

(*f*) *Conveyance of Live Stock.*

(1) *As Common Carriers and under Special Limitations of Liability.*

The plaintiff delivered to the defendants, a railway company, a dog to be carried, and signed a ticket containing the following terms: "Received the annexed ticket subject to the following conditions: The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value declared. The company will in no case be liable for injury to any horse

or other animal or dog, of whatever value, where such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2*l.* 10*s.* per cent. upon the declared value above 40*l.*, whatever may be the amount of such value, and for whatever distance the animal is to be carried." The value of the dog was 21*l.*, but the plaintiff made no declaration of its value, and paid only the regular fare, 3*s.* The dog escaped from the train during the journey, without any neglect or default on the part of the company. The plaintiff having sued the company for the loss, it was held, in the Exchequer Chamber (*dissentiente Wilde, B.*), reversing the judgment below, that the plaintiff was not entitled to recover, *Erle, C.J.* and *Keating, J.* being of opinion that section 7. of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, was confined in its application to cases where the loss or injury was occasioned by the neglect or default of the company, and had no bearing on a case such as the present, where the loss arose from pure accident, and that the company were exempt from liability by the terms of their contract. *Harrison* v. *the London, Brighton and South Coast Rail. Co.* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 113; 2 Best & S. 122.

Held, further, by *Erle, C.J., Williams, J., Channell, B.* and *Keating, J.*, that, assuming that the statute applied to this case, the conditions in the ticket were reasonable and just, and that they were not to be construed as meaning to exempt, or as having the effect of exempting the company from liability for loss or injury occasioned by wilful misconduct on their part. Ibid.

Per *Erle, C.J.*, it is for a jury, not for the Judge, to say whether the per-centage charged on the extra value declared in respect of any animal is reasonable. Ibid.

Conditions annexed by a railway company to their "cattle tickets," that "the company are to be free from all risk and responsibility with respect to any loss or damage arising in the loading or unloading, or injury in the transit from any cause whatever, it being agreed that the animals are to be carried at the owner's risk," and that "the owner of the cattle is to see to the efficiency of the waggon before his stock is placed therein, complaint to be made in writing to the company's officer before the waggon leaves the station," are—on the authority of *M'Manus* v. *the Lancashire and Yorkshire Rail. Co.*—neither just nor reasonable. *Gregory* v. *the West Midland Rail. Co.*, 33 Law J. Rep. (N.S.) Exch. 155; 2 Hurls. & C. 944.

The defendants, a railway company, received certain cattle to be carried for the plaintiff to B station. They induced him to sign a ticket containing certain "special conditions," among others that the defendants were not to be answerable for "any consequences arising from over-carriage, detention or delay in, or in relation to the conveying or delivering of the said animals, however caused." The cattle were sent to the H station, which was a more distant station than the B station, and where they remained for some hours until they were found by the plaintiff. In consequence of the delay, and from want of food and water, the cattle were injured. There was no consideration for the special contract by charging the plaintiff a smaller rate of charge, or anything of the kind:—Held, that the cattle were injured within the meaning of 17 & 18 Vict. c. 31. s. 7, and also that the condition in the ticket was unreasonable within the meaning of that section. *Allday* v. *the Great Western Rail. Co.*, 31 Law J. Rep. (N.S.) Q.B. 5; 5 Best & S. 903.

(2) *Declaration of Value.*

The first count of a declaration alleged, that the plaintiff employed the defendants, a railway company, to provide trucks for the carriage of horses of the plaintiff for reward, in consideration whereof the defendants promised that the trucks should be reasonably fit and proper for the carriage of the plaintiff's horses; breach by the defendants in not providing proper trucks, whereby the plaintiff's horses were injured. Second count—that the defendants, as carriers on the railway, having received from the plaintiff certain horses to be conveyed by them on their railway for hire, the said horses were injured in consequence of the defective state of the trucks provided by the defendants, and their negligence and want of care. The defendants paid 25*l.* into court, and the plaintiff claimed damages *ultra.* At the trial, it appeared that before the defendants would furnish the trucks, the plaintiff was requested by them to sign, and did sign, a declaration, that the value of each horse did not exceed 10*l.*, and in consideration of the rate charged for conveyance, that he agreed that they were to be carried entirely at the owner's risk. Evidence was given for the plaintiff that the horses were worth more than 10*l.* each, and it was admitted that, if taken at their real value, 40*l.* was the amount of compensation the plaintiff would be entitled to, but if at 10*l.* each, then 25*l.* was the right amount:—Held, that the declaration of the value of the horses was not part of the contract between the plaintiff and the company, but a statement of a fact by the plaintiff assumed and agreed to by the company as the basis upon which the contemplated contract was to be framed; and that consequently the plaintiff was not at liberty afterwards to deny the truth of this conventional state of the facts, nor to shew that the real value of the horses exceeded 10*l.* each: affirming the decision below, 31 Law J. Rep. (N.S.) Exch. 65; 7 Hurls. & N. 477. *M'Cance* v. *the London and North-Western Rail. Co.* (Ex. Ch.), 34 Law J. Rep. (N.S.) Exch. 39; 3 Hurls. & C. 343.

The 7th section of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enables a railway company to make reasonable conditions with respect to receiving, forwarding and delivering animals, &c., and provides that no greater damages shall be recovered from such company for the loss of or injury to a horse than 50*l.*, unless the person sending or delivering the same shall, at the time of such delivery, have declared it to be of a higher value than as above mentioned, in which case it shall be lawful for the company to demand and receive reasonable per-centage upon the excess of the value so declared, and which shall be paid in addition to the ordinary rate of charge, and such increased rate of charge shall be notified as prescribed in the 11 Geo. 4. & 1 Will. 4. c. 68. The plaintiff sent a horse of great value to the yard of the defendants' railway station

or the purpose of its being carried by their railway. By the direction of one of the defendants' servants the plaintiff's groom was leading the horse to the platform, when it was startled by another horse, and backed upon some sharp iron girders lying on the spot, receiving such an injury that it was necessary to kill it. No declaration of value had been made, nor had any ticket been taken or fare demanded; the usual practice at that station being to put the horse into the box, in which it was to be conveyed, in the first instance. The defendants were guilty of negligence in putting the girders in the place upon which they were lying:—Held, by *Cockburn, C.J.*, that as the negligence complained of was not the negligence of the defendants in their character of carriers, they were not entitled to the protection of the above section; and secondly, that if they would have been otherwise entitled to the protection, there was no evidence of their having notified the increased rate of charge as required by the section; and that therefore, on both grounds, the plaintiff was entitled to recover the full value of the horse. Held, by *Mellor, J.*, that the provision in the section applied not only to the risks of carriage and conveyance, but also to those which attend the receiving and delivery; that the injury was done in receiving the horse; and therefore that, as there was no declaration of value, the plaintiff could not recover more than the 50*l.* Held, by *Blackburn, J.*, that the statute is not confined to neglects and defaults after the relation of carrier and customer has been completely established, and that the real value above 50*l.* cannot be recovered unless the declaration is made before the injury happens, though it happen before the receipt by the railway company be complete. *Hodgman* v. *the West Midland Rail. Co.*, 33 Law J. Rep. (N.S.) Q.B. 233; 5 Best & S. 173.

A rule to reduce damages is a rule to enter the verdict within the Common Law Procedure Act, 1854, s. 34, and therefore gives a right to appeal. Ibid.

Section 7. of the 17 & 18 Vict. c. 31. (Railway and Canal Traffic Act) provides that no greater damages shall be recovered from a railway company for the loss or injury to a horse than 50*l.*, unless the person sending or delivering the same shall at the time of such delivery have declared it to be of a higher value, in which case it shall be lawful for the company to demand and receive reasonable percentage upon the excess of the value so declared, and which shall be paid in addition to the ordinary rate of charge:—Held, that the knowledge of the company as to the value of a horse not derived from a declaration to that effect by the sender does not give the company any right to demand an increased rate of charge under the above section. Held, also, that to entitle the company to demand such increased rate, the declaration must be made with an intention by the sender of the horse that it should so operate. *Robinson* v. *the South-Western Rail. Co.*, 34 Law J. Rep. (N.S.) C.P. 234; 19 Com. B. Rep. N.S. 51.

(*g*) *Conveyance beyond their own Railway.*

[See *Aldridge* v. *Great Western Rail. Co.*, *ante*, (*c*) (2) (ii).]

By arrangement between the Great Western Railway Company and the South Wales Railway Company, whose lines of rails were in connexion, each company was to work both the lines, and the fares were to be divided between them. The plaintiff, wishing to go from London to Milford on the South Wales line, took a railway ticket at the Paddington Station of the Great Western Railway Company, paid his fare, and became a passenger to be conveyed by that company to Milford. After the train had passed from the Great Western Railway on to the South Wales Railway, it came (without any negligence on the part of those who managed the train) into collision with a locomotive engine left on the line by the negligence of some servants of the South Wales Company, and the plaintiff was injured:—Held, that the Great Western Railway Company was liable to the plaintiff for the injury; for a railway company impliedly contracts with a passenger to use due and reasonable care in keeping its line in a proper state for traffic, and by the arrangement between the companies the South Wales line became the line of the Great Western Railway Company in respect of their obligation to passengers. *Blake* v. *the Great Western Rail. Co.*, 31 Law J. Rep. (N.S.) Exch. 346; 7 Hurls. & N. 987.

Per *Byles, J.*, the same obligation would have arisen from the contract to carry the whole distance if no arrangement had existed between the companies. Ibid.

Goods were delivered to P & Co., agents at Worcester for the Great Western Railway, to be carried to Chester "via Stafford." The goods were conveyed over the line of the Great Western Railway from Worcester to Stafford, and thence to Chester over the London and North-Western Company's line, the Great Western Railway having no line between Stafford and Chester. The wagons of the Great Western Company travelled the whole journey. P & Co. were also agents for the London and North-Western Company, whom they favoured rather than the Great Western Company:—Held, that there was evidence of one contract with the Great Western Company to carry the whole journey from Worcester to Chester, and that they were therefore liable for any damage done to the goods during the journey. *Webber* v. *the Great Western Rail. Co.*, 34 Law J. Rep. (N.S.) Exch. 170; 3 Hurls. & C. 771.

(*h*) *Delivery.*

Although the consignor of goods directs a carrier to deliver them to the consignee at a particular place, the carrier may deliver them wherever he and the consignee agree. *The London and North-Western Rail. Co.* v. *Bartlett*, 31 Law J. Rep. (N.S.) Exch. 92; 7 Hurls. & N. 92.

The plaintiff having sold corn by sample, to be delivered to the purchaser at his mill, at B, sent the corn by the defendants, railway carriers, paying the freight to B station, and an extra sum for cartage from B to the mill. In pursuance of general orders previously given by the consignee to the defendants, but not communicated to the plaintiff, the defendants left the wheat at their station at B, and advised the consignee of its arrival, who examined it, but left it there for two months, and afterwards refused to take it. The wheat was deteriorated in quality during that time:—Held, that the defendants were not liable to an action by the plaintiff for not delivering at the

mill, as the non-delivery there was pursuant to the orders of the consignee, and that it made no difference in this respect that the plaintiff could not recover the price of the wheat from the purchaser in consequence of there being no acceptance of the wheat within the meaning of the Statute of Frauds. Ibid.

*Semble*—The rights of the plaintiff and the purchaser were not affected by the non-delivery at the mill. Ibid.

A railway company undertaking to carry goods from A to B, must deliver them within a reasonable time, having reference to the means at their disposal for forwarding them; and they are not justified in delaying the delivery by adopting a particular mode of forwarding the goods, merely because that is the usual mode adopted. *Hales* v. *the London and North-Western Rail. Co.*, 32 Law J. Rep. (N.S.) Q.B. 292; 4 Best & S. 66.

*(i) Right to distrain Goods for Tolls.*

By a railway company's act, the tolls which the company were authorized to take were to be paid to such person and in such manner as the company should by notice, to be annexed to the list of tolls, appoint, and in case of refusal on demand to pay such tolls as may have accrued due to the person so appointed to receive the same, such person was empowered to seize the goods in respect of which such tolls ought to have been paid, and also any other goods belonging to the person to whom the goods made liable to seizure should belong, and which should pass on the railway, and to detain the same until payment of such tolls, and to sell the goods and satisfy the tolls thereout as the law directs in cases of distress for rent. The company carried coal on their railway for P, a coal merchant, under an agreement by which P was to pay the monthly accounts for such carriage, at the end of each month by a bill at two months. P stopped payment on the 6th of August, and was adjudicated bankrupt on the 24th of that month, having previously given the company a bill for the amount of the monthly account for carriage of coal, which bill became due on the day P stopped payment. This bill having been presented for payment and dishonoured, the company on the 8th of August seized all the coal which P had delivered to them to be carried on their railway, and on the 23rd of August the traffic manager of the company made a formal demand in writing of the amount due from P for the carriage of coal; this not being paid, the company afterwards sold the coal:—Held, that the assignees in bankruptcy of P were entitled to recover the value of the coal seized, as the seizure was not authorized by the statute, inasmuch as it was made by the company, and not by the person named in the notice of tolls as the person to whom they were to be paid, and as, notwithstanding the presentment and dishonour of the bill, there had not been prior to the seizure any such demand and refusal of payment as the act required. *North* v. *the London and South-Western Rail. Co.*, 32 Law J. Rep. (N.S.) C.P. 156; 14 Com. B. Rep. N.S. 132.

(B) CHARGES AND TRAFFIC ARRANGEMENTS.

*(a) Undue Preference and Unequal Charges.*

Common carriers are bound to carry such goods as are tendered to them for the purpose of being carried, together with the proper charge for such carriage; and they cannot insist upon the sender signing such conditions as are unreasonable. *Garton* v. *the Bristol and Exeter Rail. Co.*, 30 Law J. Rep. (N.S.) Q.B. 273; 1 Best & S. 112.

A condition that the company should not be liable for the loss, detention, or damage of any package insufficiently packed, is unreasonable—agreeing with *Simons* v. *the Great Western Rail. Co.* Ibid.

Common carriers have no right to close their offices, and refuse to receive goods which are tendered to them with the proper amount for carriage, while at the same time they continue to receive goods, prepared, assorted and packed in the same manner, from a particular individual. Ibid.

By 6 Will. 4. c. xxxvi. the Bristol and Exeter Railway Company was incorporated, and the company was empowered to charge for the carriage of parcels. By 8 & 9 Vict. c. clv. s. 19, amending the 6 Will. 4. c. xxxvi., the company was authorized to charge at so much per ton per mile:—Held, that this provision overrides the provisions of 6 Will. 4. c. xxxvi., so far as concerned parcels exceeding 500 lb. in weight, but not as to parcels below that weight. Ibid.

The company obliged the plaintiffs to pay more than the maximum amount allowed by 8 & 9 Vict. c. clv. s. 19:—Held, that the excess paid on all parcels exceeding 500 lb. in weight might be recovered back. Ibid.

Common carriers cannot, in addition to the charges for the carriage of goods between the place where the goods are handed to them, and the place where they are ordered to be delivered, charge for collection and delivery, where they have not, in fact, collected or delivered the goods. Such charges, if imposed, and paid under protest, may be recovered back. Ibid.

The defendants, being common carriers from B to E, and also from B to B, charged the plaintiffs, who employed them to carry goods between those places, higher rates than were charged to other persons:—Held, that the sums paid in excess of the sums charged to other people could not be recovered by the plaintiffs, under a count for money had and received, on the ground simply that the charges made by the company were unequal. Ibid.

The defendants, being common carriers, were in the habit of charging certain rates upon the aggregate weight of parcels containing the same kind of goods, and brought at one time, by any one of the public, not being a common carrier; but when the plaintiffs, who were common carriers, sent a number of such packages in one parcel addressed to the plaintiffs, but each of such packages addressed separately to the person to whom it was to be sent, the defendants insisted upon charging for each parcel separately:—Held, in accordance with *Parker* v. *the Great Western Rail. Co.*, that such a mode of charging was improper, and that the plaintiffs might recover the amount so improperly charged to them. Ibid.

The defendants, sometimes intentionally, and sometimes by mistake, charged the plaintiffs heavier rates than were set out in the bills published by them:—Held, that the plaintiffs could recover back the excess paid. Ibid.

By section 188. of 6 Will. 4. c. xxxvi., which incorporated the defendants as a company, it was enacted that the company should paint on boards an account of the several rates and tolls to be taken by them, and should affix such boards upon the toll-houses, &c.; and by section 189. it was enacted that the company should not take any rates or tolls, &c. except during the time that the said board should be so affixed as aforesaid:—Held, that the omission to put up such boards did not prevent the defendants from recovering such sums of money as they had a right to charge, and that the plaintiffs could not, as a result of such omission, recover back such sums as they had been charged. Ibid.

*Semble*—That the enactment in section 188. does not apply at all to the tolls charged for the carriage of goods in the carriages of the defendants. Ibid.

A railway company permitted a carrier (who also acted as superintendent of their goods traffic) to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving office of the company; and goods were received by him at that place without requiring the senders to sign conditions which the company required all other carriers who brought goods to their stations to sign:—Held, an undue preference, and the subject of an injunction under the 17 & 18 Vict. c. 31. *Baxendale* v. *the Bristol and Exeter Rail. Co.*, 11 Com. B. Rep. N.S. 787.

The defendants were a railway company from Folkstone to London under 6 Will. 4. c. lxxv, and other statutes, and a steam-packet company between Boulogne and Folkstone under 16 & 17 Vict. c. clvi., by which latter act they were authorized to maintain a packet communication between Boulogne and Folkstone. The statute 6 Will. 4. c. lxxv. s. 133. empowered the defendants to charge what to them should seem proper in respect of small parcels not exceeding 100 lb. weight each, and by 2 Vict. c. xlii. s. 17. the defendants were required to charge equally all persons and after the same rate for the carriage of goods of a like description by their railway. The 16 & 17 Vict. c. clvi. by its 15th section empowered the defendants to maintain and work steam-vessels for the purpose of carrying on an efficient communication between Folkstone and Boulogne, and authorized them to "take tolls in respect of such steam-vessels," and by sections 16. and 17. it established a maximum rate for charges in respect of the conveyance of passengers, and declared that it should be "charged to all persons equally and after the same rate in respect of passengers conveyed in a like vessel":—Held, that this last statute, which created the defendants a steam-packet company, has made no provision for equality of charges in respect of the conveyance of goods, and that the other statutes have no application to sea transit. *Branly* v. *the South-Eastern Rail. Co.*, 31 Law J. Rep. (N.S.) C.P. 286; 12 Com. B. Rep. N.S. 63.

Therefore, where the plaintiff, a carrier at Boulogne, delivered to the defendants three packages of goods coming under the description of "packed parcels," to be carried by the defendants by their steamboats to Folkstone, and from thence by their railway to London, and the plaintiff paid double the rate he would have paid had the goods not been so packed, but only the rate the defendants charged alike all persons according to a tariff published by them at Boulogne, in which they stated that packed parcels would be charged twice the rate of separate parcels, and there was nothing in the law of France which made this illegal,—Held, that the plaintiff could not recover back the amount of extra charge paid for such packed parcels. Ibid.

Held, also, by *Erle, C.J.*, that the plaintiff could not recover back such amount even if the railway statutes did apply to the contract made with the defendants in France. Ibid.

### (*b*) *Allowance for Cost of Collection and Delivery to Carriers.*

A railway company which carried on the business of common carriers and were empowered by their private act to charge "for the carriage of small parcels," that is to say, parcels not exceeding 500 lb. in weight each, "any sum which they think fit," charged a through rate for the carriage of goods, which rate included their collection and delivery as well as conveyance on the line of railway, and was charged in all cases, whether the goods were collected and delivered by the company or not. The company formerly made a rebate off such rate for collection and delivery, if the same were done by the customer, but the company afterwards refused to make any rebate for this off the rate charged for the carriage of the goods under 500 lb. weight. The plaintiff, who was a carrier, delivered goods under 500 lb. weight at various stations of the company's railway for carriage on their railway, and was compelled by the company to pay the rate so charged for carriage without any rebate for collection and delivery, although such collection and delivery had been done by the plaintiff and not by the company:—Held (overruling the decision below, 32 Law J. Rep. (N.S.) C.P. 225; 14 Com. B. Rep. N.S. 1), that the plaintiff was entitled to recover back from the company the amount of such rebate in an action for money had and received. *Baxendale* v. *the Great Western Rail. Co.* (Ex. Ch.), 33 Law J. Rep. N.S. C.P. 197; 16 Com. B. Rep. N.S. 137.

### (*c*) *Terminal Charges.*

The defendants, a railway company, were by their special acts required to carry, as common carriers for hire, passengers, animals, goods, &c., for which they were by their said acts entitled to demand tolls and certain rates therein specified. The defendants having, as common carriers, received, carried on their railway, and delivered to the plaintiff certain goods consigned to him, charged him (without any previous agreement), in addition to a toll charge at the rate of 3*d.* per ton per mile (the rate at which they were by their said acts authorized to charge for tolls), a sum of 12*s.* 6*d.* as a "terminal charge" for the following services, conveniences and expenses, namely, —the receiving the goods by their porters and servants when brought to their station; the weighing and invoicing the same and loading it on their trucks; the use of their station, yards, sheds and platforms; the gaslight and other conveniences necessarily connected with such stations, sheds, and platforms for the purposes of receiving, loading and unloading goods; the making of proper entries of the receiving and delivering the goods by the defendants' clerks and agents in books kept for that purpose; and also for the risk incidental to the loading, carrying, and

unloading:—Held, that the defendants were not entitled to charge any sum as a "terminal charge" over and above the charges authorized to be taken as tolls by their special acts. But, *semble*, that for some of the services, conveniences and facilities afforded by the defendants beyond the mere carriage of the goods, they might, by previous agreement, be entitled to make some charge. *Pegler* v. *the Monmouthshire Rail. and Canal Co.*, 30 Law J. Rep. (N.S.) Exch. 249; 6 Hurls. & N. 644.

(C) DAMAGES; CRITERION OF.

In an action against carriers for the non-delivery, according to contract, of goods of a marketable kind intended for sale, the jury may give as damages the difference between the market value on the day the goods ought to have been brought to market and the day on which they are afterwards brought to market, although no notice be given to the carrier that the goods were intended for market; for such damages are the natural and immediate consequence of the defendant's act. *Collard* v. *the South-Eastern Rail. Co.*, 30 Law J. Rep. (N.S.) Exch. 393; 7 Hurls. & N. 79.

There is no difference in the application of this rule, between a delay occasioned by the detention of goods in the hands of the carrier, and a delay necessary for the purpose of restoring goods to a marketable state when delivered by the carrier in a damaged condition. Ibid.

The plaintiff sent hops in bags from Kent to London by the defendants' railway for the purpose of delivery to the vendee, a hop-dealer. The hops were detained by the defendants several days, and received some damage from water, and the vendee refused to accept them. The plaintiff dried the hops, and when fit for sale the price had fallen in value. Independently of that, the stained portion of the hops deteriorated the marketable value of the whole, although for the purpose of brewing, the value of the bulk was unaffected:—Held, that the plaintiff was entitled to recover, as damages, from the defendants the difference in price of the amount of deterioration in market value, and was not confined to the value of the parts actually damaged, although the defendants had no notice that the hops were sent for the purpose of sale, and not for use. Ibid.

Where goods are sent by a carrier, the consignee is entitled to recover their value at the place to which they are consigned, as distinguished from the place at which they were delivered to the carrier. *Rice* v. *Baxendale*, 30 Law J. Rep. (N.S.) Exch. 371; 7 Hurls. & N. 96.

In an action against a carrier for the loss of a parcel of goods, the measure of damages is, in general, the market value of the goods at the place and time at which they ought to have been delivered. If there is no market for the sale of such goods at the place, then the jury must ascertain their value by taking the price at the place of manufacture, together with the cost of carriage, and allowing a reasonable sum for importer's profit. *Rice* v. *Baxendale* commented upon. *O'Hanlan* v. *the Great Western Rail. Co.*, 34 Law J. Rep. (N.S.) Q.B. 154; 6 Best & S. 484.

## CERTIORARI.

Where the *military* status *alone*, apart from the civil status of a person, is affected by the sentence of a court-martial, this Court will not interfere to control the jurisdiction of the Court. Where, therefore, a military officer has been found guilty of an offence and sentenced by a court-martial to be dismissed the service, the Court refused to grant a *certiorari* to bring up the proceedings on a suggestion that the court-martial had no jurisdiction over the offender. *In re Mansergh*, 30 Law J. Rep. (N.S.) Q.B. 296; 1 Best & S. 400.

*Semble*—That this Court has no jurisdiction to grant a *certiorari* to bring up the proceedings of a court-martial holden in India; and this, though the documents are in the custody of the Judge Advocate General in England. Ibid.

Under the provisions of section 16. of the 21 & 22 Vict. c. 98. (the Local Government Act), the ratepayers of T petitioned one of the Secretaries of State to settle the boundaries with a view to the adoption of the act. An order was made setting out the boundaries, and a resolution was duly carried for the adoption of the act. An appeal was presented to the Secretary of State by S, a ratepayer, on the ground that the boundaries, as set out, comprised land not included within the limits from which the petition proceeded. After inquiry into the circumstances, the Secretary of State dismissed the petition, and ordered that the act should, after the expiration of one month from the date of the order, have the force of law within the district of T:—Held (*dubitante Cockburn, C.J.*), that the Court would not, after all this had been done, issue a *certiorari* to bring up the order for settling the boundaries of the district. *In re Todmorden*, 30 Law J. Rep. (N.S.) Q.B. 305.

## CHAMPERTY.

[See ATTORNEY AND SOLICITOR, (F) Dealings with Client; *Grell* v. *Levy*.]

A legatee, too poor to sue, assigned the legacy for less than it was worth to the plaintiff, who bought it for the purpose of enforcing payment by suit:—Held, that this did not amount to champerty or maintenance. *Tyson* v. *Jackson*, 30 Beav. 384.

## CHARITY.

[The jurisdiction of the Charity Commissioners in certain cases established by 25 & 26 Vict. c. 112.]

(A) CHARITABLE TRUSTS ACTS.
(B) CONSTRUCTION OF INSTRUMENT CREATING.
(C) VALIDITY OF DEVISE AND BEQUEST.
(D) SUPERSTITIOUS USES.
(E) ADMINISTRATION OF.
  (*a*) *Scheme.*
  (*b*) *Trustees.*
  (*c*) *Estate.*
  (*d*) *Surplus Income.*

(A) CHARITABLE TRUSTS ACTS.

Lands given for the benefit of the poor of a parish generally, or to trustees to permit the churchwardens to distribute the rents among the poor of the parish generally, as directed by two or more of the inhabitants of the parish,—Held, by the *Master of the Rolls*, to be vested in the churchwardens and overseers as a corporation, under the 59 Geo. 3. c. 12. s. 17, and therefore that the Charity Commissioners had no jurisdiction to make an order vesting the legal estate in the lands in the official trustee of charities without the consent of the churchwardens and overseers. *Ex parte Nicholls, in re the Hackney Charities*, 34 Law J. Rep. (N.S.) Chanc. 169.

*Secus*—as to lands given upon a special trust, that the rents might be bestowed in loaves of bread. Ibid.

Held, also, per the *Master of the Rolls*, that the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136. s. 8), gives a right to appeal to two inhabitants within three months after "definitive publication" of the order of the Charity Commissioners, irrespective of any consent either of the Attorney General or the Board, or of the amount of the income of the charity. But, on appeal, held, per the *Lord Justice Turner*, (*Knight Bruce, L.J.* concurring on other grounds, in an order reversing that made at the Rolls), that the right of appeal is conferred on any two inhabitants of the parish only in cases where the actual gross annual income of the charity exceeds 50*l*. Ibid.

Per the *Master of the Rolls*—The three calendar months after "definitive publication" are to be computed from the date when publication becomes complete by the expiration of the month during which it is directed to be made. Ibid.

(B) CONSTRUCTION OF INSTRUMENT CREATING.

If lands are given to a corporation, subject to certain specified charges for charitable purposes, the increased rents will belong to the donees of the lands. The question is one of construction alone. A decision of the House of Lords is as binding on that House itself as upon any inferior tribunal,—*dubitante Lord Kingsdown*. *The Attorney-General* v. *the Dean and Canons of Windsor* (House of Lords), 30 Law J. Rep. (N.S.) Chanc. 529; 8 H.L. Cas. 369.

A testator gave the produce of real estate for the maintenance of three boys at one of the Universities for three years, who had been brought up at the petty school at Wakefield, which he had founded, until they should be fit to go to the Free Grammar School, and from thence to the University. A scheme for the management of the charity declared that the boys should be chosen first from those born in the town of Wakefield, who shall have been three years at the Free School, then from boys born in the parish of Wakefield who have been three years at the Free School, and then from other boys who have been three years at the Free School. The Charity Commissioners advised that the proper construction of the scheme was, that the qualification of a candidate for the exhibition to the University was a residence at the Free School for three consecutive years immediately preceding the election. The Governors did not adopt this advice; and, upon a complaint by a candidate that an undue election had been made, the Master of the Rolls decided that the three years were not necessarily those next preceding the day of election, but that a boy born in the town, who had been for three years at the Free School, was eligible, though he had left for five years and had gone to another public school from which he was elected; and his Honour refused an application to set aside the election, with costs. On appeal to the Lords Justices, they held, in conformity with the opinion of the Charity Commissioners, that the three years must be an entire period immediately preceding the election, though their Lordships refused to disturb the election of the candidate who had been sent to the University, and ordered the costs both of the petitioner and the respondent to be paid out of the charity funds. *In re Storie's University Gift, and in re the Charitable Trusts Acts*, 1853 *and* 1855, 30 Law J. Rep. (N.S.) Chanc. 193.

The Court having inferred from reference to the parish church in the deed of endowment, that a school founded in 1601 was a Church of England school, held, that the trustees and the schoolmaster also (if possible) ought to be members of that church, but that the instruction was open to scholars of every religious denomination. *The Attorney General* v. *Clifton*, 32 Beav. 596.

The trust deed of a Baptist chapel provided that the trustees should allow the minister to occupy a house (part of the trust property), but in case he did not occupy it, authorized the trustees to let it, and apply the rents to pay off the mortgage. The trustees without offering it to the minister let the house to another person for the alleged purpose of applying the rent to pay off a mortgage, but the Court set the lease aside and ordered possession to be given to the minister. *Ward* v. *Hipwell*, 3 Giff. 547.

The majority of trustees of a dissenting chapel have no right to deal with the trust property otherwise than according to the true construction of the deed of trust. Ibid.

A testatrix in 1763 bequeathed her residue in trust for the vicar of N for the time being for ever, he annually preaching a sermon, the same to be paid "in augmentation" of the vicarage. The income had not been paid from 1841 to 1863, and in 1847 a sequestration had issued against the vicar, and he had become insolvent in 1852, but no sequestration had issued upon it. The Court assumed the assent of the ordinary:—Held, that the gift constituted an augmentation to the living and not a mere legacy to the vicar for the time being, and that the arrears down to 1847 belonged to the vicar and the subsequent income to the sequestrator. *In re Parker's Charity*, 32 Beav. 654.

By an act of parliament for the employment and maintenance of the poor in the city of Canterbury (1 Geo. 2. c. 30), certain persons were constituted guardians of the poor for the purpose of managing a charity school, with a direction that the rents of the charity should be applied for the maintaining and lodging of sixteen poor boys of the city, to be called Bluecoat boys, who were to be nominated and elected by the mayor and commonalty of the said city. A doubt having arisen as to the description of boys to be elected to vacancies in the school, a suit was instituted; and the Court held, that the mayor and corporation were not bound to confine themselves in their election to those poor boys who required parish relief, or the children of persons requiring such relief.

*The Guardians of the Poor of Canterbury* v. *the Mayor and Corporation of Canterbury*, 31 Law J. Rep. (N.S.) Chanc. 810.

Devise to two colleges for the use and education of the descendants of any brothers, &c., "or in default of such to their next poor kindred":—Held, that this was a good charitable trust, but that if no objects existed the property was given beneficially to the two colleges. *The Attorney General* v. *Sidney Sussex College, Cambridge*, 34 Beav. 654.

An estate was devised in equal moieties to two colleges on charitable trusts, and upon an information relating only to one moiety, a decree had been made and enrolled:—Held, that having regard to the pleadings and parties, it was no bar to a subsequent information which embraced the two moieties. Ibid.

College statutes made under the 19 & 20 Vict. c. 88, held not to affect the rights of a founder's kin. Ibid.

### (C) VALIDITY OF DEVISE AND BEQUEST.

A bequest to a charity upon trust to be applied for certain specified purposes will not fail if the object of the gift can be effected, though the charity itself may have ceased to exist. *Marsh* v. *the Attorney General*, 30 Law J. Rep. (N.S.) Chanc. 233; 2 Jo. & H. 61.

Where a bequest to a charity fails *pro tanto*, as being given out of the proceeds of pure and impure personalty, the proportion in which the bequest fails is to be ascertained according to the state and value of the assets at the testator's death and not at the time of the apportionment. *Calvert* v. *Armitage*, 1 Hem. & M. 446.

A testator, by his will, gave his estate in L to two colleges for the only use, education in piety and learning of four of the descendants of his brothers and sisters, and three of the descendants of the brother and sister of his first wife, and three of the descendants of the brothers and sisters of his second wife, and in default of such to their next of kindred, for the first by the father's side, for the second by the mother's side; "and the lease of the said L to be at one-third part under true value to my said wives' kindred ever, viz. brothers and sisters, there and at Harrow." The colleges entered into possession of the estate, and leases were granted in accordance with the direction for upwards of 200 years:—Held, upon an information filed at the relation of one of the colleges, that the estate was devised to the colleges absolutely for charitable purposes; and that the direction to lease to the kindred was void as amounting to a perpetuity. *The Attorney General* v. *Greenhill*, 33 Law J. Rep. (N.S.) Chanc. 208; 33 Beav. 193.

Held, also, that a single defendant to whom leases had been granted in accordance with the direction, sufficiently represented all parties interested under the direction to lease; and that the decision being in favour of the colleges a decree might be made, although one only of the two colleges was before the Court. Ibid.

A legacy was given upon trust to appropriate the income towards the maintenance of family graves existing in B churchyard, and then to pay the surplus to the rector of the parish for the time being:—Held, that the first purpose was void as tending to a perpetuity, and that as the amount required to carry it into effect could not be ascertained the gift of the surplus was void for uncertainty. *Fowler* v. *Fowler*, 33 Law J. Rep. (N.S.) Chanc. 674; 33 Beav. 616.

### (D) SUPERSTITIOUS USES.

A trust for the benefit of several officiating priests in different Roman Catholic chapels, on condition of their saying masses for the repose of the soul of the donor, is void as a superstitious use, and cannot be supported as a charitable use. *In re Blundell's Trusts*, 31 Law J. Rep. (N.S.) Chanc. 52; 30 Beav. 360.

A trust for printing, publishing and propagating the works of Johanna Southcote is not a superstitious use so as to be absolutely void, but is a charitable trust. *Thornton* v. *Howe*, 31 Law J. Rep. (N.S.) Chanc. 767; 31 Beav. 14.

### (E) ADMINISTRATION OF.

#### (*a*) *Scheme.*

If two schemes are proposed for the regulation of a charity, and both depart from the obsolete purposes of the original foundation, the Court will approve of that which promotes, though indirectly, the object of the original foundation, and it will reject that which might possibly increase what the original foundation sought to prevent. *In re Bridewell Hospital*, 30 Law J. Rep. (N.S.) Chanc. 99.

Where, therefore, a charity was founded for the suppression of idleness and vagrancy, by providing compulsory labour for adults, it was varied, by providing for youth of the same class instruction and intellectual exertion, with a view to impress upon them good principles and furnish them with industrial habits to direct their future course in life. Ibid.

A scheme which merely provided a nightly refuge for the destitute, without any condition of labour being attached, was rejected, on the ground that it had a tendency to increase, rather than diminish, vagrancy and idleness. Ibid.

An annual sum given for a chaplain of a prison will not be applied for the delinquents for whose welfare he was to be appointed. *In re Hussey's Charities; Cheyne* v. *Apreece; Symons* v. *Delaval*, 30 Law J. Rep. (N.S.) Chanc. 491.

A testatrix gave an annual sum for a clergyman to preach on Sunday and pray daily with the prisoners in the gaol at L. There were now two gaols at L:—Held, that the income ought to be paid to the chaplains of both gaols in proportion to the number of prisoners under their charge. Ibid.

A scheme directed for regulating the French Protestant Church in London and the charities connected therewith. *The Attorney General* v. *Daugars*, 33 Beav. 621.

In a suit for a scheme for a charity, the Court declined going into questions as to the validity of the appointment of existing officers of the charity, against whom there was no personal imputation, or to remove them. Ibid.

#### (*b*) *Trustees.*

In the reign of Edward the Sixth a charity was founded in Ilminster for the teaching of "literature and godly learning." The trustees were to appoint and remove the schoolmaster. When their number was reduced to four, they were to fill it up to twenty. They were to take accounts, &c., and if the

funds gave a surplus, they were to apply it to relieve the inhabitants, in mending highways and bridges, and supplying water. For the last 156 years dissenters had frequently been appointed members of the body of trustees, and in 1857 the surviving trustees named fifteen persons, all of whom were qualified to be trustees, except that three of them were dissenters. Their appointment was objected to. The Master of the Rolls held them to be "eligible." The Lords Justices varied his order, declaring that dissenters ought not to have been appointed. On appeal, the Lords were equally divided, and so the order of the Lords Justices stood affirmed. It was affirmed without costs, which were ordered to come out of the fund. *Baker* v. *Lee* (House of Lords), 30 Law J. Rep. (N.S.) Chanc. 625 ; 8 H.L. Cas. 495.

The trustees of a charity were by a decree of this Court to be chosen at a vestry meeting of the parish; the constitution of the vestry was altered by the legislature:—Held, that the legislature could control the decree and the scheme, but that the vacancies among the trustees must be filled up by the vestry for the time being. *In re Hayle's Estate*, 31 Law J. Rep. (N.S.) Chanc. 612; 31 Beav. 139.

The Court, though holding a trustee to have been originally improperly appointed, declined to remove him. *The Attorney General* v. *Clifton*, 32 Beav. 596.

Residence within a parish being a necessary qualification of trustees on their appointment,—Held, that their removal out of the parish after their appointment, to such a distance as to make it impossible to attend to their duties, would be a vacating of their office. Ibid.

The Hospital of St. John at Bedford appeared to have been founded, or reconstituted, in 1280, "for the support of two or three brethren, the most advanced of whom was to hold the place of master, and for the relief of the poor of Bedford." The mastership of the hospital had from the earliest mention of the parish of St. John been inseparably united with the rectory of the parish. From the year 1280 to 1374, the master was elected by the brethren, but in 1444, a vacancy was filled up on the presentation of the mayor of Bedford, and from that time the united mastership and rectory had always been filled up on the presentation of the mayor or the mayor and burgesses, but there was no evidence to shew by what right these presentations were made. The corporation seal of the hospital was still in existence and leases were granted thereunder and small payments were made to ten poor persons called beadsmen:—Held, by the Master of the Rolls, that the long exercise by the mayor of the right to present to the mastership could not supersede the original trusts; and that as well the property of the hospital as the right of presentation to the mastership remained subject to these trusts. *The Attorney General* v. *the Master and Co-brethren of the Hospital of St. John, Bedford*, 34 Law J. Rep. (N.S.) Chanc. 441.

On appeal, the *Lords Justices* affirmed the decree so far as it related to property of the hospital, but held that the corporation could not be treated as trustees of the right of presentation to the mastership. Ibid.

In a suit relating to the validity of the removal of a pastor, the trustees were ordered to pay the costs. They paid them out of the charity funds, but upon an information by the Attorney General they were ordered to replace the amount. *The Attorney General* v. *Daugars*, 33 Beav. 621.

(*c*) *Estate.*

Although as a general rule the Court, in ordering capital funds of a charity to be applied for a special purpose, requires that they shall be recouped out of income, its object being to enlarge the benefits of the charity, yet in a case where the only object of a charity was (subject to small charges for repairs, &c.) the support of an incumbent, the Court upon the petition of the incumbent and trustees of the chapel funds, ordered 1,000*l.* to be applied out of the capital towards repairing and enlarging the chapel, without requiring it to be recouped out of income. *In re Willenhall Chapel Estates*, 2 Dr. & S. 467.

Where it was necessary to grant a large number of building leases of charity lands in nearly the same form under the provisions of an act of parliament, and one lease had been settled in chambers, the Court allowed the charity to grant other building leases from time to time in the same form without reference to chambers, the model lease being appended to the order. *The Attorney General* v. *Christ Church, Oxford*, 3 Giff. 514.

If a charity proceeds against a part of property charged with a rentcharge and is successful in proving its claim, the Court will direct an inquiry as to the other property charged, but at the expense of the party desiring such inquiry. *The Attorney General* v. *Naylor*, 33 Law J. Rep. (N.S.) Chanc. 151.

(*d*) *Surplus Income.*

A testator, after reciting his desire to encourage learning in Jesus College, gave all his real and personal estates upon trust, out of the yearly rents to provide stipends for six scholars and six exhibitions (which together amounted to 108*l.* a year), and to lay out the remainder in the purchase of advowsons. By a codicil he recited the purchase of lands in M; he then founded a school at B, and gave two sums of 15*l.*, one to clothe thirty scholars, and the other to the schoolmaster; and he "gave so much money to be laid out yearly, and as often as the visitors and trustees of the school should think fit, for the repair of the school-house, there being of the present rents of my estate in M, above the 108*l.* per annum and the two sums of 15*l.*, the sum of 4*l.* 17*s.*, which being reduced by 3*l.* 12*s.*, the rent of the school-house and land, left 1*l.* 5*s.* per annum for the repair of the school-house for ever." The M estate had since increased in value, and, after providing for the stipends given by the will and codicil, there remained a surplus beyond the 4*l.* 17*s.* Upon an information, asking that the surplus, or some part thereof, might be applied for the benefit of the school,—Held, that the school was not entitled to the whole of the surplus rents, but only to such a proportion as 4*l.* 17*s.* bore to the original annual rents of the M estate, and that such part must be applied in payment of the rent of the school-house and land, and then for the repair of the school-house. *The Attorney General* v. *Jesus College, Oxford*, 30 Law J. Rep. (N.S.) Chanc. 675; 29 Beav. 163.

## CHEATING.

[See False Pretences—Larceny.]

## CHEQUE.

[See Bills of Exchange and Promissory Notes.]

## CHIMNEY SWEEPERS.

[The Act for the Regulation of Chimney Sweepers (3 & 4 Vict. c. 85.) amended, &c. by 27 & 28 Vict. c. 37.]

## CHURCH.

[See Churchwardens—Rate; Church-rate.]

(A) Right to the Possession of Church and Chancel.
(B) Services.
(C) Estates.
(D) District and District Church.
(E) Church Building Acts.

### (A) Right to the Possession of Church and Chancel.

Though the freehold of a parish church may be in a lay rector, the right of the possession of the church is in the minister and churchwardens; and therefore a lay rector cannot maintain trespass against the vicar of the parish for breaking open a door leading from the churchyard into the chancel. *Griffin* v. *Deighton* (Ex. Ch.), 33 Law J. Rep. (N.S.) Q.B. 181; 5 Best & S. 108: affirming the decision below, 33 Law J. Rep. (N.S.) Q.B. 29.

### (B) Services.

A B gave 1,000*l.*, which he vested in trustees, for the endowment of a new district church. After it had been consecrated, A B and the trustees by deed declared that the funds were held in trust to pay the income to the incumbent so long as he "conducted the services according to the rites and ceremonies of the Church of England in strict and literal accordance with the order of the Book of the Common Prayer," and they also provided that disputes were to be referred to the bishop:—Held, that daily service was not required, and that disputes as to the conduct of the services ought to be referred to the ordinary. *In re Hartshill Endowment*, 30 Beav. 130.

Whether, under the above circumstances, A B had any power, after consecration of the church, to regulate the trusts of the endowment fund—*quære*. Ibid.

If numerous churches belong to a body of dissenters and each church claims a right to act independently of the other churches in all matters pertaining to it, as well spiritual as temporal, and two modes of communion divide the congregational polity of the churches in practice, a congregation of one church, though it has practised one mode of communion for years, may still change to the other; and the dissentient minority abstaining from all communion with the congregation will be subject to the discipline of the church, and may be declared not to be members of the congregation. *The Attorney General* v. *Gould*, 30 Law J. Rep. (N.S.) Chanc. 77.

This Court will not interfere to prevent a congregation of such a church from adopting a practice which from time to time shall be approved of by the majority of the congregation, so that it does not affect a fundamental point of faith. Ibid.

Where, therefore, by a deed dated the 24th of November 1746, a chapel was conveyed to trustees and their heirs, to and for the use and benefit of the congregation of Particular Baptists within the city of N for the time being, that the same might always be held and enjoyed for and as their place of worship,—it was held, as the principles of open communion and strict communion were not fundamental points of faith, and must be subject to the regulation of each church or congregation, that the majority of a congregation holding communion at the chapel might reject the practice of "strict communion," which was alleged to have been practised from the foundation of the chapel, and adopt the practice of "open communion" without violating the trusts declared of the chapel. Ibid.

### (C) Estates.

The parson has no right without the consent of the patron and ordinary to open mines under the glebe. *Holden* v. *Weekes*, 30 Law J. Rep. (N.S.) Chanc. 35; 1 Jo. & H. 280.

The patron is the proper person alone to institute a suit for the purpose of restraining waste by the incumbent, but the ordinary may institute a suit to take proceedings to prevent waste by collusion between the patron and the incumbent. Ibid.

The patron coming to the Court to restrain waste is not entitled to an account of past profits before the filing of the bill. Ibid.

### (D) District and District Church.

The formation of a district or chapelry on the requisition of the Ecclesiastical Commissioners, by an Order of the Queen in Council, under the 8 & 9 Vict. c. 70. s. 9, is valid, without any enrolment in Chancery of the name, boundaries, &c., as required by the 59 Geo. 3. c. 134. s. 6. *R.* v. *the Overseers of South Weald*, 33 Law J. Rep. (N.S.) M.C. 193; 5 Best & S. 391.

An ancient chapelry, situate within a large parish, had from time immemorial had a separate church and churchyard, and separate churchwardens and church-rates, and the incumbent had performed marriages, christenings, churchings and burials, and retained the fees to his own use. The right of presentation to the chapelry (which was a perpetual curacy) was in the rector of the parish. The chapelry was described as a "parish" in the Ecclesiastical Survey, but in recent local acts of parliament the church of the chapelry was referred to as a "church or ancient chapel of ease":—Held, that the chapelry was not a distinct parish, and that under the power conferred by the 59 Geo. 3. c. 134. s. 16, authorizing the assignment of a district to a chapel of ease or parochial chapel, the Ecclesiastical Commissioners were authorized to divide the chapelry into districts and to assign a particular district to the ancient chapel. *Tuckniss* v. *Alexander*, 32 Law J. Rep. (N.S.) Chanc. 794.

The incumbent of a district parish validly consti-

tuted under the Church Building Acts (58 Geo. 3. c. 45. and 59 Geo. 3. c. 134), has an exclusive right to celebrate marriages by banns, between persons both of whom are resident within the district parish. Ibid.

Whether after the creation, under the 6 & 7 Vict. c. 37. (Peel's Act), of new parishes out of parts of any existing parish, the incumbent of the old parish still retains by virtue of the saving clause (s. 18.) the right to publish banns and celebrate marriages between persons both of whom are resident in the new parishes —*quære.* Ibid.

Where a licence is granted, in due form, for marriage at a particular church, the incumbent is under no obligation to inquire whether there has been a sufficient residence to justify the granting of the licence. His proper course is to assume the regularity of licence and to perform the marriage ceremony. Ibid.

### (E) Church Building Acts.

[See Churchwardens; Election of.]

The Church Building Acts do not apply to a parish which has already been the subject of private legislation. *Fitzgerald* v. *Champneys*, 30 Law J. Rep. (N.S.) Chanc. 777; 2 Jo. & H. 31.

By a deed of 1840 a certain chapel was vested in trustees, upon trust to permit the same to be used as a chapel of ease, dependent upon the parish church, and to permit the vicar for the time being or his curates to officiate as ministers thereof, and to allow the vicar and churchwardens to let the pews, and to permit the churchwardens to receive the pew-rents and other emoluments for the benefit of the vicar, after paying the necessary expenses; and the vicar and churchwardens were authorized to appoint the clerk, pew-openers and other officers of the chapel. By an Order in Council, dated October 1860, the said chapel was constituted a district chapelry, and it was ordered that marriages, baptisms, &c. should be solemnized and performed in the chapel, and that the fees should belong to the minister of such chapel for the time being, subject to a proviso that so long as the existing vicar remained vicar the fees should be paid to him, but the Order did not mention or affect to deal with the pew-rents:—Held, that the effect of the Order in Council was to withdraw the chapel from all the purposes included in the trust deed; to constitute the district chapelry a benefice; and to deprive the vicar and churchwardens of the parish church of all right to receive the pew-rents, or to nominate the officers of the church. *Fitzgerald* v. *Fitzpatrick*, 33 Law J. Rep. (N.S.) Chanc. 670.

Whether after the creation of the district chapelry the pews of the chapel could lawfully be let and the pew-rents received for the benefit of the minister of the chapel—*quære.* Ibid.

## CHURCH RATE.

[See Rate.]

## CHURCHWARDENS.



### (A) Election of.

Where a new church has been built, and a district assigned to it, under 1 & 2 Will. 4. c. 38, and the bishop has given his licence for the publication of banns, and the solemnization of marriages therein, and for the taking by the minister of the same fees as were taken at the mother church, such district does not become a separate and distinct parish within section 14. of the 19 & 20 Vict. c. 104, so that the provisions of the 6 & 7 Vict. c. 37. should apply to it. And held, therefore, in such a case, that it was still lawful for the pew-renters to choose one of the churchwardens, and that it was not necessary that he should be appointed by the parishioners. *R.* v. *Perry*, 30 Law J. Rep. (N.S.) Q.B. 141; 3 E. & E. 640.

*Semble*—That the 6 & 7 Vict. c. 37. s. 5. does not apply to a district constituted under the 1 & 2 Will. 4. c. 38, with a licence by the bishop under the 6 & 7 Will. 4. c. 85. Ibid.

Though a district of an old parish, appropriated to a new church under the 58 Geo. 3. c. 45, the 6 & 7 Vict. c. 37. and the 19 & 20 Vict. c. 104, becomes a separate parish for all ecclesiastical purposes, it remains part of the old parish for parochial purposes, and the inhabitants of the district have a right to vote in vestry in the election of churchwardens for the old parish. *R.* v. *Stevens*, 32 Law J. Rep. (N.S.) Q.B. 90; 3 Best & S. 333.

### (B) Invalid Appointment, Remedy for.

Where, by custom in a parish, the rector nominates one churchwarden and the parishioners the other, and the rector nominated as churchwarden a person who was not resident nor the occupier of any house or land in the parish, and the person so appointed was afterwards sworn into office; and it was desired to question the validity of the appointment, on the ground that the person appointed was not legally qualified: the Court held, that an application for a mandamus to the rector to nominate a churchwarden was a proper course for that purpose, and made absolute a rule for such a mandamus. *In re Barlow*, 30 Law J. Rep. (N.S.) Q.B. 270.

A *quo warranto* does not lie for usurping the office of churchwarden. Ibid.

### (C) Duration of Office.

A churchwarden, whose year of office has expired, continues in office where his successor has been elected, but has not been sworn, nor has made the substituted declaration, nor has done any act which would make him churchwarden *de facto*. *Bray* v. *Somer*, 31 Law J. Rep. (N.S.) M.C. 135; 2 Best & S. 374.

Such churchwarden is therefore bound to sign the jury lists under the 7 Geo. 4. c. 50. ss. 8. and 9, and is liable to penalties under section 45. for not having done so. Ibid.

### (D) Rights and Liabilities.

Where an incumbent of a church was making alterations in the pews and internal fittings and in the flooring of a church, a suit being instituted by

the churchwardens, the Court ordered that the plaintiffs and defendants should lay before the Judge in chambers proposals for fitting up the interior of the church, such proposals to be subject to the approbation of the bishop, and on the chief clerk's certificate that the plan was so approved, the Court ordered the adoption of the plan. *Cardinall* v. *Molyneux*, 2 Giff. 535.

By immemorial custom churchwardens may be bound to pay visitation fees to the registrars of the archdeacon. *Shepherd* v. *Payne* (Ex. Ch.), 33 Law J. Rep. (N.S.) Exch. 158; 16 Com. B. Rep. N.S. 132.

When proof has been given that for an unbroken period of 130 years a certain fixed amount has been paid for fees which can have a legal origin, the jury should presume the immemorial existence of the payment, unless evidence be given to satisfy them that the payment is a usurpation; and this presumption should be made by them, notwithstanding that they do not in point of fact believe in the existence of the payment from the time of legal memory. Ibid.

If during the latter part of the 130 years a larger sum than the sum paid during the first 70 years of that period be charged and paid, the excess will evidently be an usurpation; but the fact of the excess does not destroy the value of the evidence as to the payment of the original sum. Ibid.

Slight evidence raising an inference that the payments in some years previous to the 130 years were lower and varying in amount, is not sufficient to satisfy the onus cast on those who seek to upset a right founded on so long an enjoyment, and to rebut the strong presumption in favour of its legal origin. Ibid.

A agreed to build an organ for B, and to fix it in the parish church of C for 768*l.*, to be paid by certain yearly instalments. The agreement then provided that, "in the event of the said organ being completed and erected as aforesaid, and the said sum of 768*l.* or any part thereof not being paid at the time or times thereinbefore mentioned, then it was thereby declared and agreed that the whole sum or balance, with the interest then due thereon, should become due and payable to W, and might be sued for and recovered accordingly; and in the mean time, and until the said balance and interest should be paid and discharged, W should have a lien on the organ; and, in default of any or either of such payments as thereinbefore mentioned, W might either dispose of or remove the organ as he might think proper":—Held, that the property in the organ remained in A until the instalments were paid. The instalments being unpaid, A demanded the organ of the vicar of C and the churchwardens. The vicar kept the church-door locked, and refused to allow the organ to be removed, claiming a lien upon it. The churchwardens did nothing:—Held, that the vicar was liable in trover, not the churchwardens. *Walker* v. *Clyde*, 10 Com. B. Rep. N.S. 381.

*Semble*—That the absence of a faculty for the removal of the organ was no answer to the plaintiff's claim. Ibid.

## CINQUE PORTS.

["The Criminal Justice Act, 1855," extended to the Liberties of the Cinque Ports and to the district of Romney Marsh, in the county of Kent, by 27 & 28 Vict. c. 80.]

## CLERGY.

[See CHURCH.]

The law for providing fit houses for the beneficed clergy amended, &c., by 28 & 29 Vict. c. 69.—The law as to the subscriptions and declarations to be made and oaths to be taken by the clergy amended by 28 & 29 Vict. c. 122.]

## CLERK OF THE PEACE.

[The law relating to the removal of clerks of the peace amended by 27 & 28 Vict. c. 65.]

By the 103rd section of the Municipal Corporation Act (5 & 6 Will. 4. c. 76), after the grant of a separate court of quarter sessions to a borough, "the town council shall appoint a fit person to be clerk of the peace during his good behaviour"; and by section 105. the Recorder is to hold quarter sessions, "of which he shall be sole Judge, and such court shall be a court of record, and shall have cognizance of all crimes, offences and matters whatsoever cognizable by any Court of quarter sessions for counties," provided that no Recorder shall have power to make or levy a county rate or to grant licences for alehouses, &c., or to "exercise any powers by the act specially vested in the town council":—Held, that the removal of the clerk of the peace of a borough for misbehaviour was vested by the above enactment in the Recorder; such power of removal being given by the 1 W. & M. sess. 1. c. 21. s. 6. to the quarter sessions in counties; and that the town council had no power to remove. *R.* v. *Hayward*, 31 Law J. Rep. (N.S.) M.C. 177; 2 Best & S. 585.

*Semble*—That the effect of the 1 W. & M. sess. 1. c. 21. s. 6. is to give the jurisdiction to the Quarter Sessions alone; and that the *custos rotulorum* has no power, since the act, to remove a clerk of the peace. Ibid.

## COAL.

[The London coal and wine duties further continued and appropriated by 26 & 27 Vict. c. 46.—The law relating to coal-mines amended by 25 & 26 Vict. c. 79.]

## COIN.

[The statute law of the United Kingdom against offences relating to the coin consolidated and amended by 24 & 25 Vict. c. 99.]

*Having in Possession a Coining Mould.*

The police entering prisoner's house in his absence took from some persons inside a plaster of Paris mould of a half-crown, part of which was still wet, after a resistance on their part, and an attempt by them to destroy the mould. Materials suitable for melting lead and making plaster of Paris moulds were found in various parts of the house. Shortly

afterwards the prisoner came in. He had passed a bad half-crown thirteen days before, but there was no evidence to shew that it was made in the mould seized:—Held, that there was sufficient evidence to justify the conviction of the prisoner for knowingly and without lawful excuse feloniously having in his custody and possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half-crown. *R.* v. *Weeks*, 30 Law J. Rep. (N.S.) M.C. 141; 1 L. & C. 18.

*Uttering Counterfeit Coin.*

The prisoner knowingly passed as and for a half-sovereign a coin of less value, of about the same size and colour as a half-sovereign. On the obverse side was the Queen's head, as on a half-sovereign, but with a different inscription. No evidence was given of the appearance of the reverse side of the coin. The coin itself was not produced to the jury:—Held, that there was some evidence to support a conviction of the prisoner uttering, with intent to defraud, a coin resembling a half-sovereign in size, figure and colour. *R.* v. *Robinson*, 34 Law J. Rep. (N.S.) M.C. 176; 1 L. & C. 604.

## COLONY AND COLONIAL LAW.

[An act respecting the issue of writs of *habeas corpus* out of England into Her Majesty's possessions abroad, 25 Vict. c. 20.—The appointment of vice admirals, &c., in Vice Admiralty Courts in Her Majesty's possessions abroad facilitated, and the jurisdiction and practice of those Courts extended and amended by 26 Vict. c. 24.—The time at which Letters Patent shall take effect in the colonies determined by 26 & 27 Vict. c. 76.—The validity of acts performed in Her Majesty's possessions abroad by certain clergymen ordained in foreign parts established, and the powers of colonial legislatures with respect to such clergymen extended by, 26 & 27 Vict. c. 121.—Doubts as to the validity of colonial laws removed by 28 & 29 Vict. c. 63.]

The discharge of an insolvent from his debts, under a sequestration pursuant to an act of a colonial legislature having power from the imperial legislature of this country to make laws, is no answer to an action by an English subject on a contract made and to be performed in England. *Bartley* v. *Hodges*, 30 Law J. Rep. (N.S.) Q.B. 352; 1 Best & S. 375.

Declaration for money received, money lent, money paid, interest, and on accounts stated. Plea, that the defendant was resident in the colony of Victoria, and that the debts were contracted within the colony of Victoria, and subject to the laws thereof; and that the defendant was discharged from the debts by the insolvent law of the colony. Replication, 1. That when the debts were contracted the plaintiff was resident at L in England, and that at the time of the commencement of the suit the defendant was resident in England. 2. That under and by virtue of the contracts by which the debts became payable, they ought to have been paid to the plaintiff in England. Held, that the replications shewed no answer,—because the first admitted that the debts sued on were contracted within the colony of Victoria; and the second did not shew that they were payable in England, and not elsewhere. *Gardiner* v. *Houghton*, 2 Best & S. 743.

If an absolute owner in fee of a West India estate appoints a manager, he is entitled to a lien on the inheritance for the full amount of what is due to him on account of his management, and the costs of the cultivation. *Bernard* v. *Davies*, 32 Law J. Rep. (N.S.) Chanc. 41; *sub nom. Bertrand* v. *Davies*, 31 Beav. 429.

If a manager is appointed by a tenant for life he can acquire no lien on the inheritance of the estate for the costs of such management and cultivation after the death of the tenant for life. Ibid.

If emblements are growing on the estate at the decease of the tenant for life, the manager will be entitled to a lien for the sums expended in their production, if the person in remainder is entitled to the benefit thereof. Ibid.

If, upon notice, the manager refuses to give up possession to the remainderman, and claims a lien on the estate for moneys expended during the life of the tenant for life, he will be treated as a mortgagee in possession, and on such principle accounts will be directed against him. Ibid.

If a mortgagor (owner in fee) of a West India estate appoints a manager, and dies, the costs of management and cultivation are not a lien on the estate against the mortgagees, who have not acquiesced in the appointment. Ibid.

## COMMON.

To a declaration in trespass the defendant pleaded thirty years' enjoyment of right of common of pasture over the *locus in quo* for the cattle levant and couchant upon the toftstead belonging to him as appurtenant thereto:—Held, that the number of commonable cattle not being in question, it was not necessary, for the support of the plea, that the cattle should actually be fed upon the produce of the toftstead; and that there is no distinction, in this respect, between a plea, founded on the Prescription Act, and a plea grounded on prescription properly so called. *Carr* v. *Lambert*, 34 Law J. Rep. (N.S.) Exch. 66; 3 Hurls. & C. 499.

The rights of common exercisable over Hainault Forest, and the jurisdiction of the Commissioners under the Disafforesting Act (14 & 15 Vict. c. 43.) and the Allotment Act (21 & 22 Vict. c. 37.) considered and discussed. *In re Hainalt Forest*, 9 Com. B. Rep. N.S. 648.

## COMMISSIONERS' CLAUSES ACT.

In an action for penalties against a town commissioner, under a local Lighting and Drainage Act, which incorporated the Commissioners' Clauses Act, 1847, 10 & 11 Vict. c. 16, for acting as a commissioner after being disqualified, a bill was produced, made out by the defendant, and addressed to the commissioners, for lime purporting to have been supplied at four different times, and receipted by the defendant:—Held, that there was evidence to go to the jury that the defendant was "concerned in a contract," within the 10 & 11 Vict. c. 16. s. 9, which enacts, that any person who at any time

after his appointment or election as a commissioner shall be concerned or participate in any manner in any contract under the authority of the special act, shall thenceforth cease to be a commissioner. *Nicholson* v. *Fields*, 31 Law J. Rep. (N.S.) Exch. 233; 7 Hurls. & N. 810.

Held, also, that he thereby became "disqualified," within section 15. of the same act, which imposes a penalty on commissioners acting after having become disqualified. Ibid.

The special act enacted that every person rated to a certain amount within the limits of the act should be a commissioner:—Held, that a person so rated and acting as a commissioner was an appointed commissioner, within the meaning of section 9. of the general act. Ibid.

## COMMISSIONERS OF WORKS.

[See WORKS AND PUBLIC BUILDINGS.]

## COMPANY.

[Provisions relating to the constitution and management of companies incorporated for carrying on undertakings of a public nature consolidated by 26 & 27 Vict. c. 118 (the Companies' Clauses Act, 1865).]



### *1.—RAILWAY AND OTHER INCORPORATED COMPANIES.*



### *2.—JOINT-STOCK COMPANIES.*



### *3.—DISSOLUTION AND WINDING-UP OF COMPANIES.*



### *4.—SCIRE FACIAS AGAINST SHAREHOLDERS.*

### *1.—RAILWAY AND OTHER INCORPORATED COMPANIES.*

#### (A) CONSTRUCTION OF STATUTES.

When the legislature authorizes railway directors to take, for the purposes of their undertaking, any lands specially described in their acts, it constitutes them the judges whether they will or not take these lands, provided that they act with the *bona fide* object of using the lands for the purposes authorized by the act, and not for any collateral purpose. Having provided for affording compensation to the owners of the lands, the legislature leaves it to the company to determine what lands are necessary to

be taken. *The Stockton and Darlington Rail. Co.* v. *Brown*, 9 H.L. Cas. 246.

*Quære* — Whether the words "the Court of Chancery," in the 5th section of the 18 & 19 Vict. c. cxlix. (the Stockton and Darlington Railway Act), apply exclusively to the Lord Chancellor or to the Lords Justices sitting in Lunacy? Ibid.

The Vice Chancellor made a decree which was afterwards varied by the Lords Justices. This House restored the decree of the Vice Chancellor, and further proceedings being necessary, remitted the cause to him, to proceed with it in the same state in which it was when brought by appeal before the Lords Justices. Ibid.

A company, entitled to take tolls in return for a public service, is not bound, independently of express enactment, to exact the same tolls from all persons alike, but is at liberty to remit the tolls, or any portion of them, to particular persons, at its pleasure and discretion. *The Hungerford Market Co.* v. *the City Steamboat Co. (Lim.)*, 30 Law J. Rep. (N.S.) Q.B. 25; 3 E. & E. 365.

The plaintiffs, the Hungerford Market Company, by a clause in their act of incorporation, were empowered to take (*inter alia*) from the master of any steamboat, in respect of every passenger landing or embarking from the wharf to be erected by the plaintiffs, the tolls to be from time to time fixed and appointed by the plaintiffs, not exceeding the rate of 2*d.* for each passenger. The plaintiffs fixed and appointed the toll at 2*d.* for each passenger; but, by agreement, they charged the defendants, a steamboat company, in respect of their passengers landing or embarking, tolls at the rate of 1*s.* 4*d.* per 100 passengers, while by another agreement they charged another steamboat company only 1*d.* per dozen passengers: — Held, in the absence of any equality clause in their act, that it was competent to the plaintiffs to make these agreements, and that they were entitled to charge and recover against the defendants tolls at the rate agreed on: the true construction of the clause empowering them to take tolls being, that the tolls must be fixed and appointed, in order to inform the public and persons interested, the maximum toll which they could be called upon to pay, leaving the right of the plaintiffs to lower or remit the toll, if it otherwise exist, wholly untouched. Ibid.

### (B) Powers, Duties, and Liabilities.

#### (*a*) *As to Shareholders generally.*

A railway company had authority to keep steam-vessels for the purpose of a ferry:—Held, that such vessels, when not otherwise employed, might be used by the company for excursion trips to the sea. *Forrest* v. *the Manchester, Sheffield and Lincolnshire Rail. Co.*, 30 Beav. 40.

A company incorporated for the purpose of making a railroad cannot, with the dissent of one of the shareholders, carry on a trade distinct from the purposes for which it was incorporated. Ibid.

A registered shareholder in a railway company,—which was afterwards incorporated with a new company by an act of parliament, enacting that every registered shareholder in the old company should be deemed to hold a share in the new company, to be called a deferred share, and entitled on demand to receive a certificate for such deferred share,—Held, entitled to sue in respect of the funds of the new company, although he had not exchanged his shares or received a certificate as a shareholder in the new company. *Spackman* v. *Lattimore*, 3 Giff. 16.

When the promoters of the new undertaking signed the subscription contract for sums which they represented to parliament as out of their own funds, but which in fact they borrowed, and afterwards sought to charge against the funds of the new company, the Court, at the instance of the plaintiff, a shareholder of the old company, restrained by injunction such application of the funds. Ibid.

Bill against the directors of a railway company, which had power to borrow moneys not exceeding 45,000*l.* "on mortgage or bond" so soon as the whole capital had been subscribed and one half paid up, alleging that moneys had been illegally borrowed, and praying for a declaration that such borrowing was illegal, and to restrain the defendants from repaying the moneys out of the company's assets:—Demurrer allowed, on the ground that there was no allegation that one-half of the subscribed sum had not been paid up, or that the defendants intended to issue bonds or mortgages before it was due. *Nowell* v. *the Andover and Redbridge Rail. Co.*, 3 Giff. 112.

#### (*b*) *As to taking Land.*

A railway company under the misapprehension that a tenant for life was owner in fee of certain land, entered into an agreement with his supposed agent, under the 84th section of the Lands Clauses Consolidation Act, and took possession of the land on which they constructed their railway. On a bill by the remaindermen and mortgagees, the Court granted an injunction to restrain the company from retaining possession of the land. *Perks* v. *the Wycombe Rail. Co.*, 3 Giff. 663.

Where the plans, deposited by a railway company, delineated a field, shewing the line, the limits of deviation and the boundaries on one side of those limits, but leaving the boundaries on the other side undefined, the Court restrained the company from taking the land beyond the limits of deviation on the undefined side, though the name of the owner of the whole field was described in the book of reference. *Wrigley* v. *the Lancashire and Yorkshire Rail. Co.*, 4 Giff. 352.

In a contract between a railway company and a proprietor of land to be crossed by the line of railway, the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20.) should be expressly referred to if the company intend to claim the benefit of its provisions. Therefore, where a company contracted "to provide and erect a suitable bridge over a street (marked in a plan referred to in the deed) as then planned or intended," and the plan shewed that the street was intended to be forty-two feet wide,—Held, in the absence of any reference in the deed to the act, that the company were not at liberty to narrow the street to the dimensions specified in the 49th section of the act (twenty-five feet), but must make a bridge with an arch of the full width of the street (forty-two feet). *Clarke* v. *the Manchester, Sheffield and Lincolnshire Rail. Co.*, 1 Jo. & H. 631.

#### (*c*) *Traffic Agreements.*

There is no principle of public policy which renders void a traffic agreement between two lines

of railway for the purpose of avoiding competition. *Hare* v. *the London and North-Western Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 817; 2 Jo. & H. 80.

Though a public company constituted for a particular purpose will not be allowed to apply its funds in a manner not sanctioned by the constitution of the company, the Court will not interfere with a traffic agreement between two lines of railway to divide the net earnings in certain definite proportions. Ibid.

Review of the authorities as to the legality of such an agreement. Ibid.

(*d*) *Borrowing Powers.*

The M and M Railway were empowered by their special act to raise a capital of 550,000*l.*, and to raise by mortgage any further sum, not exceeding 180,000*l.*; but no part of such further sum was to be raised until the whole of the capital had been subscribed for and one-half paid up. Part only of the capital was subscribed for; but the company determined to borrow 10,000*l.* to enable them to meet demands made upon them, and to purchase part of the land required by them. The directors applied to a bank, and obtained the sum required on the security of the joint and several promissory note of the plaintiff, the chairman of the company, and of B, one of the directors. B, having been compelled to repay the money, brought an action against the plaintiff. The board of directors resolved that, "in order to discharge the liability of the chairman, on the action of B against him, the secretary be authorized to seal Lloyd's bonds to the extent of," &c. Bonds were accordingly made under the common seal of the company, by each of which the company acknowledge "that they stand indebted to W C in the sum of 1,000*l.* for money due and owing from the company to W C; and the company, for themselves, their successors, and assigns, hereby covenant with W C, his executors and administrators, to pay to him, his executors, administrators and assigns, the said sum of 1,000*l.*," &c. These bonds were delivered to the plaintiff, and he mortgaged them to D, to secure money advanced, and with which money the action brought by B against the plaintiff was settled. Subsequently, the directors resolved that the bonds should be redeemed, and that the expenses incurred by the chairman should be paid by the company out of the first moneys in their hands:—Held, in an action brought by the plaintiff upon one of these bonds, that it was illegal, and that the plaintiff could not recover. *Chambers* v. *the Manchester and Milford Rail. Co.*, 33 Law J. Rep. (N.S.) Q.B. 268; 5 Best & S. 588.

(*e*) *Acts of their Servants.*

A railway company, though a corporation, is liable in an action for false imprisonment, if the act be committed by the authority of the company; the authority need not be under seal; but it lies on the plaintiff to give evidence justifying the jury in finding that the company's servants who imprisoned him, or some of them, had authority from the company to do so. *Goff* v. *the Great Northern Rail. Co.*, 30 Law J. Rep. (N.S.) Q.B. 148; 3 E. & E. 672.

The plaintiff, having taken a return-ticket from the London station of the defendants' railway, at the end of the return journey gave up an old half-ticket, which he had put in his pocket by mistake for the right one, whereupon the ticket-collector took the plaintiff to the ticket-office, where he explained how the mistake had occurred; he then went with the collector to the inspector of police in the defendants' station; and they all went together to the superintendent of the line, who, after hearing the matter, said, "I think you had better take him, but you had better first obtain the concurrence of the secretary"; the inspector then left, and on his return he directed a police constable to take the plaintiff to the public police station, and charge him with having travelled on the defendants' line without having paid his fare, with intent to avoid paying it. The plaintiff was accordingly taken to the station and before a magistrate; and on the hearing the plaintiff's story proved true, and the complaint was dismissed. The police inspector and constable were in the pay of the defendants. The plaintiff having brought an action against the defendants for false imprisonment,—Held, that, inasmuch as the 8 Vict. c. 20. (by ss. 103, 104.) imposes a penalty on any person travelling on a railway without having paid his fare, with intent to avoid the payment thereof, and empowers all officers and servants, on behalf of the company, to apprehend such person until he can conveniently be taken before a Justice, it might reasonably be assumed that a railway company carrying passengers would, in the ordinary course of business, have on the spot officers with authority to determine without delay whether the company's servants should, or should not, on the company's behalf, apprehend a passenger accused of this offence; and that the fact of all the subordinate servants of the company referring to the superintendent of the line as the superior authority, was sufficient evidence that he was an officer having authority from the company to act for them in the matter; and that the defendants were, therefore, liable for the false imprisonment directed by him. Ibid.

(*f*) *As to Mines.*

A conveyance of a strip of land was made to a railway company in 1834 under an act of parliament, which provided by one section, that all coal or other mineral should be deemed to be excepted out of any purchase of lands by the company and might be worked by the owners and lessees thereof, "so that no damage or obstruction be done or thereby occur to or in such railway or other works"; and in case of damage reparation was to be made by the owners or lessees. And by another section, that whenever the workings should approach within twenty yards of any masonry or building belonging to the company notice thereof should be given to them, and they might deliver a declaration requiring the minerals under such masonry or building to be reserved for their protection, and in that case they should purchase the same, and in case they should not deliver such declaration that the owners or lessees might work the minerals under the said masonry or buildings, in the usual and ordinary manner of working mines, doing no avoidable damage. The land was taken for the purpose of building thereon a bridge of great weight, which was subsequently built by the company. At the time of the purchase there was beneath the land, and a large tract of adjoining land belonging to the vendor, an old mine

which had been accidentally flooded and had long previously been full of water. In 1859 a lessee, deriving title under the vendor, threatened to drain the mine and renew the workings:—Held, that in addition to the special protection afforded by the act in respect of workings within twenty yards' distance of any masonry or building, the railway company was entitled, by way of necessary incident to the grant of the land, to such lateral support from the adjacent land of the vendor not situate within the twenty yards as might be necessary to uphold the bridge; and that the lessee was properly restrained from working minerals under the adjacent land not the property of the company, and not within the limits of twenty yards, so as to affect the stability of the bridge. *Elliot* v. *the North-Eastern Rail. Co.* (House of Lords), 32 Law J. Rep. (N.S.) Chanc. 402; 10 H.L. Cas. 333.

Held also, that the circumstance that the conveyance of the land was compulsory and not voluntary, could not, in the absence of any special enactment, affect the construction of the conveyance, nor prevent it from passing to the company the necessary right of support as an ordinary legal incident. Ibid.

Held, however, that although the water might afford additional support to the surface, the company had no right to speculate on the continuance of such an accidental circumstance, and that the lessee ought not to be restrained from withdrawing the water from the spaces left in the old workings, if such effect should be produced by working the colliery in a proper manner. Ibid.

In cases like the foregoing, it being impracticable to define beforehand the limits within which the workings ought to be restrained, an injunction is properly expressed in general terms against working so as to produce the particular evil apprehended. Ibid.

A railway company is responsible for injuries sustained by reason of water escaping from a stream in flood-time, or collected from rain falling on the railway, and flowing along a cutting of the railway and percolating through the substratum into mines beneath, although such mines had not been worked at the time of the formation of the railway. *Bagnall* v. *the London and North-Western Rail. Co.*, 31 Law J. Rep. (N.S.) Exch. 121; 7 Hurls. & N. 423.

The defendants, under parliamentary powers, purchased the surface of the plaintiffs' colliery, and carried their railway over it by means of a cutting which extended beyond the limits of the colliery. At the time when the railway was made no mines had been worked underneath it. The plaintiffs gave the defendants notice of their works approaching the railway, but the defendants did not treat for the purchase. The original surface of the soil over the railway was impervious to water, but the removal of the clay by the railway cutting exposed a pervious stratum subject to cracks and fissures. In consequence of the cutting, water from a brook crossed by the railway in flood-time flowed along the cutting over the plaintiffs' mines, and the side drains being insufficient to carry it off, the water flowed over the pervious surface and so escaped into and flooded the plaintiffs' mines. The rain water descending upon the railway and the sides of the cutting was in like manner carried along the railway, and over and into the mines. The defendants' works were in conformity with their local act and deposited plans and sections:—Held, that the defendants were liable for the damage occasioned by such flooding of the mines. Ibid.

Held, also, that such damage was the subject of an action, and not the subject of compensation under the compensation clauses of the Railway Act. Ibid.

### (C) Shareholders, Liability of.

The charter incorporating a trading company directed that the capital or stock should be divided into shares, and that the proprietors for the time being of stock in the corporation should execute a deed of co-partnership and settlement, whereby the capital should be divided into shares numbered in regular succession, and whereby they should enter into covenant for payment of the amounts subscribed. The promoters of the company previous to the charter being granted put the defendant's name down as an allottee for fifty shares, and sent him an allotment letter informing him thereof, and requiring payment of a deposit, and adding, that on his execution of the deed prepared in conformity with the charter, he would be entitled to fifty certificates for shares. The defendant paid the deposit, and afterwards several calls. The deed, which was executed by many shareholders, but not by the defendant, contained provisions that the shares should be numbered in regular succession, and be each distinguished by a separate number,—that every person who should have subscribed the prescribed sum or upwards to the capital of the corporation, or who should otherwise have become entitled to a share of the same, and whose name should have been entered on the register of shareholders, should be deemed a shareholder: that the corporation should keep a register of shareholders, in which (among other things) should be entered the number of shares each person held, distinguishing each share by its number: that certificates of ownership should be delivered on application to each shareholder, specifying the shares to which he was entitled. A register of shares was kept, in which the defendant was entered as the holder of fifty shares, but the shares were not numbered or specified. The defendant having refused to pay a subsequent call, the company sued him, charging him as a shareholder or holder of fifty shares indebted in respect of calls by virtue of the deed of settlement:—Held (affirming the decision of the Court below, 30 Law J. Rep. (N.S.) Q.B. 114; 1 Best & S. 593), that he was not liable to be so sued, as he had not executed the deed; although probably an action might have been maintained against him framed on his agreement to become a shareholder and execute the deed. *The Irish Peat Company* v. *Phillips* (Ex. Ch.), 30 Law J. Rep. (N.S.) Q.B. 363; 1 Best & S. 629.

*Quære*—Whether the omission in the register to number and specify the shares would have defeated the action had it been otherwise maintainable. Ibid.

### (D) By-laws.

By the charter of the Saddlers' Company, the wardens and assistants were empowered to elect assistants from the freemen, and to remove any for ill conduct or other reasonable cause, and to make such by-laws as should seem to them salutary and

necessary for the good government of the body in general and its various officers; no qualification for an assistant, beyond that of being a freeman, was imposed by the charter itself, but certain oaths were to be taken after election and before admission, and any election contrary to the directions or restrictions of the charter was declared void. An assistant was eligible to become warden, which was an office of trust, the holder of it having the custody and disposal of the corporate funds. A by-law was duly made, "that no person who has been a bankrupt, or become otherwise insolvent, shall hereafter be admitted a member of the court of assistants, unless it be proved to the satisfaction of the court that such person, after his bankruptcy or insolvency, has paid his creditors in full, or shall have established a fair and honourable character for the seven years subsequent." D, being otherwise qualified, but being in insolvent circumstances, and unable to pay his creditors 20*s.* in the pound, was elected an assistant, and after his election, of which he was not aware, but before his admission, he made to the agent of the wardens and assistants a statement, false to his own knowledge, that he was solvent; he was then admitted, and exercised the office of assistant. D. was afterwards adjudged a bankrupt, and this and his false statement having come to the knowledge of the wardens and assistants, they, at a meeting duly held, but of which D. had no notice or knowledge, expelled him from the office. D, having obtained a mandamus to restore him, the above facts appeared on the record:—Held, on error, by the House of Lords, that the by-law was valid; that its validity depended on the meaning of the words "or become otherwise insolvent," and that these words must be construed to mean notorious or avowed insolvency, such as stopping payment or compounding with creditors, and not a mere inability of a person to pay his debts in full; and also, that as D was admitted to the office of assistant without such fraud as rendered his admission void, he could not be legally removed without being heard in his defence; and that he was entitled to a peremptory mandamus,—affirming the decision of the Court of Queen's Bench, and reversing that of the Exchequer Chamber (30 Law J. Rep. (N.S.) Q.B. 186; 3 E. & E. 72). *R.* v. *the Saddlers' Co.* (House of Lords), 32 Law J. Rep. (N.S.) Q.B. 337; 10 H.L. Cas. 404.

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## *2.—JOINT-STOCK COMPANIES.*

### (A) Memorandum and Articles of Association.

Where the memorandum of association empowered the directors without further authority from the shareholders to pay a specific sum for the costs and expenses of the promoters,—Held, on demurrer, that a payment without taxation was not improper. *Croskey* v. *the Bank of Wales*, 4 Giff. 314.

Where the rules of a company provided that any member who should directly or indirectly engage in any merchants' or brokers' work, which was charged to the company, or if it were offered him by the principal or servants, should be fined 50*l.* for such work taken, and that no member should leave without giving the agent six months' notice, the plaintiff, who was a member, gave notice on the 27th of June, 1859, that he should leave on the 30th of June, but before that day entered into an engagement with a merchant, and within six months entered into other agreements,—Held, that the plaintiff was liable to be fined for the engagement made prior to the 30th of June, 1859, but not for those made subsequently. *Brancker* v. *Roberts*, 3 Giff. 276.

One clause in the articles of association of a company provided that an extraordinary special meeting might authorize the borrowing of such sum or sums of money on such terms as they might think fit. Another clause authorized the directors to borrow any sum of money not exceeding 10,000*l.* unless authorized to borrow a larger sum by a general meeting:—Held, that the latter clause was not restricted by the former, and that the borrowing of 30,000*l.* by the directors was sufficiently authorized by a resolution of an ordinary general meeting. *In re the Strand Music Hall Co. (Lim.)*, 3 De Gex, J. & S. 147.

The subscribers to the memorandum of association of a joint-stock company (limited), registered according to the requirements of the statute 19 & 20 Vict. c. 47, no articles of association being annexed to the memorandum, become under the provisions of the statute, directors of the company till the first general meeting of the shareholders has been held pursuant to the regulations for the management of the company contained in Table B. to that act annexed. *Eales* v. *the Cumberland Black-lead Mining Co. (Lim.)*, 30 Law J. Rep. (N.S.) Exch. 141; 6 Hurls. & N. 431.

An appointment by such directors of one of their own number to a salaried office under the company, is valid under the statute, and not void or illegal at common law. Ibid.

The powers of such directors, during their period of office, are in all respects the same as those of directors appointed at a general meeting. Ibid.

Per *Bramwell, B.*—Though such original directors have power to appoint one of themselves to a salaried office in the company, the appointment may be of a nature to render all the parties to it liable for a breach of trust. Ibid.

The plaintiff, an original subscriber to the memorandum of association, and as such a director of the Cumberland Black-lead Mining Co. (Limited), was appointed by the other subscribers (before the period for holding the first general meeting of shareholders according to the requirements of "the Joint-Stock Companies' Act, 1856," had arrived) the manager of the mine, for the working of which the company had been formed, at a yearly salary, the appointment to continue for a year, subject to the approval of the first general meeting. This appointment was not confirmed at the first general meeting, and the plaintiff afterwards sued the company for his salary up to the time of the action. The jury having found a verdict for him for a year's salary, the Court discharged a rule obtained to set this verdict aside. Ibid.

### (B) Powers, Duties, and Liabilities.

A company registered under the Joint-Stock Companies' Act, 1856, was established for the purpose of accepting a transfer of, and carrying into effect, the undertaking of an existing railway company. Under one of the acts of the provincial legislature relating to this company, grants of land were

made sufficient for the construction of a portion of the railway, and a power was reserved to the legislature of re-entering into possession of such lands, supposing the railway was not completed within ten years, and a further grant of lands was to be made on completion of the said portion of the railway. By another act grants of land adjoining the railway were authorized to be made to the company to the extent of 10,000 acres for every 10,000*l.* expended by the company in making the railway, and the act was to continue in force for ten years. By another act the provision in the first-mentioned act, as to the completion of the said portion of the railway within ten years, was repealed, and in lieu thereof it was enacted that if the said railway should not be completed within four years from the date of that act, all and every the grants of land conferred by the several acts relating to the company should be null and void, and the lands should revert to, and revest in, Her Majesty as if no grants had been made; and it was further enacted that the several grants made to or for the benefit of the company, were thereby confirmed and declared valid to all intents and purposes. The articles of association of the new company recited the above-mentioned acts, and provided that certain class A shares should be entitled to a certificate for an allotment and appropriation of four acres of the land of the company to each share. The directors in London issued Reports, on the faith of which the respondent applied at the office of the company, and was informed by the secretary that the class A shares were preference shares, entitling the holder to an allotment of four acres of land under the grants from the provincial government. Such Reports also contained statements implying that the company had an indefeasible title to the lands granted. The respondent became the purchaser of a number of the class A shares. He afterwards filed a bill to set aside his contract on the ground that he had been induced by misrepresentations to take the shares, such misrepresentations consisting, amongst others, in the statement that the company had an indefeasible title in the lands granted:—Held (reversing the decision of the Lords Justices), that there were no misrepresentations on the part of the company, and that as to their title to the lands granted to them, such grants of land were made for the encouragement of the company, and therefore, after they had become entitled thereto; that they were made for a consideration, which, in the view of the legislature, must be taken to have been already paid by the company when they had expended so much money upon the works, and that the company had therefore an indefeasible title to the lands granted. *The New Brunswick and Canada Rail. and Land Co. (Lim.)* v. *Conybeare* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 297; 9 H.L. Cas. 711.

If Reports are made to the shareholders of a company by their directors and the Reports are adopted by the shareholders, and afterwards industriously circulated, representations contained in those Reports must be taken to be representations made with the authority of the company, and therefore binding the company. And if those Reports having been industriously circulated be clearly shewn to have been the proximate and immediate cause of shares having been bought from the company, the company cannot be permitted to retain the benefit of the contract and keep the purchase-money that has been paid. Representations made by the secretary to a person in a general conversation, without a view to any definite statement by that person that he wants to purchase shares, are not binding on the company. Ibid.

If, however, an incorporated company acting by an agent induces a person to enter into a contract for the benefit of the company, that company can no more repudiate their fraudulent agent than an individual can repudiate his; consequently the company are bound by the misrepresentations of their agent. Ibid.

Misrepresentation entitling to relief must be a misrepresentation of fact, and not merely a conclusion of opinion. Ibid.

A person having taken shares in a joint-stock company, must be considered to have actually executed the articles of association of such company, and is therefore fixed with notice of its contents. Ibid.

When a case is constituted of fraud, it should be most accurately and fully stated. A mere general charge that something has been done by or obtained from a party under the influence of fraud, is not sufficient: it must be shewn in what it consists, and how it has been effected. Ibid.

When a charge is made involving the imputation of fraudulent misrepresentation or fraudulent concealment, if that charge fails, it ought to fail with the ordinary penalty of the Court, directing the party who makes it without ground, to indemnify his antagonist in costs. Ibid.

A counsel cannot be heard to argue his own case with another counsel: he must either appear in person or by counsel. Ibid.

Certain stock of a railway company was standing in the books of the company in the names of two persons, T and B. B, by a transfer executed by himself, and to which he forged the signature of T, transferred the stock to a third person, whose name was substituted upon the register for the names of B and T. T died soon afterwards:—Held (affirming the decision of the Master of the Rolls), that the personal representative of T had a legal right to call on the company to replace the stock, though the right of action at law was gone. *The Midland Rail. Co.* v. *Taylor* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 336; 8 H.L. Cas. 751.

The defendants proposed turning an inclined road or slipway, leading from the town to the sea-shore, from the north-east to the north-west. It appeared that this, so far from producing an injury, would make a more convenient landing-place:—Held, that, whether the defendants were authorized or not, the Court would not interfere in the matter. *The Ryde Commissioners* v. *the Isle of Wight Ferry Co.*, 30 Beav. 616.

Money borrowed for a company and *bona fide* applied for its benefit, held recoverable though the directors had no borrowing powers. *Hoare's case, in re the Electric Telegraph Co. of Ireland*, 30 Beav. 225.

A policy-holder, by whose policy the funds of a company were made liable to pay the sum insured, and certain shares of profit by way of bonus,—Held, entitled to an injunction to restrain the company

from transferring its business and assets to another company, contrary to the provisions of the deed of settlement, and without making provision out of its own assets for payment of the plaintiff's policy. *Kearns* v. *Leaf; Aldebert* v. *Kearns*, 1 Hem. & M. 681.

Where one insurance company, A, transferred all its business, property, effects and liabilities to another company, B, on the terms of A shareholders being indemnified, on a bill by A for specific performance of the agreement, the Court decreed such indemnity, and the other company which was ordered to be wound up, having by its official manager filed a cross-bill alleging fraud and misrepresentation, and that such agreement was *ultra vires*, the second company, B, having had the benefit of the agreement, was held not to be entitled to object that the agreement was *ultra vires* and improperly entered into by the managing body, and the cross-bill was dismissed. *The Anglo-Australian Life Assur. Co.* v. *the British Provident Life and Fire Society*, 3 Giff. 521.

The rule that notice to one partner in an ordinary trading partnership is notice to all the partners does not apply to a joint-stock company. *In re Carew's Estate Act* (No. 2), 31 Beav. 39.

By the deed of settlement of a joint-stock company established under the 7 & 8 Vict. c. 110, the directors were empowered to issue bills of exchange and promissory notes, but such bills and notes were only to bind the shareholders to the extent of their interests in the company. The directors, by deed-poll under the common seal of the company, and signed by three directors, appointed an agent in Canada, and empowered him to draw bills of exchange upon the company. To discharge claims against the company in Canada, the agent drew and gave there two bills of exchange, such bills containing no notice of any restricted liability. Upon the company being wound up, the holders of these bills put in claims for the amount, together with interest and damages calculated according to certain statutes of Canada:—Held, that the appointment of the agent was valid, and that the bills in question were well drawn by him so as to bind the company, notwithstanding the 45th section of the act, and notwithstanding also the provisions in the deed of settlement for limiting the liability of the shareholders; and accordingly that the holders of the bills were entitled to prove under the winding-up against the company. *In re the State Fire Insur. Co., ex parte Meredith's and Convers's Claims*, 32 Law J. Rep. (N.S.) Chanc. 300.

Held, also, that the proof being against the company as the virtual drawers, the claimants were entitled to the interest and damages given by the law of Canada, where the bills were drawn. Ibid.

A joint-stock company, established with limited liability, under the Companies' Act, 1862, may lawfully commence business and exercise their borrowing powers before the whole of the nominal capital has been subscribed; and a representation by prospectus issued on behalf of a company, that the capital consists of a given sum, in shares of a certain amount, does not imply that the whole capital named is to be raised at once, and that the borrowing powers are to be suspended until the whole of such capital has been subscribed. *M'Dougall* v. *the Jersey Imperial Hotel Co. (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 28; 2 Hem. & M. 528.

The payment to shareholders before any profits have been made of interest on the amount of capital paid up is illegal, and will be restrained by injunction. Ibid.

The enactments of the Companies' Clauses Consolidation Act, 1845, prescribing the mode in which contracts may be entered into on behalf of a company are affirmative only, and do not preclude the enforcement against a company of the ordinary equity based on part performance. *Wilson* v. *the West Hartlepool Harbour and Rail. Co.*, 34 Law J. Rep. (N.S.) Chanc. 241; 2 De Gex, J. & S. 475.

A contract made between the projector and the directors of a joint-stock company provisionally registered, but not in terms made conditional on the completion of the company, is not binding upon the subsequently completely registered company, although ratified and confirmed by the deed of settlement. *Gunn* v. *the London and Lancashire Fire Insur. Co.*, 12 Com. B. Rep. N.S. 694.

## (C) DIRECTORS.

### (*a*) *Power to contract.*

An agreement was entered into between Pooley and the London and County Company, represented by Betteley, one of their directors, whereby Pooley agreed to sell, and Betteley to purchase, certain bonds in consideration of the sum of 4,000*l.*, and debenture notes of the company for 2,500*l.*, and also 3,500 shares in the company, on which 1*l.* should be considered to have been paid. Betteley then took the bonds at 5,750*l.* (their market value), and, after paying the 4,000*l.* to Pooley, paid over the remainder for the use of the company. Pooley sold his interest in the debenture notes to Wood and Brown, who, upon the winding-up of the company, brought in their claims:—Held, that the whole transaction was invalid and must be set aside, it being neither a borrowing nor a purchasing under the powers given to the directors by their deed of settlement. *In re the London and County Assur. Co., Wood's Claim and Brown's Claim*, 30 Law J. Rep. (N.S.) Chanc. 373.

Knowledge of a particular fact relating to the accounts by one director of a banking company is not notice to the company where that director had no voice in the management of the accounts, and the money transactions of the company were conducted exclusively by a manager under three directors, of whom the director possessing the knowledge was not one. *Carew's Estate Act* (No. 2), 31 Beav. 39.

When a director is about to commit a fraud, it is to be presumed that he will not disclose the circumstance to his colleagues. Ibid.

Colonel W fraudulently obtained possession of acceptances of C, and he got them discounted and carried to his account by a banking company, to whom he was greatly indebted, and of which he was a director and local manager:—Held, under the circumstances, that the bank had notice, and could not be considered *bona fide* owners. Ibid.

The directors of a railway company are not justified in acting on an old resolution, authorizing the issue of shares after the particular purpose for which the authority was given has ceased to be available. *Fraser* v. *Whalley*, 2 Hem. & M. 10.

Nor in issuing shares, supposing them to have the power for the express purpose of creating votes, to influence a coming general meeting. Ibid.

And an injunction will be issued to restrain the issue of such shares, it not being a question of the internal management of the company, but an attempt on the part of the directors to prevent such management from being legitimately carried on. Ibid.

A clause in the deed of settlement of a joint-stock company gave power to the directors "generally, where these presents are silent or do not otherwise provide, to act in the direction of the concerns of the society in such manner as at their absolute discretion they shall think most conducive to the interests of the society." Whether under such a clause it is competent to the directors to purchase the business and take the assets and liabilities of another company —*quære. The Era Assurance Society's case*, 32 Law J. Rep. (N.S.) Chanc. 206; 2 Jo. & H. 400; 1 De Gex, J. & S. 29; 1 Hem. & M. 672.

Where, however, the shareholders had acquiesced in the amalgamation, and the dealings had been such that it was impossible to replace the companies in their original possession, it was held to be too late to disturb the arrangement which had been made, whether within the power of the directors or not. Ibid.

*Semble*—The Court has power to relieve against mistakes in law, as well as mistakes in fact. Ibid.

The promoters of an assurance company, provisionally registered under the 7 & 8 Vict. c. 110, agreed with the provisional trustees to assign to them a lease of a house, and a Treatise on Life Assurance, in consideration of 750*l.*, and a per-centage on the policy-premiums received. By the deed of settlement, executed shortly afterwards, the promoters were made directors. The company was afterwards completely registered, and the directors passed a resolution adopting the transaction, but it was never sanctioned by any general meeting of shareholders: —Held, that, the promoters not being actually directors at the time of the transaction, the 7 & 8 Vict. c. 110. s. 29. did not apply, and that the sanction of a general meeting of shareholders was not requisite to give the contract validity. *Ex parte Paul and Beresford, in re the Waterloo Life, &c. Assur. Co.*, 33 Law J. Rep. (N.S.) Chanc. 545; 33 Beav. 204.

The directors of a company borrowed 5,000*l.* from A B under a written agreement, one term of which was that 2,000 mortgage bonds of 50*l.*, each "forming part of 25,000*l.* of mortgage-bonds constituting a first charge on the property of the company," should be deposited with A B as a collateral security for the sum which was secured by two promissory notes of 2,500*l.* each:—Held, that as the directors had power to charge the property of the company and the intention to create a charge appeared from the agreement, a valid charge was created though the mortgage-bonds were invalid through incompleteness. *In re the Strand Music Hall Co. (Lim.)*, 3 De Gex, J. & S. 147.

### (*b*) *Rights and Liabilities.*

A director of a joint-stock company, registered under the Joint-Stock Companies' Act, 1856 (19 & 20 Vict. c. 47), cannot make a binding contract for profit to himself in a transaction with the company. *Ex parte Hill, in re the Cardiff Preserved Coal and Coke Co. (Lim.)*, 32 Law J. Rep. (N.S.) Chanc. 154.

Where a director had advanced money to the company from time to time under an arrangement for receiving a bonus or commission of 6*d.* per ton on the amount of produce sold by the company, and the account between him and the company as entered in the company's books included this commission, the Court refused to allow it, but directed the account to be taken allowing interest on the advances at 5*l.* per cent. Ibid.

A was nominated a director of a new company by the articles of association, which provided that no person should be eligible as a director unless holding in his own right fifty shares. By the memorandum of association, which he signed, he agreed to take twenty-five shares only. He subsequently signed the articles themselves:—Held, by the Master of the Rolls, and, on appeal, by the Lords Justices, that, though a director, he was not liable as a contributory for more than the twenty-five shares which he had agreed to take.—The clause respecting the qualification of directors held, by the *Lord Justice Turner*, not to apply to directors nominated by the articles of association. *Ex parte Stock, in re the Llanharry Hematite Iron Ore Co. (Lim.); ex parte Roney, in re same Co.*, 33 Law J. Rep. (N.S.) Chanc. 731.

A joint-stock company, registered under the statute 7 & 8 Vict. c. 110, had a fiat in bankruptcy issued against it. One of the Commissioners of Bankruptcy ordered a person who had been a director, but who, before the date of the fiat, had sold all his shares, and so had become disqualified under the deed of settlement to act as director, to file a balance-sheet and accounts of the company as directed by the 12th section of the statute, 7 & 8 Vict. c. 111. On appeal, the *Lord Justice Knight Bruce* considered that it was proved that this person had acted as a director down to the date of the fiat, and therefore the order of the Commissioner was right. The *Lord Justice Turner* did not concur. *Ex parte Strousberg, in re the Mitre General Life Assurance, Annuity and Family Endowment Association*, 30 Law J. Rep. (N.S.) Bankr. 13.

The person so held to be a director applied to the Lords Justices for leave, under the provisions of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106. s. 18), to appeal to the House of Lords; but their Lordships considered that the question was one of fact and not of law (and, per the *Lord Justice Turner*, supposing that some question of law was involved, it was not of that difficulty or importance to justify the appeal), and refused the application. Ibid.

One of the directors of a company, established under the Joint-Stock Companies' Act, 1844, and having definite borrowing powers, made advances (not in accordance with the borrowing powers) to meet the necessary expenses of carrying on the concern. Subsequently the company, after being registered as a limited company under the Joint-Stock Companies' Act, 1856, was voluntarily wound up:—Held, that the director was entitled to rank as a creditor of the company, and to receive payment next after the general creditors, in the event of there being then any assets. *Lowndes* v. *the Garnett and Moseley Gold-Mining Co. of America (Lim.)*, 33 Law J. Rep. (N.S.) Chanc. 418.

Assuming that a resolution of a board of directors, signed by the chairman, would be sufficient to revive against a company a debt barred by the Statute of

Limitations,—*semble*, the acknowledgment will be vitiated if the resolution was come to by a board meeting, at which the creditor was himself present in his character of director. Ibid.

The summary power conferred by the 165th section of the Companies' Act, 1862, of ordering directors to repay money misapplied by them, cannot properly be exercised by the Court under the 138th section in the case of a company which is being wound up voluntarily, without making an order for the compulsory winding-up of the company. *In re the Bank of Gibraltar and Malta (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 617.

The Court will not exercise the powers given to it by the 165th section in cases where the question of the liability of the directors is complicated or difficult, but will in such cases require a bill to be filed for the purpose of taking an account against the directors.—See this case on appeal, 35 Law J. Rep. (N.S.) Chanc. 49. Ibid.

A prohibition in the company's articles against a director voting in respect of any matter in which he has an interest, does not preclude him from voting as a shareholder at a general meeting in respect of any such matter. *East Pant Du United Lead Mining Co.* v. *Merryweather*, 2 Hem. & M. 254.

The defendant authorized his name to be inserted as a director in the prospectus of a joint-stock company, limited. The prospectus was sent to the defendant, who suggested alterations in it. The secretary gave orders to the plaintiff to advertise the prospectus, which was done at an expense of 236*l.* The company was never registered:—Held, in an action by the plaintiff against the defendant, to recover the expenses of the advertisements, that the defendant, by consenting to act as a director, had not authorized the secretary of the company to pledge his credit, and that he was not liable to the plaintiff. *Burbidge* v. *Morris*, 34 Law J. Rep. (N.S.) Exch. 131; 3 Hurls. & C. 664.

A prospectus of a projected company for the conveyance of emigrants to British Columbia, contained statements calculated to induce intending emigrants to believe that arrangements had been perfected for the object in view, and inviting them to take tickets for their passage and the public to purchase shares. This prospectus was shewn by the secretary to the defendants, and they were asked to allow their names to be inserted therein as directors, to which they consented on being qualified (that is, presented each with 200 paid-up shares of the nominal value of 10*l.* each) and indemnified. Their names were accordingly inserted and the prospectus published in the *Times*:—Held, that, from these facts the jury were warranted in inferring that one who contracted with the secretary for a passage and paid his money upon the faith of the representations contained in the prospectus, did so upon the credit of the defendants, and, consequently, that he was entitled to sue them for a breach of the contract. *Collingwood* v. *Berkeley*, 15 Com. B. Rep. N.S. 145.

The defendants and others, as provisional directors of a projected joint-stock company, resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for the purpose. The secretary accordingly applied to an advertising agent, to whom (on his calling at the company's offices to inquire under what authority the secretary was acting) he shewed the prospectus and the above resolutions:—Held, affirming the judgment of the Common Pleas, that there was evidence to go to the jury that the directors were parties to the resolutions, and were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by him, and that they would incur no liability,—there being nothing to shew that the secretary, in giving the orders, or in communicating to the plaintiffs the resolutions of the directors, had acted beyond the scope of his actual or apparent authority as secretary. *Maddick* v. *Marshall* (Ex. Ch.), 17 Com. B. Rep. N.S. 829.

### (c) *Contracts between.*

The directors of the company made an order awarding fees to those of their body who should attend their board-meetings, and afterwards allotted shares to those members who attended, according to the number of their attendances, which shares they deemed to be fully paid-up shares; and, on appeal, it was held, that the Court had no power to alter the agreement which had been come to, and that the shares having been issued as paid-up shares must be so treated. *Ex parte Currie, in re the Great Northern and Midland Coal Co. (Lim.)*, 32 Law J. Rep. (N.S.) Chanc. 57.

The promoters of a company agree with their co-directors to surrender the per-centage secured to them under a contract in consideration of receiving fixed annuities; this arrangement was never submitted to a general meeting of shareholders:—Held, that it was invalid, under the 7 & 8 Vict. c. 110. s. 29, for want of the sanction of a general meeting. *Ex parte Paul and Beresford, in re the Waterloo Life, &c. Assur. Co.*, 33 Law J. Rep. (N.S.) Chanc. 345; 33 Beav. 204.

The first count of the declaration was for non-payment of a sum of money which the defendants, who were a gas company registered under 7 & 8 Vict. c. 110, contracted to pay the plaintiff on the completion of certain gasworks, erected for them by the plaintiff. The second count was for a per-centage on outlay and contracts for the defendants, in which the plaintiff should be concerned as engineer of the defendants, which per-centage they had agreed to pay him in consideration of his engineering superintendence; and the third count was for money lent:—Held, that a plea to each of these counts, that the plaintiff was a director of the company at the time of making the contract and was interested therein, was a good answer, as the contract in respect of which the claim in each of such counts was founded was within section 29. of 7 & 8 Vict. c. 110, and therefore void. *Stears* v. *the South Essex Gaslight Co.*, 30 Law J. Rep. (N.S.) C.P. 49; 9 Com. B. Rep. N.S. 180.

Held, secondly, that a plea to the first count, on equitable grounds, that the company were induced to make the contract on condition that the plaintiff would guarantee to the shareholders a certain dividend in respect of their shares, and that the plaintiff had not given such guarantee, was a bad plea, as the contracts were independent contracts, and the defendants' remedy was only by cross-action. Ibid.

Held, lastly, that the defendants having pleaded a plea of accord and satisfaction, by the delivery to the plaintiff of money and deeds, it was a good equitable replication to so much of the claim as that plea alleged to have been satisfied by the delivery of deeds, to reply that such deeds were never of any value. Ibid.

A joint-stock company, registered under the 19 & 20 Vict. c. 47. may, by their articles of association, agree to pay a remuneration to each of their directors, and an action is maintainable on such an agreement. *Orton* v. *Cleveland Fire Brick and Pottery Co. (Lim.)*, 3 Hurls. & C. 868.

## (D) SHARES.

### (*a*) *Acceptance of.*

In an action for calls made by a company registered under 19 & 20 Vict. c. 47, it was proved that the defendant had paid the deposit on the shares in advance to the bankers of the company, and had applied for the shares by a letter, which was in a printed form provided by the company and signed by the defendant, in which he requested the directors to allot him twenty shares, and stated that he thereby agreed to accept the same. In compliance with this letter the number of shares applied for were allotted to the defendant, and the company never directed any other form of acceptance of shares:—Held, that as no other form had been directed by the company, the defendant had, by the letter of application, sufficiently testified his acceptance of the shares to satisfy the statute, which provides, in Schedule, Table (B.), that "no person shall be deemed to have accepted any share in the company unless he has testified his acceptance thereof by writing under his hand in such form as the company from time to time direct." *The Bog Lead Mining Co.* v. *Montague*, 30 Law J. Rep. (N.S.) C.P. 380; 10 Com. B. Rep. N.S. 481.

*Quære*—Whether any acceptance of shares in writing is required where the company has not directed any form of such acceptance whatever. Ibid.

### (*b*) *Transfer of.*

It was provided, by the deed of settlement of a joint-stock company, that no shareholder should be at liberty to transfer his shares except in such a manner as a board of directors should approve. A shareholder contracted to sell his shares:—Held, that he was bound specifically to perform the contract, by the execution of a transfer, though the directors refused to allow it. *Poole* v. *Middleton*, 29 Beav. 646.

A banking and loan company was formed in England, for the purpose of carrying on banking business in the colonies, and particularly in Australia. According to a scheme, a prospectus of which was issued in Australia, the company had registered certain shares to be called "Colonial Shares," and also shares for the purpose of being issued to parties desirous of taking them in part payment of any loan which they might contract. These shares were to bear interest at 6*l.* per cent. for two years, and the manager was authorized to give off a limited number of English shares, which were transferable either in the colony or in England. It was conceived that these shares would be an advantageous mode of remitting money to England. Share certificates were accordingly issued by the manager at Sydney, upon which it was stated that "notice of certificates sent to England and the names of parties to whom transmitted must be given to the manager at Sydney." The company also furnished blank powers of attorney for the execution of the deed of settlement in London, in the names of the parties to whom the shares were issued, and also to receive dividends, and sell the shares. M, to whom some of these shares had been issued, sold his certificates to D and executed the powers of attorney. D, in 1841, sold and assigned the shares to H, who had previously been informed at the Sydney office that there would be no difficulty in the sale and transfer of the shares:—Held, that the company could not, as against these shares, assert a lien in respect of a debt due from the person to whom they were originally issued. *Hunter* v. *Stewart*, 31 Law J. Rep. (N.S.) Chanc. 346.

In 1848, A transferred some shares in a company to B. In 1851 the company was ordered to be wound up. The Court refused in 1863 to allow the official manager to contest the validity of the transaction, until he had laid a sufficient ground for it, by stating to the Court what information he had received on the subject, and when he had first obtained it. *In re the Cameron Coalbrook Co. (Hunt's case)*, 32 Beav. 387.

A shareholder executed a transfer of his shares, which he took, together with his certificate of shares, to the company's office for registration. He left the transfer, but refused to leave the certificate for the inspection of the directors:—Held, that the Court would not, on motion under the 25 & 26 Vict. c. 89. s. 35, compel the company to register the transfer, and the Court refused a motion for that object with costs. *In re the East Wheal Martha Mining Co.*, 33 Beav. 119.

The 54th section of 7 & 8 Vict. c. 110. prohibits the transfer of shares by a shareholder only if he shall not have paid the full amount *payable* as well as due, in respect of every share held by him. Therefore, in a case governed by that act, non-payment of a call made before, but not payable till after, the execution of a transfer, forms no objection to the validity of the transfer. *In re the British Provident Life and Fire Assur. Society (Orpen's case)*, 32 Law J. Rep. (N.S.) Chanc. 633. (This case was afterwards compromised; see 33 Law J. Rep. (N.S.) Chanc. 67.)

The non-return of a transfer to the Registrar of Joint-Stock Companies, under 7 & 8 Vict. c. 110. s. 13, though leaving the transferor liable for the debts of the company as between himself and the creditors of the company, does not leave him so liable as between himself and the other shareholders; and, consequently, the omission to make such return affords no ground for placing him upon the list of contributories. Ibid.

S, a registered holder of shares in a joint-stock company, in which the shares could only be transferred by deed executed by the transferor and transferee, was induced by O, his broker, to intrust him with some forms of transfer, signed and sealed by S in blank, for the transfer of certain shares in another company, which latter shares S had employed O to sell for him, S intending that the blanks should be filled up by O, and the forms used for the transfer of the last-mentioned shares. O having stolen the certificates of the first-mentioned shares from a box

belonging to S, deposited at a bank for safe custody, feloniously filled up the blanks in two of these forms of transfer with the description of the shares in the first-mentioned company, and having forged the attestations delivered the transfers to *bona fide* purchasers for value; and the company removed the plaintiff's name from the register of shareholders, and placed thereon the names of the purchasers. The plaintiff having brought an action against the company to recover the dividends, and claiming a mandamus commanding the defendants to replace his name on their register as the owner of such shares,—Held, per *Pollock, C.B.*, and *Wilde, B.*, that the defendants were entitled to judgment;—that the forgery by O was the proximate consequence of the plaintiff's own negligence, and that he was therefore estopped from denying that the property in the shares passed by the transfers;—that the doctrine of estoppel by executing instruments in blank is not confined to negotiable instruments. *Swan* v. *the North British Australasian Co. (Lim.)*, 31 Law J. Rep. (N.S.) Exch. 425; 7 Hurls. & N. 603.

Per *Martin, B.* and *Channell, B.*, that the plaintiff was entitled to judgment;—that O having no authority under seal from the plaintiff to fill up the blank forms of transfer, these forms were not deeds, and therefore could not operate to deprive the plaintiff of his property in the shares, which could be done only by deed;—that the doctrine of estoppel, by executing instruments in blank, is confined to negotiable instruments. Ibid.

Per *totam Curiam*, that negligence whereby another is injured, to operate as an estoppel, must be the proximate cause of the injury. Ibid.

A contract to deliver shares in a joint-stock company does not require the actual delivery of scrip certificates, which are the mere *indicia* of property; but the party contracting to deliver the shares sufficiently performs his engagement when he places the other in the position of being the legal owner of them. *Hunt* v. *Gunn*, 13 Com. B. Rep. N.S. 226.

### (c) *Creation of Half-Shares.*

By the deed of settlement of a joint-stock company it was provided that the capital of the company should consist of 100*l.* shares. The company subsequently, at a general meeting, created half-shares, and the defendant afterwards purchased some of those shares, and received the dividends, and executed the deed of settlement. The company afterwards agreed to dissulve and wind up, under the Joint-Stock Companies' Acts, 1856 and 1857, and the defendant was sued for calls, made by the directors and by the liquidators of the company:—Held, that the defendant was estopped from disputing the validity of the creation of the half-shares. *The Hull Flax and Cotton Mill Co.* v. *Wellesley*, 30 Law J. Rep. (N.S.) Exch. 5; 6 Hurls. & N. 38.

### (d) *Preference Shares and Debentures.*

Although debentures issued by a joint-stock company to a director in payment for work contracted to be done by him for the company are invalid in his hands under the 7 & 8 Vict. c. 110. s. 29, their invalidity will not affect a *bona fide* assignee for valuable consideration without notice, if the company have encouraged him in the belief that they were valid. *In re the South Essex Gaslight and Coke Co. (Hulett's case)*, 31 Law J. Rep. (N.S.) Chanc. 293; 2 Jo. & H. 306.

Under the articles of association of a joint-stock company, the company was empowered at a special meeting to increase the capital of the company by the issue of new shares to be of such nominal value and subject to such conditions as to payment of calls or proportion of profits, as might be determined:—Held, that this did not authorize the issue of preference shares. *Moss* v. *Syers*, 32 Law J. Rep. (N.S.) Chanc. 711.

By the memorandum of association of a joint-stock company the amount of capital was fixed at 120,000*l.* in 12,000 shares of 10*l.* each, and by the articles of association the directors were empowered, with the sanction of the company in general meeting, to declare a dividend to be paid to the shareholders in proportion to their shares. About half the shares only were allotted, and at an extraordinary general meeting of the company duly convened, it was resolved that the directors might, if they should think fit, issue the remaining shares with a preferential dividend. Upon a bill by dissentient shareholders to restrain the directors from acting on this resolution,—Held, affirming the decision of one of the Vice Chancellors, that the proposed issue was contrary to the articles of association and *ultra vires*. *Hutton* v. *the Scarborough Cliff Hotel Co. (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 643; 2 Dr. & S. 514.

*Semble*—That the proposed issue was opposed to the memorandum of association, constituting the basis of the company, and therefore could not have been rendered legal by any exercise of the power conferred by the 50th section of the Companies' Act, 1862, to alter the regulations contained in the articles of association. Ibid.

## (E) SHAREHOLDERS.

### (a) *Acquiescence by.*

At an extraordinary general meeting of a joint-stock company established for granting assurances on lives, it was resolved to extend the business to marine insurances. The resolutions were afterwards confirmed; a deed embodying them was executed by some, but not all of the shareholders, and in the annual return to the Joint-Stock Companies' Registry Office the business of the company was stated to include marine insurance. The reports of the directors several times alluded to the extension of the business, and on one occasion a report alluding to such extension accompanied the dividend warrant. The business as extended was carried on for a year and a half, when the company was ordered to be wound up:—Held, that the above-mentioned circumstances were not sufficient to bind the general body of shareholders by acquiescence to the extension of business, which could only be effected by a new deed executed by all the shareholders: consequently, holders of marine policies could not come in as creditors of the company in respect of losses upon such policies. *In re the Phœnix Life Assur. Co. (Burges and Stock's case)*, 31 Law J. Rep. (N.S.) Chanc. 749; 2 Jo. & H. 441.

Held, however, that the holders of such policies might claim in respect of the premiums paid. Ibid.

A supplemental deed of settlement is necessary to

bind shareholders to a change in the objects of a joint-stock company—*semble*. Ibid.

Shareholders in a company cannot lie by sanctioning, or by their silence at least acquiescing in, an arrangement, which is *ultra vires* of the company, watching the results, and if it be favourable and profitable to themselves, to abide by it, and insist on its validity, but, if it prove unfavourable and disastrous, then to institute proceedings to set it aside. Therefore, where shareholders complained of acts *ultra vires* which they had acquiesced in for six years, relief was refused. *Gregory* v. *Patchett*, 33 Beav. 595.

Where an act has been done by a public company, to the legality of which certain formalities are requisite, and the circumstances are such that knowledge and acquiescence may be imputed to every shareholder, the Court will, as against the company, infer that the necessary formalities have been complied with. *In re the British Provident Life and Fire Assur. Society (Grady's case)*, 32 Law J. Rep. (N.S.) Chanc. 326; 1 De Gex, J. & S. 488.

*(b) Rights and Liabilities.*

Although it is the undoubted right of every shareholder in a company to prevent the directors from exceeding their powers, still where it appears that the plaintiff is merely a puppet in the hands of others not shareholders in the company who indemnify him against the costs of the suit, the Court will not interfere by interlocutory injunction. *Filder* v. *the London, Brighton, and South Coast Rail. Co.*; *Barchard* v. *the Brighton, Uckfield and Tunbridge Wells Rail. Co.*, 1 Hem. & M. 489.

In matters strictly relating to the internal management of a company, the Court, though it should come to the conclusion that the course adopted is not warranted by the terms of the instrument, will not interfere, even though the minority should have summoned a meeting of all the shareholders, and the majority should have persisted in the course complained of. *Gregory* v. *Patchett*, 33 Beav. 595.

But if measures adopted are plainly beyond the powers of the company, and are inconsistent with the objects for which the company was constituted, then the Court will, at the instance of the minority, interpose to prevent the performance of the act complained of, and it will do so, whether an appeal has or has not been made by the minority to the shareholders generally. Ibid.

The Court will interfere to prevent the directors of a railway company, not having powers so to do, from embarking the funds of the company in carrying on a brewery or steamboat company, and from speculating in the purchase or sale of stock, and from transferring their business to another company. But it will not interfere or prevent a call not required, or stop a dividend not justified by the pecuniary condition of the company, though it will prevent the illegal apportionment of the dividends amongst the shareholders. Ibid.

Where the Court interferes by injunction to prevent the performance by the directors of a company of an act *ultra vires*, it will also to the extent of its power redress the act performed, and give relief to the persons injured thereby; although it is not called upon to dissolve the company or wind up its affairs. Ibid.

The only available property of a company was transferred to two shareholders in lieu of their shares, and the company was thereby practically put an end to, and the debts were thrown on the remaining shareholders. This was sanctioned by a majority of the shareholders at a general meeting:—Held, that the majority could not bind the minority in such a transaction, and it was set aside. Ibid.

Where a plaintiff filed a bill on behalf of himself and all other shareholders except the defendants, against the company and the directors and solicitors, alleging misrepresentation and suppression, and praying for repayment of the deposits, a demurrer was allowed without leave to amend. *Croskey* v. *the Bank of Wales*, 4 Giff. 314.

Where shares in a joint-stock company have been issued fraudulently, a *bona fide* purchaser of these shares in the market before any bill has been filed to impeach the transaction, is entitled, on a winding up of the company, notwithstanding the fraud and notwithstanding that he bought the shares at a very great discount, to prove on equal terms with the other shareholders of the company who bought their shares at par; but this privilege does not extend to any person who purchased his shares after the filing of the bill, unless his vendor was a *bona fide* holder of the shares before bill filed, and the onus of proof that such was the case is upon him. *Barnard* v. *Bagshaw, in re the Lake Bathurst Australasian Gold Mining Co.*, 1 Hem. & M. 69.

A shareholder in a company, which is in course of being wound up voluntarily, and of which the business is proposed to be transferred to another company in consideration of shares in such other company, cannot be compelled, under the powers conferred by the 161st section of the Companies' Act, 1862, to take shares in the other company, nor does he by failing to express his dissent in writing from the resolution sanctioning the arrangement within seven days after the meeting at which it was passed forfeit his right to refuse to become such shareholder. *In re the Bank of Hindustan, China and Japan (Lim.), ex parte Los*, 34 Law J. Rep. (N.S.) Chanc. 609.—See also *Higgs's case*, 2 Hem. & M. 657; and *Martin's case*, 2 Hem. & M. 669.

A person, whose name has been improperly placed on the register of members of a company, is entitled, under the 35th section of the Companies' Act, 1862, to have his name erased from the register, although the shares in respect of which it was placed there have been declared forfeited, and the forfeiture has been entered in the register. Ibid.

*(c) Contract to take Shares.*

The plaintiffs issued a prospectus containing, among other things, a statement that the company had succeeded in obtaining from the colonial government the free grant of the unallotted land, ten miles in width, for the whole extent of the Crown territory through which the line would pass, being estimated at upwards of 200,000 acres, and that each holder of shares in classes A and B would be entitled to the land in certain proportions, upon the completion of a specified section of the railway. The defendant, who had signed an agreement to take shares, but had not actually accepted them, discovered that the right to the land was only contingent upon the completion of the line within a limited period. He then

declined to accept the shares:—Held, upon bill filed by the company to enforce acceptance of the shares, that although the Court will direct specific performance of a contract to take shares, yet it will not enforce the contract where the prospectus, upon the faith of which the shares were taken, contains misrepresentations of facts, whether intentionally or otherwise. Every fact must be stated with scrupulous accuracy, and no fact must be omitted the existence of which might affect the interests of those who take shares. Bill dismissed, but, in consideration of the defendant's want of caution, without costs. *The New Brunswick and Canada Rail. Co. (Lim.)* v. *Muggeridge*, 30 Law J. Rep. (N.S.) Chanc. 242; 1 Dr. & S. 363.

A, in reliance on statements contained in a prospectus issued and forwarded to him by a company which had been formed for the construction of a railway abroad under a concession from a foreign government, took shares in the company. The prospectus, besides minor inaccuracies, contained the following mis-statements: first, that the contractor for the works had guaranteed 2½ per cent. on the paid-up capital during construction, whereas the contractor's liability to pay interest was to cease when the payments in respect thereof should reach a fixed sum; secondly, that by the concession of the foreign government 9*l.* per cent. was guaranteed on the capital subscribed, whereas the guarantee was limited by a stipulation giving it effect only while the line failed to produce that amount without the default of the company. Upon a bill by A against the company seeking to be relieved from his purchase, on the ground of misrepresentation,—Held, by the Lords Justices, reversing a decree made by the *Vice Chancellor Stuart*, that having regard to the mis-statements above mentioned, the plaintiff was entitled to be relieved, and the purchase was declared void. *Kisch* v. *the Central Rail. Co. of Venezuela (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 545; 3 De Gex, J. & S. 122.

### (*d*) *Registration of.*

A person may be a shareholder of a company within the meaning of section 27. of the statute 8 & 9 Vict. c. 16. without there being a register of shareholders duly authenticated by the seal of the company, provided he is entered in a book analogous to a register, as the holder of shares numbered and specifically appropriated to him. *The Wolverhampton New Waterworks Co.* v. *Hawkesford* (Ex. Ch.), 31 Law J. Rep. (N.S.) C.P. 184; 11 Com. B. Rep. N.S. 456.

S, a holder of shares in a joint-stock company, was induced by O, his broker, to entrust him with deeds of transfer, signed by S in blank; and O, having afterwards stolen from S certain share-certificates, was enabled, by means of the blank transfers, to which he also forged the signature of an attesting witness, to transfer to innocent purchasers for value the share-certificates, and the names of the transferees were in due course entered on the register of the company as shareholders in the place of S. On motion by S, under the Joint-Stock Companies' Acts, to rectify the register,—Held, that the Court ought to decide the title to the shares. *Ex parte Swan*, 30 Law J. Rep. (N.S.) C.P. 113.

Held, per *Erle, C.J.*, and *Keating, J.*, that S was estopped by his negligence, in entrusting O with the blank deeds of transfer, from setting up his right against a *bona fide* purchaser, who had been guilty of no negligence. That the doctrine adopted in *Young* v. *Grote* as to the effect of signing negotiable instruments in blank was applicable to instruments under seal. Ibid.

Per *Williams, J.*, and *Willes, J.*, that the right of S to the shares had never been divested, and that he was entitled to have his name restored to the register. And, *semble*, that the doctrine adopted in *Young* v. *Grote* ought not to be extended to conveyances by deed of land or other property. Ibid.

Per *Williams, J.*, that, even assuming the doctrine of *Young* v. *Grote* to be extended to this case, S had not been guilty of negligence. Ibid.

*Quære*, per *Williams, J.*, whether the cases as to the liability of a man who signs a blank bill or note or cheque are founded on the doctrine of estoppel, or on a rule of law-merchant, that an actual authority is thereby conferred on the person in whose hands the instrument is. Ibid.

### (*e*) *Rectification of Register.*

After the name of a person has been wrongfully placed upon the register of any company, it is not in the power of the directors by simply removing his name from the register effectually to indemnify him against liability arising from such wrongful insertion of his name; if they desire to do so, they must apply to the Court for the purpose, and if they neglect so to do, the shareholder may himself apply, notwithstanding that his name has been in fact removed. *In re the Bank of Hindustan, China and Japan (Higgs's case)*, 2 Hem. & M. 657; and *Martin's case*, 2 Hem. & M. 669.

The prospectus of a proposed company, described as a "finance bank," stated eight objects, some of which went beyond ordinary banking business. In May S, on the footing of the prospectus, applied for fifty shares, and paid the deposits. On the 1st of June the company was registered with a memorandum of association, which went considerably further in stating its objects than the prospectus. On the same day the directors sent S a letter of allotment of fifty shares. In December of the same year the company failed. S applied to have his name taken off the list of shareholders, on the ground that he never had agreed to become a shareholder in a company with these extended objects. There being no evidence to rebut S's positive oath that until the company failed he never had any notice of the extension of the objects of the company beyond those named in the prospectus,—Held, affirming the decision of the *Vice Chancellor Wood*, that his name ought to be removed from the list. *Ship's case*, 2 De Gex, J. & S. 544.

## (F) CALLS.

To a declaration by a railway company for calls made pursuant to Colonial acts, which provided that no calls should in any one year exceed a prescribed amount, the defendant pleaded that the directors made more calls for money and to a greater amount than were prescribed by the acts; and that the call sued upon was a call made in excess of the calls by the acts empowered to be made. The plaintiff replied that the calls in the plea mentioned other

than the call sued for were not authorized by the acts, and were therefore void; and that the call sued for was not a call made in excess of the calls empowered to be made, if the void calls were not reckoned as calls empowered to be made; and that the defendant did not pay the void calls, or any part thereof, nor were the same, or any part thereof, paid on the shares in respect of which the defendant was sued:—Held, that the replication did not answer the plea, inasmuch as it was consistent with the plea that the company had treated the unauthorized calls as valid, and received the greater part of the money in respect of them. *The Welland Rail. Co.* v. *Berrie*, 30 Law J. Rep. (N.S.) Exch. 163; 6 Hurls. & N. 416.

To an action for calls on shares in a joint-stock company, registered under the Joint-Stock Companies' Act, 1856, and having Table B. as the articles of its association, it is no answer that the shares were taken on the faith of a representation in the memorandum of association that the capital was to be a certain named sum, and that the intended capital was not and could not be raised, and only a small and insignificant number of shares taken, insufficient to carry on the business of the company, and that the defendant never assented to the business being commenced or carried on with the shares taken. *The Ornamental Woodwork Co. (Lim.)* v. *Brown*, 32 Law J. Rep. (N.S.) Exch. 190; 2 Hurls. & C. 63.

Future calls which, under the deed of settlement of a society, are to be made when it shall appear to the directors necessary or expedient, cannot be validly mortgaged under a provision in the deed of settlement, authorizing the directors to borrow on the security of the funds or property of the society, and to cause the funds or property on the security of which any sums shall be so borrowed, to be assigned, transferred, conveyed or surrendered by way of mortgage, to the person from whom such sums shall have been borrowed. *In re the British Provident Life and Fire Assur. Soc., ex parte Stanley*, 33 Law J. Rep. (N.S.) Chanc. 535.

A company established under the Limited Liability Act, 1856 (19 & 20 Vict. c. 47.) borrowed money upon debentures, which charged the same upon "all the lands, tenements and estate" of the company, and all their "undertaking." Upon the company being wound up voluntarily,—Held, as between the simple contract creditors of the company and the debenture holders, that the debentures did not include arrears of unpaid calls, or moneys to arise from future calls. *King* v. *Marshall*, 34 Law J. Rep. (N.S.) Chanc. 163; 33 Beav. 565.

The payment required on allotment is not a call. *Croskey* v. *the Bank of Wales*, 4 Giff. 314.

### (G) Funds of the Company.

The funds of a joint-stock company established for the purposes of one undertaking cannot be applied to another, and the attempt so to apply them, though sanctioned by all the directors, and by a large majority of the shareholders, is illegal. But where a company was established "for the erection, furnishing, and maintenance of an hotel, the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects"; and the directors, while the hotel was in the course of being built, agreed to let off, for a stipulated period of short duration, a large portion of it to the head of a government department for the business of his office, and evidence was given that such a letting was calculated to be productive of advantage to the company in its intended business, and that a majority of shareholders had sanctioned the act, it was held, that the arrangement was valid within the words of the clause, "all such things as are incidental or otherwise conducive to the attainment" of the objects for which the company was established. *Simpson* v. *the Westminster Palace Hotel Co.*, 8 H.L. Cas. 712.

The Lords Justices were divided in opinion as to the propriety of the Vice Chancellor's decree, and so no costs were given in this House. Ibid.

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## 3.—*DISSOLUTION AND WINDING-UP OF COMPANIES.*

### (A) Jurisdiction.

A petition for winding up a company was presented before its bankruptcy, but was heard afterwards. There being no application by the assignee to wind it up, the Court held that, notwithstanding the 11 & 12 Vict. c. 45. s. 6. (which prevents any other person than the assignee applying for a winding-up after a fiat), it had jurisdiction to make the order, and it made the order accordingly. *In re the Mitre General Life Assur. &c. Assoc.*, 29 Beav. 1.

Where a shareholder in a mining company on the cost-book system in the Stannaries was being sued in London, and the Vice Warden had no power to stay the action,—Held, (the company having ceased to carry on the business), that this was a proper case for a winding-up order in this and not in the Stannaries Court. *In re the Wheal Anne Mining Co.*, 30 Beav. 601.

In winding up the affairs of a company, the Court, notwithstanding the opposition of a large shareholder, has jurisdiction under the Joint-Stock Companies' Acts to direct a compromise of any claim against the company to be carried into effect, if apparently it is for the benefit of the greater number of shareholders. *In re the Risca Coal and Iron Co.*, 31 Law J. Rep. (N.S.) Chanc. 283; 30 Beav. 528.

The Joint-Stock Companies' Acts, 1856, 1857 and 1858, do not take away from the Court of Chancery the jurisdiction to adjudicate upon a disputed claim against a company which is in course of voluntary winding-up. *Lowndes* v. *the Garnett and Moseley Gold-Mining Co.*, 31 Law J. Rep. (N.S.) Chanc. 451; 2 Jo. & H, 282.

The shareholders in a mining company within the jurisdiction of the Stannaries passed a resolution for a voluntary winding-up of the company, and appointed two liquidators. A creditor presented a petition for a compulsory winding-up, upon which the Vice Warden made an order directing the voluntary winding-up to continue under the supervision of the Court, and substituting a new liquidator for one of those appointed by the resolution:—Held, by the *Lord Justice Knight Bruce* (the *Lord Justice Turner* doubting), that the Vice Warden had jurisdiction to remove the liquidator appointed by the

shareholders. *In re the Old Wheal Neptune Mining Co.*, 2 De Gex, J. & S. 348.

Prior to the Companies' Act, 1862 (26 & 27 Vict. c. 89), a limited company, which was liable to be wound up in the Bankruptcy Court, passed a resolution for winding up voluntarily, but, after the Companies' Act, 1862, had come into operation, a petition was presented for winding it up compulsorily:—Held, that under the 26 & 27 Vict. c. 89. s. 207, the jurisdiction was in Bankruptcy and not in Chancery. *In re the West Silver Bank Mining Co.*, 32 Beav. 226.

A company of unlimited liability registered under the statute 7 & 8 Vict. c. 110, after carrying on business, was registered as a limited company under the statute 19 & 20 Vict. c. 47, and was afterwards ordered to be wound up. The Court, affirming an order of one of the Commissioners of Bankruptcy, decided that the same must be done under the jurisdiction in Bankruptcy, both as to matters before as well as after registration, under the act of 1856. *Ex parte Stevenson, in re the Liverpool Tradesman's Loan Co. (Lim.)*, 32 Law J. Rep. (N.S.) Chanc. 96.

The 32nd section of the 18 & 19 Vict. c. 32, extending the jurisdiction of the Stannaries Court over the county of Devon, does not oust the jurisdiction of the Court of Chancery over mines in that county, and therefore it is no objection to a petition for winding-up a joint-stock mining company in that county that the petitioners are not owners of one-tenth in value of the shares, as required by the 12 & 13 Vict. c. 108. s. 1. in the case of mining companies formed on the cost-book principle within the jurisdiction of the Court of Stannaries. *In re the South Lady Bertha Copper Mining Co.*, 32 Law J. Rep. (N.S.) Chanc. 92; 2 Jo. & H. 376.

Leave to present such a petition was held to have been properly granted under the 20 & 21 Vict. c. 78. s. 12. on the ground that the Stannaries Court had no jurisdiction to restrain proceedings at law against individual shareholders. Ibid.

A company was formed for the purpose of purchasing and working a mine in Cornwall, and was registered under the Companies' Act, 1862, in the Registry Office of the Stannaries Court, but its registered office was in London, and it never commenced business:—Held, that it was a company "engaged in working" a mine within the meaning of the 81st section of the Companies' Act, 1862, and that the jurisdiction to wind it up was in the Stannaries Court, and not in the Court of Chancery. *In re the East Botallack Consolidated Mining Co. (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 81; 34 Beav. 82.

The test of the Stannary jurisdiction under that clause is not "actual working," but the object for which the company is framed. Ibid.

A Commissioner in Bankruptcy having settled on the list of contributories of a company in course of winding-up the name of a man who died before the date of the winding-up order, has jurisdiction to rehear the case, and to correct the list by striking out the name of the dead man. *In re the Southampton, Isle of Wight and Portsmouth Improved Steamboat Co. (Lim.) (Hopkins' case)*, 33 Law J. Rep. (N.S.) Bankr. 40.

### (B) WHAT COMPANIES MAY BE WOUND UP UNDER THE ACTS, AND WHEN.

A company was, in 1852, registered as one of unlimited liability, under the act, 7 & 8 Vict. c. 110. After the passing of the act of 1856 (19 & 20 Vict. c. 47), it was re-registered as one of limited liability. In 1858 one of the Vice Chancellors made an order for winding-up the company, and appointed Mr. R P H official manager, who proceeded in the winding-up. On appeal to the Lords Justices, their Lordships discharged the order for winding-up, and subsequently one of the Commissioners in Bankruptcy made an order for winding-up, and appointed an official liquidator. R P H paid over all the assets in his hands to such official liquidator, and presented a petition to the Commissioner for payment of his costs and expenses as official manager out of the estate of the company, but the petition was dismissed on the ground that there was no jurisdiction to make the order; and, on appeal, the order of the Commissioner was affirmed, but without costs. *Ex parte Harding, in re the Plumstead, Woolwich and Charlton Water Co.*, 32 Law J. Rep. (N.S.) Chanc. 145.

A company originally constituted under the 7 & 8 Vict. c. 110. neglected to register, as directed by the 25 & 26 Vict. c. 89. s. 210. On a petition for winding-up being presented by the company and the chairman jointly,—Held, that the company was precluded from petitioning by reason of its not having registered, and that it could not be permitted to evade the provisions of the 25 & 26 Vict. c. 89. s. 210. by joining a shareholder as a co-petitioner, and that no order could therefore be made upon the petition. *In re the Waterloo Life, Education, Casualty and Self-Relief Assur. Co.*, 32 Law J. Rep. (N.S.) Chanc. 370; 31 Beav. 586.

A company registered under the act of 1856 (18 & 19 Vict. c. 47), but not under the act of 1862 (25 & 26 Vict. c. 89), may be wound up voluntarily under a resolution passed after the latter act came into operation. *In re the Torquay Bath Co.*, 32 Beav. 581.

The words "unregistered company" in the 25 & 26 Vict. c. 89, s. 199 (2), mean a company not registered under any act, and not a company unregistered under that act. Ibid.

A limited company, whose business is being carried on at a loss without any reasonable prospect of ultimate success, may be wound up, on the petition of a shareholder, before the whole of the capital has been called up. *In re the Factage Parisien Co. (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 140.

Where the proceedings in a voluntary winding-up under the act of 1856 were dilatory and unsatisfactory, and had not come to a conclusion at the end of five years, the Court, upon the petition of a shareholder, directed a winding-up under the Court. *In re the Fire Annihilator Co.*, 32 Beav. 561.

The provisions of the Companies' Act, 1862, as to winding-up orders under the Court of Chancery, are not intended to apply to cases where there is a very small body of shareholders and no difficulties in the way of voluntary winding-up exist. *In re the Natal, &c., Co.*, 1 Hem. & M. 639.

To warrant a winding-up order against a company on the ground of neglect for three weeks after demand to pay or secure a debt, the three weeks must have expired before presentation of the petition for winding-up. *In re the Catholic Publishing and Bookselling Co. (Lim.)*, 33 Law J. Rep. (N.S.) Chanc. 325; 2 De Gex, J. & S. 116.

Where upon a winding-up of a petition there is a *bona fide* dispute as to the existence of the debt the non-payment whereof is made the foundation for the petition, the convenient and proper course is, not to try the question of debt upon the petition, but to adjourn the hearing of the petition under section 86. of the Companies' Act, 1862, until the debt has been established at law.—[Per the *Lord Justice Turner*, differing from the Master of the Rolls, who had held that he was bound under the 25 & 26 Vict. c. 42. to decide the legal question of debt.] Ibid.

The 8th part of the Companies' Act, 1862 (25 & 26 Vict. c. 89.) includes and applies to all companies which had been registered other than (as well as) companies registered under that act itself. "Registered companies" there means registered under that act itself; "unregistered companies," all those which had been registered under other acts antecedently to its passing. Therefore, an insurance company which was formed in 1852, and registered under the act of 1844 (7 & 8 Vict. c. 110), and which ceased to carry on business in 1855, was held to be capable of being made the subject of a winding-up order under the 25 & 26 Vict. c. 89. *Bowes* v. *the Directors, &c. of the Hope Life Insurance and Guarantee Co.*, 11 H.L. Cas. 389.

Ordinarily speaking, it is not under the provisions of the 25 & 26 Vict. c. 89. s. 199. a discretionary matter with the Court, when a debt, due by a registered company, has been established and remains unsatisfied, to refuse to the creditor an order for winding up the company. But (per *Lord Cranworth*) it is possible that a case might occur in which the Court could refuse such an order. Ibid.

H, an insurance company, registered under the Joint-Stock Companies' Act, 1844, granted a policy on a life. H transferred its business and its liabilities to another company, M. The life fell; an action was brought against the H company. Several pleas were pleaded: a director and agent of the M company entered into a negotiation with the plaintiff and got the policy transferred to himself; the pleas were then withdrawn, and judgment entered against the H company. The director then assigned the policy and judgment to B as trustee for another person. Execution was issued, and a return of *nulla bona* made. B then presented a petition for a winding-up order against the H company. The Master of the Rolls granted the order. The Lords Justices offered to B the opportunity of going into evidence in support of his claim, which was alleged by the H company to be collusive; but he refused to do so, insisting that that company could not impeach it, except by filing a bill to stay the judgment. On this refusal the Lords Justices discharged the order of the Master of the Rolls:—Held, that the order of the Master of the Rolls could not be sustained, the H company being entitled to file a bill to impeach the judgment. But the petitioner was not bound, as a preliminary to his right to the order, to go into further evidence in support of his claim, for, there being a judgment in his favour, the burden of impeaching it lay on the company. The order of the Lords Justices was therefore reversed, and the petition was ordered to stand over until a fixed day, on the respondents undertaking to file a bill to impeach the judgment. The costs of the appeals to the Lords Justices and to the House were ordered to be costs in the cause. Ibid.

(C) Petition and Order for Winding-up.

A petition was presented by a shareholder to wind up a company, after a petition to make the company bankrupt had been presented, but before any adjudication:—Held irregular, and dismissed with costs. *In re the Mitre General Life Assur., &c. Association*, 29 Beav. 1.

An order having been made for winding up a company by consent between the solicitors for the official liquidators and the petitioners, two contributories, who were not before the Court when the order was made, applied, after the expiration of twenty-one days from the date of the order, praying that such order might be discharged or varied, or the petition itself re-heard:—Held, first, that although the order might have been made by consent, that did not preclude the contributories who were not before the Court from making this application; secondly, that their not being parties to the order formed no objection; thirdly, that the period of twenty-one days did not apply to applications to discharge or vary a winding-up order; and fourthly, that leave was not required for an application to re-hear, vary, or discharge an order of this nature. *In re the Anglo-Californian Gold Mining Co.*, 31 Law J. Rep. (N.S.) Chanc. 238; 1 Dr. & S. 628.

Shareholders in a company who have either sold or forfeited their shares may apply for a winding-up order against the company when it has ceased to carry on business and is winding up its affairs privately, if they claim to be contributories, and have been sued, and made liable as such. *In re the Times Fire Assur. Co.*, 31 Law J. Rep. (N.S.) Chanc. 478; 30 Beav. 596.

A creditor of a limited company petitioned for a compulsory winding-up order. This was objected to by the company and by a considerable body of creditors, who supported a voluntary winding-up:—Held, that the petitioners were entitled to a compulsory order. *In re the General Rolling Stock Co.*, 34 Beav. 314.

Principles on which this Court proceeds in such cases stated. Ibid.

The Court will not, except under special circumstances, order a limited company to be wound up on the petition of a shareholder whose shares are fully paid up. *In re the Patent Artificial Stone Co. (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 330; 34 Beav. 185.

The holder of paid-up shares in a limited company is not *ipso facto* disqualified from presenting a petition for the winding-up of the company; but to obtain a winding-up order he must satisfy the Court that the company has ceased to carry on its business, and that the assets of the company are sufficient after payment of the debts of the company to produce a surplus for division among the shareholders. *In re the Lancashire Brick and Tile Co. (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 331; 34 Beav. 330.

Upon a petition by an unregistered transferee of scrip certificates in a limited company, an order was made by the Master of the Rolls, and, on appeal, affirmed (but *dissentiente* the *Lord Justice Turner*), for winding up the company, on the petitioner admitting his liability as a contributory, and undertaking

to do all necessary acts for making himself a legal shareholder. *In re the Littlehampton, Havre and Honfleur Steamship Co. (Lim.), ex parte Ellis*, 34 Law J. Rep. (N.S.) Chanc. 237; 34 Beav. 256; 2 De Gex, J. & S. 521.

Notwithstanding a company is in course of being wound up voluntarily with the assent of a large majority of its creditors, an order for winding-up by the Court will be directed where there is danger of want of efficient supervision under the voluntary winding-up. Ibid.

The creditors of an insolvent company are entitled to a winding-up order, even though there may, by reason of prior claims, be no assets coming to them, on the principle that the concern is virtually theirs, and that they ought to have the control of the management. *In re the Isle of Wight Ferry Co.*, 2 Hem. & M. 597.

On a petition to wind up a company within the Stannaries, a creditor is not entitled to appear and oppose. *In re the Tretoil and Messer Mining Co.*, 2 Jo. & H. 421.

(D) Official Manager, Official Liquidator, and Creditors' Representative.

The duties of an official manager require a sensible and an honest man, who is a good accountant. *In re the Agriculturist Cattle Insur. Co., and in re the Joint-Stock Companies' Winding-up Acts*, 1848, 1849, 1866, *ex parte Lowe; in re the same Company, and in re the same Acts, ex parte Findlater*, 30 Law J. Rep. (N.S.) Chanc. 619; 3 De Gex, F. & J. 194.

Accountants are not to be regarded as officers of the Court exercising any legal functions. Ibid.

A motion to have a claim for a large debt allowed against a company in course of being wound up having been successfully made, the Vice Chancellor declined to certify that the case was a proper case for the appearance of the creditors' representative by counsel, and, on appeal, a motion to have the costs of his appearing by counsel allowed was refused. *In re the Era Life, &c. Assur. Co.*, 1 De Gex, J. & S. 172.

Per the *Lord Justice Turner*,—as a general rule, the creditors' representative ought not to appear on applications in which the contributories and creditors have a common interest, where the interest of the contributories is as great as that of the creditors. Ibid.

The creditors' representative represents only the established creditors of the company, and cannot be heard on behalf of a class of persons claiming to be admitted as creditors. *In re the Phœnix Life Assur. Co.*, 31 Law J. Rep. (N.S.) Chanc. 749; 2 Jo. & H. 441.

The Court will not, upon the hearing of a petition to wind up a company, enter into a contest as to the person to be appointed official liquidator; and it will not appoint one on that occasion unless with the concurrence of all parties. *In re the Commercial Discount Co.*, 32 Beav. 198.

Notice was given by advertisement that it was intended voluntarily to wind up a company which had adopted the regulations contained in 19 & 20 Vict. c. 47, Table B, by a meeting to be held on a day and at an hour named. The meeting took place. It was resolved to have a voluntary winding-up, and an official liquidator was appointed, who sold property of the company by auction. On motion by the official liquidator to restrain a creditor from attaching the proceeds in the auctioneer's hands,—Held, that the advertisement, not having stated that an official liquidator was to be appointed, his appointment was invalid, and the motion must be refused, with costs. *In re the Stearic Acid Co.*, 32 Law J. Rep. (N.S.) Chanc. 784.

Upon a bill filed by the official manager of an unincorporated society representing a particular class of shareholders, against another class of shareholders, praying that the defendants might be declared liable to make good certain funds alleged to have been misapplied, the Court held that such a suit could not be maintained. *Ernest* v. *Weiss*, 32 Law J. Rep. (N.S.) Chanc. 113.

The Court also expressed an opinion that an official manager of an unincorporated company, that is, a company which has only been provisionally registered, can under no circumstances bring an action, or institute a suit against any person, nor can any action or suit be instituted against such official manager. Ibid.

A provisional official liquidator is not entitled to appear at the hearing of a winding-up petition. *In re the General International Agency Co. (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 337.

The creditors' representative is not as of right entitled to appear separately on an appeal; and it appearing that he had no interest distinct from the official manager, the greater part of his costs were disallowed against the estate. *Ex parte Cotterell, in re the National Assur. and Investment Assoc. (the Bank of Deposit)*, 32 Law J. Rep. (N.S.) Chanc. 66.

The creditors' representative has a right to appear on a contributory summons upon a winding-up and have his costs. *In re the British Provident Life and Fire Assur. Soc. (Orpen's case)*, 32 Law J. Rep. (N.S.) Chanc. 633.

The deed of settlement of a registered joint-stock company provided that every general meeting, whether ordinary or extraordinary, should be called by advertisement, and that such advertisement should express the object of such meeting or the business proposed to be transacted thereat, and that no other business should be transacted at an extraordinary general meeting than the business for which it should have been expressly called. The deed did not contain any provisions for the winding up of the company:—Held, that liquidators for the winding up of the company, under the statutes 19 & 20 Vict. c. 47. and 20 & 21 Vict. c. 14. could not be appointed at a meeting convened for the purpose of proposing a resolution to wind up the company voluntarily; and that it was immaterial that the company was established before the passing of the Winding-up Acts. *The Anglo-Californian Gold Mining Co.* v. *Lewis*, 30 Law J. Rep. (N.S.) Exch. 50; 6 Hurls. & N. 174.

(E) Contributories; Persons liable to be made Contributories, and Extent of their Liability.

(*a*) *Directors.*

The defendant, being a shareholder in a company conducted on the cost-book principle, in October, 1861, sold and transferred all his shares; in the November following, the company was registered under the Joint-Stock Companies' Acts, 1856, 1857; in

April, 1862, an order of the Vice Warden of the Stannaries was made for winding up the company; and under that order, in April, 1863, the defendant's name was put on the list of contributories to the company. In March, 1863, an action was commenced, by the plaintiff against the defendant, for goods supplied to the company between 1859 and 1861, while he held shares. On an application for a stay of proceedings, on the ground that the action could not be brought without leave of the Court pursuant to the 6th section of the 21 & 22 Vict. c. 60,—Held, that the defendant was not within the protection of that section: for that neither was he nor had he been a member of the registered company, nor was the debt a debt of that company; and that the fact of the Vice Warden having put the defendant on the list of contributories made no difference, as the act was *ultra vires*. *Lanyon* v. *Smith*, 32 Law J. Rep. (N.S.) Q.B. 212; 3 Best & S. 938.

*Quære*—If the company had been registered under 19 & 20 Vict. c. 47. and 20 & 21 Vict. c. 14?

S, the local manager of a company, was asked by the general manager to become a director, the qualification for which was the holding 500 shares. 500 shares held by the manager as a trustee for the company were transferred to S by deed, which S also executed. He acted as director, but he was not registered as a shareholder, never received any notice of dividends, continued to be local manager, and never paid the price which was expressed in the deed of transfer to be paid for the shares, nor appeared to have been treated as a shareholder; and the Court was satisfied on the evidence that he had never agreed to purchase the shares, but that they were transferred to him by order of the directors merely to qualify him for the directorship:—Held, that if the company, which could not be bound by the transaction, elected to affirm it, S was only a trustee for the company, and so not a contributory: and that if they elected to disaffirm it, then, it not appearing that S was privy to the breach of duty on the part of the directors, it must be rescinded altogether, and that S therefore was not a contributory. *In re the Waterloo Life, &c. Assur. Co. (Saunders's case)*, 2 De Gex, J. & S. 101.

On application by the official manager of a company ordered to be wound up, the Court refused to put in the list of contributories or to declare liable to contribute to the debts of the company a provisional director and allottee of fifty shares, who had attended meetings and taken part in the proceedings, but had never signed the subscription contract. *In re the Hereford and Merthyr Tydvil Rail. Co. (Maitland's case)*, 3 Giff. 29.

The deed of settlement of a joint-stock company provided for the division of the persons concerned in it into three classes: (1.) Those interested in the Mutual Investment or Depositors' Fund; (2.) Those interested in the Mutual Assurance Fund; (3.) Those interested in the General Fund. The deed also provided that the depositors or holders of the investment stock (1.) were to have such interest not exceeding 5*l.* per cent. as should be determined by the directors of the association; and it gave the depositors any surplus profits on that stock. The depositors or holders of that mutual investment stock (1.) paid their money over the counter of the company, and received in return certificates of acknowledgment referring to the deed of settlement, and stating that the interest was payable half-yearly on the deposits so made. The prospectuses of the association, and an almanac issued by the directors also, referred to the rate of interest payable to the depositors, and spoke of the profits to be realized by them on their deposits. Upon the question whether the depositors were to be put upon the list of contributories to the association, the Master of the Rolls decided that, as they were affected with notice of the contents of the deed, and entitled to receive interest on their deposits according to the profits of the concern, they were partners in it, and as such to be put on the list of contributories, but without prejudice to any ulterior questions of liability *inter se;* also, that as to one of the depositors (Mrs. Davies) who had obtained a judgment in an action against the association, execution in the action must be stayed; also, that if a person authorizes a director of a company to apply to the board of it to elect him as a director, he must be taken to authorize the directors who elect him to do all that is legal and necessary to constitute him a director of the company, and he cannot afterwards be heard effectually to say that he did not authorize them to take the proper course for the purpose. The Marquis of A was therefore a contributory, though the extent of his liability was not determined. On appeal by Mrs. Davies and the Marquis of A respectively from the above decisions, the Lords Justices held, reversing the order of the Master of the Rolls, that (as to Mrs. Davies) the prospectus contained nothing to shew that the "investment" contemplated was anything more than an ordinary deposit with the bank, and could not give the depositor any claim to a share of the profits, and her name must be removed from the list; and further, that the fact that the prospectus which was in Mrs. D's hands mentioned the special act of parliament of the company, which act referred to the deed of settlement, was not notice to her of the contents of the deed. She must also be allowed to proceed with her action against the company. Their Lordships (as to the case of the Marquis of A) considered that his consent to become a director was not a consent to accept the necessary qualification for that office under the deed; that there was no implied agreement by him to become the holder of the stock; that, as he had no actual notice of the deed, so he could not, under the circumstances, be taken to have had constructive notice thereof, and that the consent to become a director did not impose upon him the obligation of accepting any stock; and, generally, that the mere fact of filling the office of a director did not make such director a contributory; and their Lordships decided, upon the same grounds as governed Mrs. D's case, that the Marquis of A was not a contributory in respect of the 105*l.* investment stock, and his name was accordingly removed from the list. *In re the National Assur. and Investment Assoc. (the Bank of Deposit); Ex parte Davies; Ex parte the Marquis of Abercorn*, 31 Law J. Rep. (N.S.) Chanc. 828.

A company was in process of being wound up. By the deed of settlement of the company it was provided that no person should be or continue a director unless he was the holder of a particular amount of stock. The company was managed by a board of directors at the chief office in London, and

by boards in various towns, in the latter of which local agents or deputies, called provincial directors, had conferred upon them limited authority. C was one of these provincial directors, but held no shares in the company, and, on a question of his liability to be placed upon the list of contributories,—Held, that the clause requiring the qualification for directors did not apply to those who held the office of provincial directors, and that C was not liable to be placed on the list of contributories. *Ex parte Cotterell, in re the National Assur. and Investment Assoc. (the Bank of Deposit)*, 32 Law J. Rep. (N.S.) Chanc. 66.

On the 10th of August, 1860, at a meeting of five persons, held before the formation of and for the purpose of forming a joint-stock company, this resolution was passed: "Each of the gentlemen present agrees to hold 100 shares in the company, and also to execute the articles and memorandum of association when ready, and act as directors of the company." At a meeting held on the 14th of August the draft articles of association were submitted to the five gentlemen and approved, and ordered to be engrossed for execution at the next meeting. On the 25th they all signed the memorandum of association for twenty-one shares each, and executed the articles of association. By one of the articles the qualification of directors was fixed at 100 shares, and by another, it was provided that until directors were appointed, the subscribers thereto should be deemed to be directors. The company was afterwards wound up in Bankruptcy:—Held (affirming a decision of one of the Commissioners), per the *Lord Justice Turner*, that by the resolution of the 10th of August and the articles of association taken together, and per the *Lord Justice Knight Bruce*, that by the effect of the resolution and articles and of the proceedings in January, 1861, reported 32 Law J. Rep. (N.S.) Chanc. pages 57, 58, the five gentlemen were contributories in respect of 100 shares each, in which number the twenty-one shares for which they had subscribed the memorandum of association should be included. *Ex parte Currie and others, in re the Great Northern and Midland Coal Co. (Lim.) (Second case)*, 32 Law J. Rep. (N.S.) Chanc. 421.

*(b) Registered Shareholders.*

A person's name having been improperly placed on the register of shareholders in a public company was, on the winding-up of the company, placed by the Commissioner on the list of contributories. On appeal,—Held, that the name being on the register, the Commissioner could not do otherwise than place it on the list of contributories. *Ex parte Fox, in re the Moseley Green Coal and Coke Co. (Lim.)*, 32 Law J. Rep. (N.S.) Bankr. 57.

*(c) Holders of Paid-up Shares.*

Shares in a projected company, with limited liability, were allotted in payment of the purchase-money of property on which the intended company was about to carry on its business, and were accepted and treated by the vendor of such property as paid-up shares, and he afterwards transferred to each of the directors of the company 100 of them. One of the Commissioners of Bankruptcy in winding-up the company placed the names of each of these directors on the list of contributories, and made a call upon them. On appeal, it was held, that, as the shares had been allotted to a stranger as paid-up shares, they must be so considered, and the directors' names be removed from the list in respect to them. *Ex parte Currie and others, in re the Great Northern and Midland Coal Co. (Lim.)*, 32 Law J. Rep. (N.S.) Chanc. 57.

*(d) Applicants for Shares.*

A party who applies for shares and says, "which I hereby accept," and pays the deposit, if he writes before the allotment is made, saying he withdraws, and desires to cancel his application, is not a contributory. *Ex parte Graham, in re the Cardiff and Caerphilly Iron Co. (Lim.), and in re the Joint-Stock Companies' Acts*, 1856 *and* 1857, *and in re Gledhill*, 30 Law J. Rep. (N.S.) Chanc. 861; 30 Law J. Rep. (N.S.) Bankr. 42.

A filled up a blank form of application, by which he agreed to accept a certain number of shares in a company, or any less number which might be allotted to him, and he paid a deposit, for which he received a banker's receipt. No shares were ever allotted; but he never made any formal claim for repayment of his deposit, which the company used. The company was wound up before it had commenced its intended operations, and A was placed by the Master of the Rolls on the list of contributories. But, on appeal,—Held, by the Lords Justices, that the contract was only to accept shares when an allotment of them should have been made, and that until allotment there was no complete contract, and consequently that A was not a contributory. *In re the Adelphi Hotel Co. (Lim.), (Best's case)*, 34 Law J. Rep. (N.S.) Chanc. 523; 2 De Gex, J. & S. 650.

A B agreed, verbally, to take 100 shares in a limited company, paying 1*l.* per share as deposit, and stipulating for the return of the 100*l.* if he did not get the shares in a few days. By the terms of the prospectus for launching the company, 2*l.* per share was payable upon allotment, in addition to the deposit. The shares were allotted in a few days, but no notice of allotment was given to A B, who, on his part, did not apply for the shares. Shortly after the company became defunct:—Held, affirming a decision of the Master of the Rolls (the *Lord Justice Knight Bruce hæsitante*), that the contract to accept the shares became complete on allotment; that it was the duty of A B to have applied for the shares and paid the 2*l.* per share; that neither his default in this respect, nor the omission by the company to give notice of the allotment, exonerated him; and, consequently, that A B was liable as a contributory. *Ex parte Bloxam, in re the New Theatre Co. (Lim.)*, 33 Law J. Rep. (N.S.) Chanc. 574; 33 Beav. 529.

A person accepting shares in a company, though intending to do so as agent only for another person, will be personally liable in respect thereof, unless he state at the time of acceptance that he accepts them only as agent. *Ex parte Bird; ex parte the Southampton, Isle of Wight and Portsmouth Improved Steamboat Co. (Lim.); in re the Joint-Stock Companies' Acts*, 1856 *and* 1857, 33 Law J. Rep. (N.S.) Bankr. 49.

A B, who was a shareholder in and director of a company, signed an undertaking to take fifty additional shares in the company, intending at the time

(but not so stating) to take them on behalf of a landowner for whom he was agent, and who was largely interested in the operations of the company. The landowner subsequently took 100 additional shares in his own name, and, as A B contended, in satisfaction of the fifty shares agreed to be taken by him. The company was afterwards wound up:—Held, that in the absence of notice given by A B, at the time of signature, that he signed the undertaking as agent only, he must remain on the list of contributories in respect of the fifty shares. Ibid.

(*e*) *Persons who have taken Shares upon Conditions.*

C executed the deed of settlement of a company which provided that no person should be entitled to the rights of a proprietor who should not have been previously accepted as such by the directors; that no persons purchasing shares from the directors should be considered approved by the board as a proprietor until he should have paid down the price, and that upon his making such payment the board should cause his name to be entered in the register of shareholders as a proprietor; that every person who should subscribe for or take or purchase or acquire any shares should, from the time of the entry or alteration in the register as a proprietor, be so considered; that every entry or alteration in the register should, as between the company and the last proprietor, be binding; and that the register should, as between the company and every person claiming to be a proprietor, be conclusive evidence on behalf of the company to shew whether he was a proprietor. On an application of C to be removed from the list of contributories, it appeared that the managing director, S, had induced C to execute the deed on an agreement that he should be appointed one of the medical officers, and should not be removed except for misconduct. It further appeared that after a correspondence as to this stipulation, C insisted that his name should be erased from the list of shareholders and his subscription cancelled. S finally engaged that the shares should be treated as forfeited, and assured C that the company would treat his signature to a deed of settlement as a nullity. No entry relating to this transaction appeared in the company's books, except an entry in the minutes of a meeting of the directors after the execution of the deed to the effect that 300 shares were allotted to C; who, however, never made, nor was required to make, any payment in respect of deposit or otherwise, nor received any communication whatever from the company until after an order had been made for winding it up:—Held, first, that the contract made between S and C, even if binding in equity, which (*semble*) it was not, was not within the powers of the directors under the deed of settlement; secondly, that C, notwithstanding his execution of the deed, never was a shareholder, nor had entered into a binding contract to become one; thirdly, that if C was a shareholder, it was competent to an extraordinary board of directors to declare his shares forfeited; and (*semble*) that that course would, under the circumstances of the case, have been assumed by the Court to have been taken, if it had been clear that C had ever become a shareholder under the deed. *In re the British Provident Assur. Soc. (Coleman's case)*, 1 De Gex, J. & S. 495.

A, upon his appointment as agent to a limited assurance company, agreed to take shares upon the terms that the payment for them should be deducted from his commission as agent, and no deposit was ever paid by him upon them, but he was registered as the holder of the shares. The company, very soon after his appointment, dismissed him; but, as he contended, wrongfully. On the winding up of the company,—Held, by the Lords Justices, reversing a decision of the Master of the Rolls to the contrary effect, that the company's cancellation of A's appointment as agent, whether justifiable or not, could not operate as a cancellation of A's agreement to become a shareholder, and that (subject to any question of account as to payment for the shares) A was liable as a contributory. *In re the Life Assoc. of England (Lim.) (Thomson's case)*, 34 Law J. Rep. (N.S.) Chanc. 525.

If a person is induced to take shares on the faith of a promise by the promoters of a company, which promise is not kept, he is, nevertheless, a contributory, his remedy being only against the persons who made the promise. *In re the United Kingdom Shipowning Co. (Felgate's case)*, 2 De Gex, J. & S. 457.

(*f*) *Persons who have taken Shares upon Misrepresentation.*

If a person be induced, by the false representations of a company, to take shares, he cannot be rendered liable as a contributory; but the representations must come from an actual report put forward by the authority of the company, and not from the statements of directors' clerks or others. *In re the Royal British Bank (Frowd's case)*, 30 Law J. Rep. (N.S.) Chanc. 322.

The brokers, at Bristol, of a recently formed company sent to B, who resided in that neighbourhood, a prospectus of the company, and told him that the London share list was closed, but that they had some shares of the company to dispose of, and that the shares were quoted in the market at a premium. The statement as to the closing of the share list was made on the authority of the secretary of the company; that as to the shares being at a premium, agreed with certain reports in the newspapers, of which the authorship was not traced. Both statements were untrue. B agreed to take 150 shares, paid the deposit, and received a scrip certificate; but having discovered that three persons named as directors in the prospectus had no shares, that the London share list was not closed, and that there had been no sales of shares, he repudiated his shares and claimed a return of the deposit. The directors repaid the deposit and struck B's name off the share-register. By the articles of association, the cancellation of shares by the directors required the sanction of a general meeting; but no meeting was held. B was never asked to pay any calls, and did not execute the deed of settlement. Six months after the repayment of the deposit to B the company was voluntarily wound up:—Held, that B could not be made a contributory. *In re the Life Assoc. of England (Lim.), ex parte Blake*, 32 Law J. Rep. (N.S.) Chanc. 278; 34 Beav. 634.

A company may be treated as having, *qua* company, been guilty of fraudulent misrepresentation. Ibid.

Certain reserved shares in a banking company were, in June, 1864, offered by the directors to the

existing shareholders, on the terms that the price of the shares was to be paid on the 1st of October then next, and that the shares would then be entitled to one quarter's dividend at the end of the year, but that, if paid before that time, interest at 5*l.* per cent. would be allowed. A, a shareholder, agreed in July, 1864, to take certain of the reserved shares; and in August he paid for them in advance. The manager informed him that a certificate would be given for the shares on the 1st of October; but, on the 19th of September the bank stopped payment. It was admitted that the directors had gravely misrepresented the financial position of the company in their annual report, adopted by a general meeting in February:—Held, affirming a decision of *Vice Chancellor Kindersley* (but *dissentiente* the *Lord Justice Knight Bruce*), that the contract was to take the shares *in præsenti*, and that A was a contributory in respect of the reserved shares agreed to be taken by him. *In re the Leeds Banking Co., ex parte Barrett*, 34 Law J. Rep. (N.S.) Chanc. 558; 2 Dr. & S. 415; 3 De Gex, J. & S. 30.

Held, also (per *Vice Chancellor Kindersley*), that A could not be relieved on account of misrepresentations to which he was, as a shareholder, himself constructively a party; and (per *Lord Justice Turner*), that having regard to the lapse of time between the date of the report and the taking of the shares, the misrepresentations in the report could not be regarded as the proximate cause of A taking the shares. Ibid.

(*g*) *Owners of Shares standing in the Name of others.*

J C took 300 shares in a cost-book mining company, and in order to increase the apparent number of shareholders, and thereby cause the mining scheme to be more favourably regarded in the share-market, caused 100 of them to be transferred into the name of A, and 100 to be transferred into the name of B, who, notwithstanding the transfers, neither attended meetings nor paid calls, nor took any part in the affairs of the company:—Held, that having regard to the absence of any *bona fide* trusteeship on the part of A and B, and to the extended definition of the word "contributory" in the 200th section of the Companies' Act, 1862 (25 & 26 Vict. c. 89), J C was properly inserted on the list of contributories in respect of the whole 300 shares. *The Wheal Emily Mining Co. (Cox's case)*, 33 Law J. Rep. (N.S.) Chanc. 145.

B being applied to by C to allow shares in a joint-stock company to be taken in his name, consented on condition that he should not be liable to any demands in respect thereof, and this arrangement was known to the directors, who were well aware that the deposit had been paid by C, and always treated C as the real owner of the shares. By a subsequent arrangement between the directors and C, but which was not within the powers of the directors, nor confirmed by the company, it was agreed that these shares should be transferred into C's name, and, accordingly, the secretary was instructed to substitute the name of C for that of B as the holder of the shares. The secretary made the alteration in the share-ledger, but B's name was not removed from the register of shareholders. The company was afterwards ordered to be wound up in Bankruptcy, and B's name was inserted in the list of contributories. Upon an application by B in Chancery that his name might be removed from the register of shareholders, coupled with an appeal from the order placing him on the list of contributories,—Held, by the Lord Chancellor, that whatever might be the equities as between B and C, the company had a right to retain B as a contributory, and the application and appeal were dismissed, notwithstanding the submission of C to have his own name substituted for that of B. *Ex parte Barrett, in re the Moseley Green Coal and Coke Co.*, 33 Law J. Rep. (N.S.) Chanc. 617.

(*h*) *Trustees and Executors.*

The liability of a trustee as a contributory will not be limited to the extent of the trust estate. *In re the Phœnix Life Assur. Co. (Hoare's case)*, 31 Law J. Rep. (N.S.) Chanc. 504; 2 Jo. & H. 229.

A transferee of shares, having taken upon himself the character of owner, cannot rely upon any irregularities in the transfer to escape liability, whether the shares belong to him beneficially or as trustee. Ibid.

A testatrix, who held shares in a company, by her will gave her residuary estate, which included them, to A B, whom she appointed her executrix. The deed of settlement of the company provided that executors, legatees, &c., should become shareholders and receive dividends only upon executing a deed, making themselves personally liable. A B, without executing any deed, received six dividends, and, with the exception of the two last, signed the receipts as executrix. The company, without the knowledge of A B, returned her name to the Stamp Office as a shareholder, and about four years after the testatrix's death entered it on the dividend list in lieu of that of the testatrix. Upon the company being wound up,—Held, that A B was liable as a contributory only in her representative character. *Ex parte Bulmer, in re the Herefordshire Banking Co.*, 33 Law J. Rep. (N.S.) Chanc. 609; 33 Beav. 435.

(*i*) *Persons who have withdrawn from the Company or forfeited their Shares.*

By the rules of a mutual guarantee society notice of the withdrawal of any of the members was required to be given, but no particular form of notice was required, nor was it stated to whom the notice should be given:—Held, that parol notice of withdrawal given by a member to the agent through whom the original contract with the society was made was sufficient. *In re the Solvency Mutual Guarantee Soc. (Hawthorne's case)*, 31 Law J. Rep. (N.S.) Chanc. 625.

A shareholder withdrew from a company in pursuance of various resolutions passed at several general and special meetings; he paid what was required of him, and the company was subsequently remodelled. Twelve years and five months afterwards the company was wound up under an order of this Court:—Held, by the Master of the Rolls, and affirmed, on appeal, by the Lords Justices, that the lapse of time and the subsequent acts of the company prevented any inquiry into the validity of the transaction, and that the retiring shareholder could not be placed on the list of contributories. *Ex parte Brotherhood, in re the Agricultural Cattle Insur. Co.*, 31 Law J. Rep. (N.S.) Chanc. 861; 31 Beav. 365.

The directors of a company made arrangements with S, a shareholder who was dissatisfied with its management and desirous of obtaining a winding-up order, for enabling him to retire from the company by a forfeiture of his shares for non-payment of calls upon the terms of the shareholder paying a sum of money to the directors. The stipulated sum of money was paid; a resolution of the board of directors was passed declaring the shares forfeited for non-payment of calls, and the forfeiture registered at the office for the registration of joint-stock companies; and from that time the name of S was omitted from the list of shareholders in the share-register book, and in the next balance-sheet the shares were entered as cancelled; but no other notice of the transaction was given to the other shareholders, and no notice of any of the transactions of the company was given to S after the registration of his forfeiture. Twelve years afterwards the company was ordered to be wound up, and three years later an application was made by the official manager to add the name of S to the list of contributories:—Held, reversing the decision of the Master of the Rolls, that the transaction was collusive between S and the directors, and was not cured by lapse of time; and the name of S was ordered to be added to the list of contributories. *In re the Agriculturist Cattle Insur. Co. (Spackman's case)*, 34 Law J. Rep. (N.S.) Chanc. 321.

*Brotherhood's case* (31 Beav. 365; 31 Law J. Rep. (N.S.) Chanc. 861) distinguished. Ibid.

A shareholder, who is permitted to retire from a company by an irregular arrangement entered into with the directors, cannot, by way of defence to proceedings impeaching the arrangement, successfully allege acquiescence therein on the part of the other shareholders, without shewing that the arrangement was brought to their knowledge. Ibid.

In October, 1846, A, in the belief that he must take shares in order to qualify for the office of director which he had accepted in an insurance company, applied for, and had certain shares allotted to him. Understanding shortly afterwards that no qualification was necessary, he thenceforward repudiated the shares, refusing to execute the deed of settlement, or to pay calls. No dividend was ever received by him. In 1855, after intermediate communications, he offered to pay a specified sum on being released from all further liability, and the directors, who were empowered by the deed of settlement to compromise disputed claims, passed a resolution accepting his proposal. This resolution was confirmed at a general meeting of shareholders, but no notice had been given of the intention to confirm the arrangement or of its terms, nor were the terms stated in the circular subsequently sent to the shareholders, containing the directors' report, and the resolutions passed by the meeting. A's name had been originally put upon the register of shareholders, and was never removed. In the year 1861 the company was wound up. The Master of the Rolls, on the authority of the decision on appeal in *Spackman's case* (34 Law J. Rep. (N.S.) Chanc. 321), put A on the list of contributories; but the order was, on appeal, discharged by the Lords Justices, their Lordships holding (there being no ground for imputing fraud, collusion, suppression, or concealment) that whether A was originally liable as a shareholder or not, the arrangement under which he had been released must stand as a *bona fide* compromise. *In re the Agriculturist Cattle Insur. Co. (Lord Belhaven's case)*, 34 Law J. Rep. (N.S.) Chanc. 503; 3 De Gex, J. & S. 41.

The decision in *Spackman's case* distinguished, as founded on the existence of collusion. Ibid.

The directors of a company having treated shares as forfeited for non-payment of calls, and the company being afterwards ordered to be wound up, the shareholder's name will not be placed upon the list of contributories on the application of the official manager. *In re the State Fire Insur. Co. (Webster's case)*, 32 Law J. Rep. (N.S.) Chanc. 135.

Whether it would be done on the application of the creditors' representative—*quære*. Ibid.

M applied for 200 10*l.* shares in a company, and paid 500*l.*, being the amount of a call of 2*l.* 10*s.* per share. Before any registration or allotment he expressed a wish that the number of shares should be reduced, and that the 500*l.* should be applied to pay for fifty shares in full. The directors of the company thereupon passed a resolution accepting the 500*l.* as in respect of full payment on fifty shares, and treating the matter of the remaining 150 shares as remaining in abeyance, and sent M certificates for fifty shares paid for in full. M having afterwards discovered that his name had been entered on the register for 200 shares, he complained, and requested that the entry might be altered so as to represent him as a holder of fifty paid-up shares, and he received the copy of a resolution that the 150 shares had been forfeited as no calls had been paid. Upon the winding-up of the company,—Held, by the Master of the Rolls, and, on appeal, by the Lords Justices, that M had a right to modify his acceptance of the 200 shares before he became absolute owner by allotment and registration of any shares, and that he was not a contributory in respect of the 150 shares. *Ex parte Miles; In re the Exhall Coal Mining Co. (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 123.

### (*k*) *Transferor of Shares.*

A joint-stock company, the shares in which passed by delivery, was ordered to be wound up. After this a shareholder sold them at a nominal price, through a broker, to his (the shareholder's) own father, who was a needy man, and supported by others. The shareholder admitted that he parted with the shares to avoid liability. The Master of the Rolls placed the name of the shareholder on the list of contributories, instead of that of his father; and, on appeal, the Lords Justices held, that the transaction was not *bona fide*, but colourable merely, and that the name of the son must be retained. *Ex parte Costello, in re the Mexican and South American Co.*, 30 Law J. Rep. (N.S.) Chanc. 113.

The holder of a large number of shares in a joint-stock company, for which he had executed the deed, transferred them, in consideration of a small sum of money, to his bailiff, a man without property, and who earned wages of a guinea a week. The consideration-money was not paid. The company was ordered to be wound up, and the name of the transferee was placed upon the list of contributories; but upon appeal, the Master of the Rolls ordered the name to be removed, and that of the original holder of the

shares to be placed thereon, his Honour considering the transaction to be merely colourable; and the Lords Justices affirmed the decision. *Ex parte Budd, in re the Electric Telegraph Co. of Ireland*, 31 Law J. Rep. (N.S.) Chanc. 4; 3 De Gex, F. & J. 297.

In order to constitute a valid sale of shares, so as to entitle the vendor to have his name excluded from the list of contributories, though it is not necessary that the purchaser should be a person capable of meeting all demands that may be made upon him in respect of the shares, yet the transaction must be *bona fide* as between the vendor and purchaser. *In re the Phœnix Life Assur. Co., ex parte Hatton*, 31 Law J. Rep. (N.S.) Chanc. 341.

A shareholder in a joint-stock company, to avoid payment of a call, procured a person of no means to accept a transfer of his shares for a nominal consideration, and agreed to indemnify him against all liability. The directors refused to register the transfer until the call should have been paid. Afterwards, upon the winding up of the company, the original shareholder's name was placed upon the list of contributories. Upon his application to have it removed, it was held, that there was no *bona fide* transfer of the shares, and the name was retained upon the list. Ibid.

If the directors of a company take a transfer of the shares of a shareholder to a nominee to prevent an exposure of its affairs and the prosecution of a petition to wind up the company, it will not relieve the shareholder from his liabilities to the company, or prevent him on a winding-up order being obtained from being put upon the list of contributories to the company in respect of his shares. *Ex parte Eyre, in re the Mitre Assur. Co.*, 31 Law J. Rep. (N.S.) Chanc. 640; 31 Beav. 177.

Upon the compromise of an action brought by G against a company in which he was a shareholder, it was arranged that G should transfer his shares to S, who was the managing director, and should receive from the company a sum of money as the price of his shares and in satisfaction of his claim. Accordingly, the money was paid, the shares were transferred, and the transfer registered. Two years afterwards the company was ordered to be wound up, and the official manager placed G's name on the list of contributories, on the ground that the transfer was invalid, S being a trustee for the company, and the assent of the shareholders to the transaction not having been obtained. The Court, under the circumstances, declined to impute to G knowledge that S was a trustee for the company; but independently of this it was held, that the transaction having been acquiesced in by the shareholders for two years, their consent must be presumed as against the company, and accordingly G's name was ordered to be taken off the list. *In re the British Provident Life and Fire Assur. Soc. (Dr. Grady's case)*, 32 Law J. Rep. (N.S.) Chanc. 326; 1 De Gex, J. & S. 488.

A shareholder in a joint-stock company was chosen director, and acted as such, but, wishing to get rid of his shares, applied to the managing director and entered into an arrangement that if the latter would find a purchaser for the shares he (the managing director) should have 10*l.* per cent. commission on the transaction. Subsequently the shareholder transferred direct to the company, the purchase-money for the shares being taken in part payment for annuities granted by the company to the shareholder, and paid the managing director the balance of the consideration for the annuities, and the 10*l.* per cent. The deed of settlement authorized the purchase of shares by the company, provided that it should not be lawful for the directors to purchase any shares without the authority and sanction of a general meeting of proprietors previously in that behalf obtained. The only notice of the transaction at any general meeting appeared to be an obscure reference to it in a balance-sheet presented at a subsequent meeting; but the minutes of what took place at the meetings of the company were generally inaccurate, and the company exercised acts of ownership over the shares so transferred. Five years elapsed, and the company was ordered to be wound up:—Held, that it was not necessary that the sanction of a general meeting should be obtained previously to any treaty for the purchase of the shares, but only previously to the contract becoming finally binding, and that under the circumstances it must be assumed as against the company that the transaction was properly submitted to a meeting and sanctioned; and consequently (reversing the decision of one of the Vice Chancellors) that the transfer was valid, and the transferor must be struck off the list of contributories. *In re the British Provident Life and Fire Assur. Soc. (Lane's case)*, 33 Law J. Rep. (N.S.) Chanc. 84; 1 De Gex, J. & S. 504.

Held, also, that the stipulation for the allowance of commission did not affect the transaction as between the transferor and the company. Ibid.

(*l*) *Insolvent.*

A shareholder in a company, in respect of which a winding-up order was made, applied for his discharge in India under the India Insolvent Act, but did not name the company in his schedule as creditors. After he had obtained his discharge his name was placed on the list of contributories, and a call was made:—Held, reversing the decision of one of the Vice Chancellors, that his name must be removed from the list of contributories, and that he was not liable to the call. *Ex parte Parbury, in re the Warwick and Worcester Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 513; 3 De Gex, F. & J. 80.

(*m*) *Extent of Liability.*

A joint-stock company purchased mines, subject to an existing mortgage debt, for payment of which B was a surety for the original mortgagor, and in pursuance of arrangements entered into they gave to the mortgagee their promissory note for the money due on the mortgage, and to the vendor several promissory notes for the payment of the rest of the purchase-money by instalments. Before the notes became due the company was ordered to be wound up, and B, who was also a shareholder, was placed upon the list of contributories. B then took from the mortgagee a transfer of the mortgage securities, (including the promissory note for the mortgage-money,) and from the vendor an assignment of two of the other promissory notes, and claimed to set off the amounts so due against the amount of his call *pro tanto*:—Held, that he was entitled to such set-off in respect of the mortgage-money, on the principle that a surety paying off his principal's debt is entitled to the benefit of all the securities held by

the creditor, but that he was not entitled to set off the amount due upon the other two promissory notes. *Ex parte Barrett, in re the Moseley Green Coal and Coke Co.*, 34 Law J. Rep. (N.S.) Bankr. 41.

(F) CREDITORS.

(*a*) *Rights of, against Property of the Company.*

A creditor of a company which was in the course of being wound up established his debt against the official manager. The Court refused to allow the creditor to proceed directly against the contributories to recover the amount under the 11 & 12 Vict. c. 45. s. 56, thinking that the proper course was to pay the debt by means of a call. *In re the Cameron Coalbrook Co.*, 30 Beav. 216.

A B, a creditor of an unregistered company, sued for his debt, and after long hostile litigation obtained judgment and issued a writ of *fi. fa.*, which was duly executed by seizure on the 29th of September. On the 6th of October, a petition was presented, under the Companies' Act, 1862, for the winding-up of the company; and on the 9th of October an order was made by the Master of the Rolls *ex parte*, to restrain the sale by the sheriff of the property seized, his Honour being of opinion that the object of the act was to secure equal distribution amongst all creditors. On appeal, it was held, that the creditor ought not, under the circumstances, to be restrained from reaping the fruits of his action by sale of the property taken in execution. *Ex parte Parry, in re the Great Ship Co. (Lim.)*, 33 Law J. Rep. (N.S.) Chanc. 245.

Whether, where an execution has been duly perfected by seizure before the presentation of a petition for winding-up, the Court has jurisdiction, under the 201st section of the Companies' Act, 1862, to restrain a sale—*quære.* Ibid.

Whether in any case an injunction can properly be granted *ex parte*, under that section—*quære.* Ibid.

Where an execution has been perfected by seizure before the commencement of the winding-up, a sale after the commencement is not a "putting in force of the execution within section 163. of the Companies' Act, 1862" (per the *Lord Justice Turner*). Ibid.

The sheriff was served with notice of the original motion, but not with notice of the appeal:—Held, that he was entitled to the costs of his appearance at the Rolls, but not to any costs on the appeal. Ibid.

After an order has been made for winding-up, a judgment creditor will be restrained by injunction from proceeding to execution under a *fi. fa.* against the company. *In re the Waterloo Life, Education, Casualty and Self-Relief Assur. Co.*, 32 Law J. Rep. (N.S.) Chanc. 371; 31 Beav. 589.

A landlord demised a colliery to certain persons who declared themselves trustees for a company. The rent fell into arrear, and the landlord put in a distress upon the premises. At that time a petition had been presented, upon which an order to wind up the company was afterwards made. Upon a petition by the landlord for leave to remove and sell the goods distrained,—Held, notwithstanding the 25 & 26 Vict. c. 89. ss. 84, 163, that he was entitled to proceed with the distress and sell the goods of the company upon the premises, and leave was given accordingly. *In re the Exhall Coal Mining Co. (Lim.)*, 33 Law J. Rep. (N.S.) Chanc. 595.

*Semble*—The prohibition contained in section 163. of the Companies' Act, 1862, against enforcing a distress against the effects of a company which has been ordered to be wound up, applies only where the company is the tenant. Ibid.

(*b*) *Actions and Suits by.*

Under a voluntary winding-up, the Court has jurisdiction to stay actions by creditors against the company. *In re the Keymsham Co.*, 33 Beav. 123.

Upon granting an injunction to stay an action by a creditor against a company, during a voluntary winding-up, the Court required the liquidators to give the creditor access to the proceedings, and gave to the creditor his costs down to the time he had notice of the winding-up. Ibid.

A creditor brought an action against a company, which afterwards resolved voluntarily to wind up. On an application by the company,—Held, that all further proceedings in the action must be stayed upon the creditor being allowed to prove for his debt and the costs of the action and of the application. *In re the Life Assoc. of England (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 64.

In a suit against a company to restrain trespass, liberty was given, under the 25 & 26 Vict. c. 89. s. 87. to the plaintiffs, after a winding-up order, to proceed with the suit. *Wyley* v. *the Exhall Coal Mining Co. (Lim.)*, 33 Beav. 539.

(*c*) *Payment of Debts.*

The S company agreed, in writing, to purchase the business of the T company. Part of the consideration was to consist of a sum of money payable by instalments at fixed times. In 1861 an order was made for winding up the S company. At that time all the instalments of the consideration-money had become due, but none had been paid, and the T company claimed to be entitled to interest on the unpaid instalments from the respective times when they became due to the date of the winding-up order. The agreement contained no provision as to the payment of interest:—Held, that the T company was entitled to interest at 5*l.* per cent., and that the Court of Chancery had jurisdiction, under the 11 & 12 Vict. c. 45. s. 83, to make calls to raise the amount of such interest. *In re the State Fire Insur. Co. (the "Times" Co. claim)*, 34 Law J. Rep. (N.S.) Chanc. 58; 2 Hem. & M. 722.

Under a winding-up subsequent to the Winding-up Amendment Act, 1857, and prior to the Companies' Act, 1862,—Held, that on the company being found to be insolvent, an annuitant was entitled to prove under the winding-up for the estimated value of the annuity without taking any preliminary proceedings to establish the amount as a debt. *In re the English and Irish Church and University Assur. Soc. (Hunt's Annuity case)*, 1 Hem. & M. 79.

(G) CALLS.

An order under the winding-up acts is necessary to justify the official manager in proving under a bankruptcy; but proof having been made without such order against a bankrupt who had been com-

mitted for non-payment of a call,—Held, that the bankrupt was entitled to his discharge. *In re the Life Assur. Treasury, ex parte Pepper*, 1 Hem. & M. 755.

A call can be made by the Court of Bankruptcy upon the shareholders at the time of re-registration to discharge debts of the company then due, whenever they accrued. *Ex parte Stevenson, in re the Liverpool Tradesman's Loan Co. (Lim.)*, 32 Law J. Rep. (N.S.) Chanc. 96.

A winding-up order having been made in 1849 under the Winding-up Act, 1848, in 1862, an order for a call was made in the usual manner, and a circular notice of such order was sent by post, prepaid, to one of the contributories, and the circular notice so sent was not returned. At the expiration of three weeks a balance or four-day order was made, and as it was found impossible to effect personal service, an order for substituted service was obtained, which immediately reached the party, and he took out a summons to discharge the balance order and the order for substituted service:—Held, that both orders were regular, and that the summons must be dismissed, with costs. *In re the Warwick and Worcester Rail. Co., ex parte Sir John de Beauvoir*, 32 Law J. Rep. (N.S.) Chanc. 453.

(H) PRACTICE.

Where the Court of Chancery has made an order in a winding-up case for the further proceedings to be taken in a particular Court of Bankruptcy, that Court has jurisdiction to commit persons disobeying its order in such further proceedings. *Ex parte Hirtzel, in re the United General Bread and Flour Co. for Plymouth, Devonport and Stonehouse*, 30 Law J. Rep. (N.S.) Chanc. 38.

An unincorporated joint-stock company of more than seven members, having a private act of parliament enabling it to sue and be sued, and regulated by a deed of settlement which contained a clause for the transfer of stock of members becoming insolvent, and stipulated that the assignees of such insolvent members should not be members in respect of such stock, was ordered to be wound up by the Master of the Rolls, under the Joint-Stock Companies' Winding-up Acts. This order was made after one of the members of such company had become insolvent. The defendant, who had been also a member of such company, but had transferred his shares in it previously to the making of such order, compromised his liability as contributory by payment of a sum of money to the official manager, with the consent of the Master of the Rolls, after creditors' representatives had been duly advertised for and chosen pursuant to the 20 & 21 Vict. c. 78. The plaintiff proved against the company in the winding-up proceedings for a debt due to her from the company, and afterwards brought an action against the defendant for such debt without the leave of the Master of the Rolls:—Held, that this Court, being the Court in which the action was brought, had authority under the 20 & 21 Vict. c. 78. s. 7. to stay proceedings in such action. —Held, also, that the company was within the Winding-up Acts, 11 & 12 Vict. c. 45. and 12 & 13 Vict. c. 108. and that the Master of the Rolls had jurisdiction to make the winding-up order, and that the company was not dissolved by the said insolvency of one of its members so as to prevent the application of the Winding-up Acts. *Thomas* v. *Wells*, 33 Law J. Rep. (N.S.) C.P. 211; 16 Com. B. Rep. N.S. 508.

Where a person's name had been improperly placed upon the register of shareholders of a company, the proper course was considered to be to apply, under the special statutory jurisdiction (see 19 & 20 Vict. c. 47. s. 25. and 25 & 26 Vict. c. 89. s. 35), to remove the name from the register of shareholders, and not to oppose the placing his name upon the list of contributories. *In re the Moseley Green Coal Co., ex parte Fox*, 32 Law J. Rep. (N.S.) Bankr. 57.

In such a case, a single notice of motion may be given intituled both in Chancery and in Bankruptcy, seeking to remove the name as well from the register of shareholders as from the list of contributories. Ibid.

When a decision under which a person's name has been placed on the list of contributories, has been reversed, it is unnecessary for other persons similarly situated to apply to the Court. *Ex parte Munday*, 31 Beav. 206.

The affidavit in support of a petition to wind up a society was filed *before* instead of *after* its presentation, contrary to the General Order of the 11th of November, 1862. On a statement of the facts, the Court allowed the affidavit to be re-sworn and filed, and the order which had been made on the petition to be dated subsequently. *In re the Western Benefit Building Society*, 33 Law J. Rep. (N.S.) Chanc. 179; 33 Beav. 368.

A motion for the rectification of the register of a joint-stock company, under the 25 & 26 Vict. c. 89. s. 35. is not irregular merely on the ground that an order has been made for winding up the company. *In re the Scottish and Universal Finance Bank (Breckenridge's case)*, 2 Hem. & M. 643.

But where there are a number of persons in a similar situation and the official liquidator has taken proper steps for having the question adjudicated upon once for all so as to rule all the cases, the Court will not entertain a separate application on the part of one of such persons, but will adjourn the motion to come on with the other similar cases. Ibid.

Where a petition for winding up a limited company cannot be heard on the day appointed by advertisement, by reason of the advertisement not having been inserted in proper time, the practice is to let the petition stand over for a fortnight, with liberty to insert fresh advertisements. The practice of the Court of Bankruptcy in this respect is not followed. *In re the London and Westminster Wine Co.*, 1 Hem. & M. 561.

Form of removing the name from the register of shareholders under the Companies' Act, 1862. *In re the Iron Ship Building Co.*, 34 Beav. 597.

(I) COSTS.

The creditors' representative of a company being wound up, having been served with the petition of appeal, must be paid his costs by the appellant, who, being unsuccessful, was ordered to pay those of the official manager. *Ex parte Costello, in re the Mexican and South American Co.*, 30 Law J. Rep. (N.S.) Chanc. 113.

Costs of a second petition to wind up allowed under the circumstances. *In re the Commercial Discount Co.*, 32 Beav. 198.

The general rule of the Court that costs follow

the result, applies, in the absence of special circumstances, to cases of contributories under a winding-up who have unsuccessfully opposed an application to place them on the list. *In re the Birkbeck Life Assur. Co., ex parte the Representatives of Barry*, 2 Dr. & S. 321.

### 4.—*SCIRE FACIAS AGAINST SHAREHOLDERS.*

[*Cleave* v. *Harwar*, 8 Law J. Dig. 156; s. c. 6 Hurls. & N. 22.]

The Court will not grant a rule under the 8 & 9 Vict. c. 16. s. 36, for a *scire facias* against a party as a shareholder in a joint-stock company upon a judgment obtained against the company, unless the affidavits disclose reasonable grounds for believing that the party sought to be charged is a shareholder. The fact of his having applied for and received an allotment of shares and paid a deposit thereon is not enough. *Edwards* v. *the Kilkenny Rail. Co.*, 14 Com. B. Rep. N.S. 526.

The Court will not allow a *sci. fa.* to go against one as a shareholder in a joint-stock company unless reasonably satisfied that he actually is a shareholder. —*Quære*, whether a *sci. fa.* can be granted to one who from the constitution of the association is a partner therein. *Mather* v. *the National Assur. Co., in re Clark*, 14 Com. B. Rep. N.S. 676.

## COMPENSATION.

[See Lands Clauses Consolidation Act.]

## COMPROMISE.

A decree was made in a suit for taking and adjusting a complicated series of accounts. The decree was, in the opinion of the Court, in effect for a general account; but it was considered by the parties to be merely for an account from 1825, all earlier accounts being supposed at the time of taking the decree to be correct. The suit was then compromised by the payment of 22,000*l.* Subsequently to the compromise, it was discovered that there were claims arising out of accounts prior to 1825. The Master of the Rolls considered that the whole accounts must now be taken and the compromise set aside. The Lords Justices, on appeal, held, that the compromise was binding from 1825; and the defendants electing to so consider it, their Lordships varied the order of the Master of the Rolls, by directing the accounts prior to 1825 only to be taken. *Stainton* v. *the Carron Co.*, 30 Law J. Rep. (N.S.) Chanc. 713.

Parties entered into an agreement for compromising a suit, and infants being interested, a reference was made to chambers to ascertain whether it was for their benefit. Pending the reference, one of the adult parties became bankrupt, and afterwards the Court approved of the compromise:—Held, that the compromise was binding on the bankrupt from that date, subject to the confirmation by the Court, and that the assignees could not recede from it. *Bousfield* v. *Bousfield*, 31 Beav. 591.

In order that a transaction not otherwise valid may be supported upon the ground of its being a family arrangement, there must be a full and fair communication of all material circumstances affecting the subject-matter of the agreement which are within the knowledge of the several parties, whether such information be asked for by the other parties or not. *Greenwood* v. *Greenwood*, 2 De Gex, J. & S. 28.

A compromise sanctioned by the Court of Chancery, on behalf of persons under disability, is liable to be set aside on the ground of fraud, or of suppression of material facts, which amounts, in the eye of the Court, to fraud; but, per the Master of the Rolls, not on the ground of error of judgment on the part of the Court in sanctioning the compromise; and, per the *Lord Justice Turner*, not on any other ground than fraud, or conduct amounting thereto. *Brooke* v. *Lord Mostyn*, 34 Law J. Rep. (N.S.) Chanc. 65; 2 De Gex, J. & S. 373.

An infant and a married woman were interested in a legacy, which was secured by a term of 500 years, created, by will, in real estates, to raise a fund, in aid of the personal estate, for payment of debts and legacies. It was represented by, or on behalf of, the tenant for life of the estates, that both funds were deficient, but he offered to give his personal covenant for the payment of the legacy within a limited time, if the estates were released. A suit was accordingly instituted by the parties entitled to the legacy; and upon a reference to the Master, the latter relying upon evidence which represented the property to be much less valuable than it really was, reported in favour of the compromise, which was accordingly carried into effect with the sanction of the Court. A great part of the estates was afterwards sold in fee simple for sums which far exceeded those named as the value of the estates if sold for the term of 500 years. In the mean time the interest of the tenant for life in the estates was sold by his mortgagees to his son, who was tenant in tail, and the tenant for life became bankrupt. Upon a bill, on behalf of the infant, to set aside the compromise and obtain payment of the legacy,—Held, by the Master of the Rolls, (he being of opinion that the evidence before the Master, though erroneous, had been given *bona fide*,) that the compromise must stand, although in the events which had happened, the covenant given by the tenant for life was wholly unavailable and worthless. But, on appeal, it appearing that material information which might possibly have led the Master to a conclusion adverse to the proposed compromise was in the possession of the tenant for life or his advisers, and not of the plaintiff or his advisers, and had been withheld from the Master,—Held, by the Lords Justices (reversing the decision of the Master of the Rolls), that the withholding of such information from the Master amounted to fraud; and that, consequently, the plaintiff was entitled to be relieved against the compromise. Ibid.

Suits were compromised with the sanction of the Court (infants being interested), and it was agreed that the estate should be sold by auction for the purpose of division, and that A B should have the conduct of the sale. At the auction, the property could not be sold, and it was afterwards sold by private contract at the reserved bidding:—Held, that this was a valid sale, and the purchaser was decreed specifically to perform his contract. *Bousfield* v. *Hodges*, 33 Beav. 90.

## CONFLICT OF LAWS.

The owners of a British ship mortgaged her in England, and she afterwards was taken by the mortgagors to New Orleans, where she was attached by creditors, who took proceedings in the Courts there for the purpose of making her available for their demands. The English mortgagees intervened in these proceedings for the purpose of asserting their rights; but their claim was wholly disregarded, the law of New Orleans not recognizing a mortgage of chattels; and, under an order of the Court, the ship was sold to a British subject. The ship having afterwards returned to England with a cargo, the mortgagees filed a bill to enforce their claim:—Held, that the judgment of a foreign Court of competent jurisdiction is conclusive *inter partes* on the merits of the matter in dispute, but may be reviewed by the Courts in England if any error appears on the face of the record. *Simpson* v. *Fogo*, 32 Law J. Rep. (N.S.) Chanc. 249; 1 Hem. & M. 195.

Where a foreign tribunal acts in defiance of the comity of nations by refusing to recognize a title properly acquired according to the laws of England, its judgment will be disregarded by the English Courts. Ibid.

In the distribution of assets the *Lex fori* prevails. Ibid.

A will of personal estate, made by a testator in the place of his domicil (and *semble* also though made elsewhere), must be construed according to the law of the testator's domicil. *Boyes* v. *Bedale*, 33 Law J. Rep. (N.S.) Chanc. 283; 1 Hem. & M. 799.

A testator domiciled in England made his will there, whereby he left a legacy to the children of his nephew C. At the date of the will and death of the testator, C was residing abroad, but his domicil was English. C subsequently acquired a French domicil, and became the father of an illegitimate child by a French lady. He afterwards married this lady, and the child was legitimated under the French law:—Held, that the will must be construed according to the English law; and that the legitimated child of C was not entitled to the legacy. Ibid.

Under a bequest to the children of L S, who had three children born to him in England, while domiciled there, by a woman with whom he had cohabited, and with whom he removed to Holland, and while domiciled in Holland had another child born to him by the same woman, whom he afterwards married in Holland,—Held, that the law of the country of the domicil at the time of the birth and of the marriage must prevail, and that the child born in Holland was entitled to share equally with another child, born there after the marriage; but the three children born in England, being illegitimate according to the law of England, were excluded. *Goodman* v. *Goodman*, 3 Giff. 643.

By a deed executed and registered in the manner required by the law of Ceylon, certain estates there were mortgaged to a banking company, to secure the payment of bills of exchange which had been discounted by the bank, and, subject to this mortgage, the same estates were, by another deed also duly executed and registered, mortgaged to R & Co., and by a deed, not executed as required by the law of Ceylon, the banking company covenanted on payment of the bills to transfer the mortgage securities to R & Co. The bills were paid at maturity by R & Co., the necessary funds being advanced by S upon an agreement that the mortgage securities should be transferred to him, and accordingly R & Co. by letter directed the banking company to transfer the mortgage securities to S; but afterwards R & Co. themselves demanded and obtained possession thereof as being the next registered incumbrancers. S then filed a bill against the banking company and others, alleging that the deed of covenant and the letter of R & Co. constituted the banking company trustees for him, and that in delivering the securities to R & Co. they had committed a breach of trust, and praying consequential relief:—Held, (affirming the decision of one of the Vice Chancellors,) that although the transactions would by the law of this country constitute the plaintiff equitable assignee of the securities, yet as it appeared by the evidence that they were insufficient for that purpose according to the law of Ceylon, and that according to that law the banking company had no legal defence against the demand of R & Co., the bill must be dismissed with costs as against the banking company. *Sichel* v. *Raphael*, 34 Law J. Rep. (N.S.) Chanc. 106.

A contract by written correspondence between three brothers, British subjects, two of whom resided in England, and one in Chili without having acquired a domicil there, held, though relating to land in Chili, to be governed by English law. *Cood* v. *Cood*, 33 Law J. Rep. (N.S.) Chanc. 273; 33 Beav. 314.

In the year 1825, G C died at Arequipa, intestate, leaving a large real and personal estate at Valparaiso, in Chili. His mother and his three brothers, B, T and H, survived him. They all resided in England, except H, who at the time of the death of G C was in Peru, and who for many years subsequently resided either in Peru or in Chili, but without acquiring a foreign domicil. In 1831 their mother died, having bequeathed all her property to her sons B, T and H, equally. In 1832 T offered his share of G C's estate to H for 1,000*l.*; H, in reply, intimated that with a view to save the expense of rendering formal accounts of G C's estate, he was willing to buy the shares of both B and T, which led to a long correspondence. In 1833, B wrote to H offering his share for 1,100*l.*, to be paid in part out of the mother's estate, but by a given date, and T wrote to H at the same time, saying whatever B determined would meet with his approval. The condition as to payment by the given time was not fulfilled; but in the subsequent correspondence between B and H the arrangement was treated as binding between them, and was never repudiated by T, nor were any accounts of G C's estate applied for until after B's death, which occurred in 1849. In 1850, T sent an agent to Valparaiso, who, on behalf of T and the representatives of B, took proceedings in the Courts in Chili, and, in 1858, by a decree made in the Court at Santiago, it was decided that the letters between the brothers amounted to an agreement which bound B, but not T; and H was directed to account to T for one-third of G C's estate. But upon a bill in this Court by H, and the assignee under his insolvency,—Held, that having regard to H's avowed object in purchasing both shares, and to T's acquiescence from 1833 to 1849, T was bound equally

with B; and a decree was made restraining T from further proceedings in Chili to compel an account, and declaring him a trustee of his share in the estate of G C for the plaintiffs. Ibid.

## CONTINGENT REMAINDER.

A testator devised freeholds, copyholds and leaseholds for lives to T W for life, with divers contingent remainders over, with an ultimate remainder to the right heirs of the testator. There being no limitation to support contingent remainders, T W, who was also the heir-at-law of the testator, executed a release by which he granted and released the freeholds, copyholds and leaseholds to W B, to the intent that they should be discharged from the limitations declared by the testator, and he resettled the estates. Upon a bill by the party first entitled in remainder under the will,—Held, that the release destroyed the contingent remainders created in the freeholds.—Held, also, that the contingent remainders in the copyholds were supported by the estate in the lord of the manor, and that they were not destroyed.—Held, further, that the contingent remainders in the leaseholds for lives were not destroyed, as upon the death of the tenant for life the possible estate of the heir or executor, as special occupant, was not of sufficient capacity to merge the estate of the tenant for life. *Pickersgill* v. *Grey*, 31 Law J. Rep. (N.S.) Chanc. 394; 30 Beav. 352.

## CONSPIRACY.

[See INDICTMENT.]

## CONTAGIOUS DISEASES.

[The Contagious Diseases Prevention Act, 1864 (27 & 28 Vict. c. 85)].

## CONTEMPT.

A Court of assize is a superior Court; and, consequently, in a warrant of commitment by a Judge of assize for contempt, the adjudication of contempt may be general, and the particular circumstances need not be set out. *In re Fernandes*, 6 Hurls. & N. 717.

## CONTRACT.

[See PLEADING; Equitable Pleadings.]

(A) WHAT AMOUNTS TO A CONTRACT.
(B) WHEN VALID OR ILLEGAL.
  (*a*) *Consideration to support.*
  (*b*) *Founded on Mistake.*
  (*c*) *Contrary to Statute or Public Policy.*
  (*d*) *In Restraint of Trade.*
  (*e*) *Concealment.*
(C) CONSTRUCTION OF CONTRACTS.
  (*a*) *In general.*
  (*b*) *Particular Words.*
    (1) "*Forthwith.*"
    (2) "*Russian black.*"
    (3) "*Ship.*"
    (4) "*Three months' bill.*"
  (*c*) *Promise implied by Law.*
  (*d*) *Conditional Contracts.*
  (*e*) *Condition Precedent.*
  (*f*) *Time of the Essence of the Contract.*
  (*g*) *When for the Court.*
  (*h*) *Extras.*
(D) RESCISSION, DETERMINATION, AND ABANDONMENT OF CONTRACTS.
(E) BREACH OF CONTRACT.
(F) EVIDENCE TO EXPLAIN OR VARY.

### (A) WHAT AMOUNTS TO A CONTRACT.

The plaintiff, having had no previous dealings with the firm, and knowing them only by reputation, applied at the place of business of "Gandell & Co." for orders for goods: the firm then consisting of Thomas Gandell only, and being managed by Edward Gandell, a clerk. On the plaintiff asking to see Messrs. Gandell, Edward Gandell presented himself, and so conducted himself as to lead the plaintiff to suppose that he was one of the firm of Gandell & Co. and had authority to order goods on their behalf (which was not the fact). The plaintiff sent goods, according to Edward Gandell's order, to the place of business of Gandell & Co., an invoice being made out, by Edward Gandell's direction, to the name of "Edward Gandell & Co." Edward Gandell, unknown to the plaintiff, carried on business with one Todd at another place; and the goods were, within three or four days of their delivery, pledged with the defendant, with a power of sale, to secure advances *bona fide* made by him to Gandell & Todd, and he sold them under the power without notice from the plaintiff:—Held, that there was no contract of sale, inasmuch as the plaintiff intended to contract with Gandell & Co., and not with Edward Gandell personally, and Gandell & Co. were not contracting parties; that no property therefore passed, and the plaintiff was entitled to recover the value of the goods from the defendant. *Hardman* v. *Booth*, 32 Law J. Rep. (N.S.) Exch. 105; 1 Hurls. & C. 803.

A legal contract may be made with a fluctuating body, such as a volunteer rifle corps, to supply certain of its members with uniforms under which each individual member of the corps will be liable for the price of all the uniforms. Therefore, where the plaintiff, a tailor, supplied uniforms to certain members of the C Rifle Corps, and brought an action against one of the members for the price, entries in the plaintiff's book (made evidence by the defendant) headed "Dr., C Rifle Corps," is some evidence from which a jury may be justified in finding that the contract was made with the C Rifle Corps. *Cross* v. *Williams*, 31 Law J. Rep. (N.S.) Exch. 145; 7 Hurls. & N. 675.

The plaintiff, a tailor, brought an action against the defendant, the captain and a member of the committee of management of a company of volunteer rifles called "The C Volunteer Rifle Corps," for the price of uniforms supplied to members of the corps, as the plaintiff alleged, by the defendant's order. The defendant pleaded the general issue, and put in evidence entries in the plaintiff's books headed "C Rifle Corps, Dr. 28 suits for the supply of the following gentlemen, at 3*l.*," followed by the names of the members of the corps to whom the suits had

been supplied. The Judge, at Nisi Prius, left to the jury—1st. Did they believe that the understanding between the parties was that the defendant was to be paymaster? 2nd. Did they believe that the contract was with the defendant jointly with the committee? 3rd. Did they believe that the contract was with the defendant jointly with the whole corps? 4th. Did they believe that the plaintiff looked to each member to pay for his own uniform? And he directed them that, if they found the affirmative on the 1st, 2nd and 3rd questions, inasmuch as the defendant had not pleaded in abatement the non-joinder of the other members of the committee and of the corps, that the defendant would be liable in this action; that if they found the affirmative on the 4th question, the defendant would not be liable. And, that the entries in the plaintiff's books headed "C Rifle Corps" were some evidence from which they might infer that the contract had been with the whole corps. The jury having found a verdict generally for the plaintiff,—Held, discharging a rule to set aside this verdict on the ground of misdirection, that there was no misdirection,—inasmuch as there was some evidence on which the jury might have found their verdict on any one of the questions left to them; that, although it might be very improbable that a contract such as that stated in the 3rd question had been made in fact, yet such a contract could be made in law; and, per *Channell, B.*—that although, looking at the entries in the plaintiff's books, it could not be said there was no evidence, or not a scintilla of evidence, of the contract stated in the 3rd question, and that, therefore, the Judge was warranted in leaving the 3rd question to the jury, yet the evidence was wholly unsatisfactory and insufficient to establish such a contract. Ibid.

A proposal to receive tenders for certain things to be sold (specifying no limitation or qualification) and an acceptance (also specifying no limitation or qualification) is a contract for the whole. *Thorn* v. *the Commissioners of Public Works*, 32 Beav. 490.

The defendants advertised that offers would be received for old Portland stone of Westminster Bridge. The plaintiff made an offer for the stone of a particular quality which was accepted:—Held, that this was a contract for the purchase of all the stone of that quality. Ibid.

The plaintiff insured his ship by becoming a member of an association for marine assurance, and signed an undertaking to be bound by the rules of the association; but although he applied for a copy of the rules, he was not furnished with one, and although he mentioned that his ship was mortgaged, he was not told that there was a rule that no member should recover any money on his assurance whose ship was mortgaged, unless the mortgagee had, previously to the loss, covenanted by deed to pay all sums which might become due from the mortgagor to the association. Demurrer to the bill filed, alleging the loss and to recover the sum insured, on the ground that the mortgagee had not executed such a deed—overruled. *Turnbull* v. *Woolfe*, 3 Giff. 91.

The assent which is so necessary to the validity of an agreement in this Court, must be an assent uninfluenced by any power which the one party may have of operating on the fears of the other; therefore, where an agreement was executed by the one party, the plaintiff, under a threat by the other that the plaintiff's son would otherwise be indicted for forgery, it was set aside with costs. *Bayley* v. *Williams*, 4 Giff. 638.

Where the plaintiff's main and influencing purpose for entering into the agreement was to relieve his son from exposure, disgrace and ruin, the intervention of other circumstances or collateral advantages to himself are not enough to sustain the agreement in this Court. Ibid.

A father, in contemplation of the marriage of his daughter, wrote to her intended husband, saying "that she should be entitled to her share in whatever property he (the father) might die possessed of." The father by his will gave to his daughter only a life interest in a portion of his property, and died, leaving real and personal estate. Upon a bill by the husband and wife,—Held, that the letter did not affect the real estate, but that it bound the father to leave his daughter a legal share of the personalty equal to what she would have taken if he had died intestate. *Laver* v. *Fielder*, 32 Law J. Rep. (N.S.) Chanc. 365; 32 Beav. 1.

The defendant, by letter, offered to sell a piece of land to the plaintiff at a certain price. The letter concluded, "There will be the usual clauses in a contract and some limitations as to the length of title to be shewn and other minor details":—Held, that this offer, with the acceptance in writing, did not constitute a contract which the Court could enforce, owing to the uncertainty as to the clauses to be inserted and as to the title to be shewn. *Rummens* v. *Robins*, 3 De Gex, J. & S. 88.

A railway company who were promoting a bill for a new line, entered into an agreement with a landowner that if the act passed they would pay him a fixed sum for so much land as they should require, and would, for the convenience of his estate, make such crossings as his surveyor should, within a month after their taking possession, notify to their engineer:—Held, that this could not be construed as a contract to make all necessary and proper crossings, with a superadded direction as to the mode of ascertaining them, so as to enable the Court to ascertain them if not ascertained in that particular mode; and as no notification was given within the time, there was no contract which the Court could enforce. *The Earl of Darnley* v. *the London, Chatham and Dover Rail. Co.*, 3 De Gex, J. & S. 24.

### (B) When Valid or Illegal.

#### (*a*) *Consideration to support.*

After a marriage between the plaintiff and the daughter of W G, the father of the plaintiff and W G, in order to provide a marriage portion, agreed respectively to pay two sums of money to the plaintiff, and they also agreed that the plaintiff should have full power to sue for the said sums of money. The plaintiff was not a party to the agreement. After the deaths of the father of the plaintiff and W G, the plaintiff brought an action upon the agreement, against the executor of W G, to recover the sum which W G had agreed to pay to him:—Held, that he could not recover, notwithstanding his near relationship, as he was not a party to the agreement, and no consideration ran from him. *Tweddle* v. *Atkinson*, 30 Law J. Rep. (N.S.) Q.B. 265; 1 Best & S. 393.

C, the testator, wrote the following letter to L, his nephew: "I am glad to hear of your intended marriage with E, and, as I promised to assist you at starting, I am happy to tell you that I will pay to you 150*l.* yearly during my life, and until your annual income, derived from your profession of a Chancery barrister, shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require." L having afterwards married E, sued C's executors for arrears of the annuity accrued due during C's lifetime:—Held, per *Erle, C.J.* and *Keating, J.*, that the above letter contained a good consideration for C's promise to pay the annuity; the consideration pleaded being, that L would marry E, and his subsequent marriage. Per *Byles, J.*, that the letter was a mere letter of kindness, and created no legal obligation. *Shadwell* v. *Shadwell*, 30 Law J. Rep. (N.S.) C.P. 145; 9 Com. B. Rep. N.S. 159.

Held, per *Erle, C.J.*, *Byles, J.* and *Keating, J.*, that L's continuance at the bar was not a condition precedent to his right to the annuity. Ibid.

An agreement not to call for the performance of a deed, and to substitute certain other terms for some of the matters provided for by the deed is a good consideration for a promise to perform such substituted contract, even although the deed be not thereby released. *Nash* v. *Armstrong*, 30 Law J. Rep. (N.S.) C.P. 286; 10 Com. B. Rep. N.S. 259.

*Semble*, per *Willes, J.*, such agreement would be an answer to an action on the deed by way of equitable plea. Ibid.

The delivery of goods by A to B is a good consideration for a promise by B, although A had already contracted with C to deliver the goods to his order, and C has ordered him to deliver to B. *Scotson* v. *Pegg*, 30 Law J. Rep. (N.S.) Exch. 225; 6 Hurls. & N. 295.

To a declaration, alleging that in consideration that the plaintiffs would deliver to the defendant a cargo of coals, then on board the plaintiff's ship, the defendant promised to unload the coals in a certain time, the defendant pleaded that the plaintiffs had previously contracted to deliver the coals to the order of other persons, who had ordered the plaintiffs to deliver to the defendant, and that there was no other consideration for the defendant's promise:—Held, that the plea was no answer to the action. Ibid.

B and the defendant, being joint-owners of a horse and a mare, agreed that the defendant should sell them and pay one moiety of the proceeds to the plaintiff, as the agent of B, who was abroad. The defendant accordingly sold the horse to C for 600*l.* and the mare for 300*l.*, but did not receive the price of the horse, but took a promissory note for 300*l.* for the price of the mare, and indorsed the note to the plaintiff, as B's agent, and the plaintiff received the amount as such agent. The defendant afterwards requested the plaintiff, on his own responsibility, to pay him a moiety of the 300*l.*, in the plaintiff's hands as such agent, and the plaintiff agreed to do so provided the defendant would undertake either to deliver to the plaintiff a bill of exchange at two months, accepted by C, for 233*l.*, B's moiety of the horse (after certain deductions), or would pay to the plaintiff that amount in cash within two weeks. The defendant, thereupon, gave the plaintiff the following undertaking:—"In consideration of your having paid me a sum of 150*l.* on account of my share of the mare, I hereby undertake to deliver to you a bill for 233*l.*, drawn by me upon and accepted by C, at two months, or the above sum in cash within two weeks from this date":—Held, that a declaration alleging the above facts disclosed a good consideration for the defendant's promise. *Surtees* v. *Lister*, 30 Law J. Rep. (N.S.) Exch. 369; 7 Hurls. & N. 1.

Communications took place between a bachelor and his kept mistress as to a discontinuance of the cohabitation, and in the course of these communications the woman uniformly asserted that he had promised to marry her, which assertions there appeared to be a fair prospect of her being able to substantiate. Ultimately, the man proposed by letter that they should separate, he allowing her an annuity, which offer she accepted:—Held, that this was a contract for valuable consideration, which could be enforced against the man. *Keenan* v. *Handley*, 2 De Gex, J. & S. 283.

A suit was instituted by A against B, founded on an alleged agreement signed by B's testator. A being ordered to produce on oath all documents in his possession, and being unable to find the agreement, induced B, without stating this inability, and in the absence of his solicitor, to compromise the suit. B filed a bill to set aside the compromise, and A, being still unable to produce the alleged agreement, and there being no secondary proof of its ever having existed, except the testimony of A and his wife, the Court set aside the compromise. *Cooke* v. *Greves*, 30 Beav. 378.

A banker required security from his customer for an overdrawn account. The customer, by letter, promised to hypothecate certain goods, but upon being asked for the delivery warrants, he refused to carry out his promise. Upon bill filed to enforce the promise, and demurrer thereto by the defendant,—Held, that from the nature of the transaction, some forbearance to sue on the part of the creditor must be assumed to have taken place, and that this was sufficient to prevent the promise to hypothecate from being *nudum pactum*. *The Alliance Bank* v. *Broom*, 34 Law J. Rep. (N.S.) Chanc. 256; 2 Dr. & S. 289.

S, being an executor of G, and devisee of his real estate in trust for his children, induced the children to concur in the sale and conveyance of G's real estate to his own brother and partner, he himself being interested in the purchase, by a verbal promise to leave them by his will as much as or more than they would get under the will of G:—Held, that the 4th section of the Statute of Frauds did not apply, the promise being one which might possibly be performed within twelve months; that although the sale was necessary for payment of debts, and the full value was given, there was a sufficient consideration for the promise; and that the estate of S was bound to pay the children of G a sum equal in amount to the clear residue of G's estate. *Ridley* v. *Ridley*, 34 Law J. Rep. (N.S.) Chanc. 462; 34 Beav. 478.

An obligor bound himself to pay an annuity to an unmarried woman by whom he had had several children, on condition that she should not require the custody or management of the said children:—Held, that there was a sufficiently valuable consideration to support the bond as a specialty debt.

*In re Plaskett's Estate*, 30 Law J. Rep. (N.S.) Chanc. 606.

(*b*) *Founded on Mistake.*

The defendant by letter offered to sell some property to the plaintiff for 1,250*l.*; the plaintiff by letter accepted the offer. The defendant had by mistake inserted 1,250*l.* instead of 2,250*l.* in his letter, and he immediately gave notice of the error. The Court refused to enforce the contract. *Webster* v. *Cecil*, 30 Beav. 62.

(*c*) *Contrary to Statute or Public Policy.*

To a declaration for the price of certain volunteers' uniforms, the defendant pleaded that the contract was corruptly entered into (in violation of the 49 Geo. 3. c. 126), with the intent that the defendant might have a certain military commission:—Held, that the plea disclosed no illegality within the statute. *Eicke* v. *Jones*, 11 Com. B. Rep. N.S. 631.

A contract for the payment of money in consideration of the resignation of a majority in the service of the East India Company, is illegal by the 49 Geo. 3. c. 126. *Eyre* v. *Forbes*, 12 Com. B. Rep. N.S. 191.

A B, being requested by C D (in consequence of reports that he was paying improper attentions to a daughter of the latter) to discontinue visiting at his house, in order to lay C D under obligation to him, and so, by obtaining permission to continue his intercourse with C D's family, to gain free access to the daughter, whom he had in fact secretly seduced, advanced to C D a sum of money on mortgage. Upon bill by A B to foreclose and by C D to set aside the deed,—Held, that, notwithstanding the pecuniary consideration, the immoral purpose vitiated the whole deed; and a decree was made for its cancellation, leaving A B to sue at law, if he thought fit, for the money lent. *Willyams* v. *Bullmore*, *Bullmore* v. *Willyams*, 33 Law J. Rep. (N.S.) Chanc. 574; *sub nom. W*—— v. *B*——, 32 Beav. 574.

A bank agreed to advance a sum of money on behalf of a company for the deposit required by the Houses of Parliament from the promoters, upon an agreement that unless the money was previously repaid, the bill should not be read a third time in the House of Lords. The money was accordingly deposited in the Court of Chancery on behalf of two persons, one of whom was named by the bank, and the other by the promoters. Afterwards the bank, without receiving the money, consented to the third reading of the bill in the House of Lords, upon an understanding that the directors of the railway company would as soon as practicable procure a bond (upon the execution of which the deposit was by the special Railway Act made returnable) to be given to the Lords of the Treasury, and that the nominee of the company should then concur in such acts as would be requisite to obtain a return to the bank of the deposit. The act passed, and a bond was executed to the Lords of the Treasury; but the nominee of the railway company refused his consent to any application to obtain a return of the deposit. Upon a bill by the bank against the two nominees and the railway company,—Held, on demurrer, by the Master of the Rolls, and on appeal by the Lords Justices, that the case was properly one for a bill in equity; that the agreement was neither illegal nor against public policy; and that the directors of the railway company were not necessary parties in their individual capacity. *Scott* v. *Oakeley*, 33 Law J. Rep. (N.S.) Chanc. 612; 33 Beav. 501.

The mere fact of the deposit being with the Accountant General of the Court of Chancery was sufficient to attract the jurisdiction of that Court—per the Master of the Rolls. Ibid.

It is not an offence against the law of nations, or the law of this country, for the subject of a neutral state to supply contraband of war to a belligerent power; and the right of the other belligerent to seize such contraband of war *in transitu* is merely a co-existent conflicting right, which exposes the neutral merchant to the risk of confiscation, but does not render illegal a contract between him and another neutral subject for a joint adventure for the supply of such contraband goods. *Ex parte Chavasse, in re Grazebrook*, 34 Law J. Rep. (N.S.) Bankr. 17.

Nor is such a contract rendered void by the Foreign Enlistment Act, 16 & 17 Vict. c. 107, or the Royal Proclamation of the 13th of May 1861. Ibid.

(*d*) *In Restraint of Trade.*

Upon the sale by the defendant to the plaintiffs of a business of a horsehair manufacturer the defendant by written contract agreed not to buy, sell, manufacture, or directly or indirectly interfere in the trade or business of a horsehair manufacturer, except for the benefit of the plaintiffs; and subsequently in a deed of assignment (executed in pursuance of the previous contract) the defendant covenanted that he would not, directly or indirectly, carry on the business of a horsehair manufacturer within 200 miles from B, without the consent in writing of the plaintiffs, except for their benefit and at their request. The defendant, besides being a manufacturer of horsehair, was, at the time of the sale, a general dealer in unmanufactured horsehair; he also purchased and sold manufactured horsehair, which was usual both with dealers and manufacturers:—Held, upon evidence as to the mode of carrying on the business, that the limit of 200 miles was reasonable; and held also, that the defendant had sold so much of the business as belonged to that of a horsehair manufacturer, though forming part also of the business of a horsehair dealer; and that he must be restrained from the purchase and sale of manufactured horsehair. *Harms* v. *Parsons*, 32 Law J. Rep. (N.S.) Chanc. 247; 32 Beav. 328.

(*e*) *Concealment.*

R, being in difficulties, and the defendant being desirous to assist him, the plaintiff, at the request of the defendant, accepted a bill drawn upon him by R. The defendant, at the same time, entered into the following agreement with the plaintiff, dated the 24th of October: "You having lent your name to R on a bill for 110*l.*, payable three months from this date, I undertake to share with you any loss or liability you may incur in respect of such bill." The bill was dated the 25th of October, and not the 24th, and was payable three months after date. It was not paid at maturity, and after being several times renewed, was at length paid by the plaintiff. In an action brought on the above agreement, it was proved that in a schedule of R's debts made shortly before, a

debt owing to the plaintiff by R of 2,000*l.* had been intentionally omitted for a purpose not connected with this transaction. The plaintiff was a party to the making of this omission, and he knew that the schedule had been communicated to the defendant without the omission having been supplied, but nothing was said by the plaintiff to the defendant on the subject either way. The jury found that there was no actual fraud on the part of the plaintiff, and the Court held, that under these circumstances the defendant was not entitled to the verdict; that the contract was one of indemnity, and not one of suretyship; and that, the transaction having originated with the defendant, the mere concealment by the plaintiff of the existence of the debt from the defendant was not sufficient to avoid the contract. *Way* v. *Hearne*, 32 Law J. Rep. (N.S.) C.P. 34; 13 Com. B. Rep. N.S. 292.

Held, also, that though dated the 25th of October, the bill was sufficiently described as a bill "payable at three months from this date," in an agreement made on the 24th. Ibid.

Held, also, that the plaintiff's loss or liability was incurred and the defendant's liability attached, as soon as the first bill came to maturity and was not paid by R; and that there was nothing in the plaintiff's subsequent conduct, in renewing the bill from time to time, to deprive him of his right to recover from the defendant half the sum he ultimately was called on to pay. Ibid.

### (C) CONSTRUCTION OF CONTRACTS.

#### (*a*) *In general.*

By an agreement between the plaintiff and the defendant, in consideration of the plaintiff forbearing to prosecute a Chancery suit, the defendant promised that he would, out of the first moneys he might receive from W in respect of the defendant's claim on him, arising out of a certain railway contract, hand to the plaintiff 500*l.*; and out of any further moneys he might receive from W in respect of the same contract 10*l.* per cent. upon the net amount which he might so from time to time receive, until such per-centage to the plaintiff should amount to 1,300*l.*, when all further payments by the defendant were to cease, it being agreed that the defendant would not compromise with W without providing for the plaintiff the 1,300*l.*, or so much of it as might remain due to him. No more than one instalment having been received by the defendant from W in respect of the said railway contract, the plaintiff was held to be not entitled to any per-centage *ultra* the 500*l.* due on that instalment, although such instalment exceeded 500*l.* *Cochrane* v. *Green*, 30 Law J. Rep. (N.S.) C.P. 97; 9 Com. B. Rep. N.S. 448.

A judgment debt recovered in the name of a trustee, which if recovered in the name of the *cestui que trust* would have been a good set-off in law against the plaintiff's demand, may be pleaded by way of equitable set-off in answer to the demand. Ibid.

It is no answer to an action for a debt of 300*l.* to plead that the plaintiff was indebted to one S in 300*l.*, and that the defendant, at the request of the plaintiff, agreed with S to pay S the 300*l.*, and S agreed to accept the defendant as his debtor, instead of the plaintiff, for the 300*l.*, and that the defendant was still liable to pay the same to S, as such plea does not shew any discharge of the plaintiff's debt to S. Ibid.

The defendants, a public company, employed the plaintiff, a broker, to dispose of their shares on the terms that he should be paid 100*l.* down, and 400*l.* in addition, upon the allotment of the whole of the shares of the company. The plaintiff disposed of a considerable number of shares, when the defendants wound up the company:—Held, by the Court, which had power to draw inferences of fact, that the plaintiff was prevented earning the 400*l.* by the act of the company, and was therefore entitled to recover a proportion of the 400*l.* *Inchbald* v. *the Western Neilgherry Coffee Co. (Lim.)*, 34 Law J. Rep. (N.S.) C.P. 15; 17 Com. B. Rep. N.S. 733.

A contracted to supply to B 1,000 tons of coals, delivered at Rangoon alongside craft, &c., as might be directed by B; the price to be 45*s.* per ton, delivered at Rangoon; payment, one-half of invoice value by bill at three months on handing bills of lading and policy of insurance to cover the amount, or in cash at 5*l.* per cent. discount, at A's option; and the balance in cash on right delivery at Rangoon. A chartered a ship in pursuance of his contract, and shipped on board 1,166 tons of coal, and delivered to B the bill of lading and a policy covering half the invoice price, and B paid the half invoice price. On the voyage the ship became disabled, and the master chartered another vessel and trans-shipped 850 tons of the coal on board her at 45*s.* per ton freight to Rangoon. On arrival at Rangoon the master of this latter vessel offered the coals to B's agent on payment of the 45*s.* freight; this offer was refused, and the coals were afterwards put up for sale by auction by direction of the master, and were *bona fide* purchased by B's agent for B at 25*s.* per ton, that being the best price that could be obtained for them there:—Held, by *Cockburn, C.J.*, and *Wightman, J.*, that by the contract, though the property in the coals passed to B on the shipment and delivery of the shipping documents, A was bound to deliver them at Rangoon, and not having delivered any (as the purchase by B's agent was no delivery under the contract) he was liable to refund to B the half which he had received of the purchase-money, and for any damages arising from the non-delivery. By *Blackburn, J.*, and *Mellor, J.*, that the property in the coals passed to B, the right of A to the second half of the price being contingent on the right delivery at Rangoon; and that therefore, under the circumstances that had occurred, neither party had any right of action against the other. *The Calcutta and Burmah Steam Navigation Co. (Lim.)* v. *De Mattos*, 32 Law J. Rep. (N.S.) Q.B. 322.

Plaintiffs bought of the defendant "300 tons old bridge rails at 5*l.* 14*s.* 6*d.* per ton delivered at Hamburgh, cost, freight and insurance, payment by net cash in London, less freight, upon handing bill of lading and policy of insurance; a dock company's weight-note or captain's signature for weight to be taken by buyers as a voucher for the quantity shipped:—Held, in the Court of Exchequer (and affirmed in the Exchequer Chamber), that according to the true construction of the contract, the defendant did not undertake to deliver the iron at Ham-

burgh, but that when he put it on board a ship bound for that place and handed to the plaintiffs the policy of insurance and other documents, his liability ceased and the goods were at the risk of the purchasers. *Tregelles* v. *Sewell*, 7 Hurls. & N. 574.

A, a clerical agent, was employed to sell an advowson for B, upon the terms contained in a circular in which it was stipulated that the commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been derived from, or any particulars had been given by, or any communication whatsoever had been made from A's office, however and by whomsoever the negotiation might have been conducted, and notwithstanding the business might have been subsequently taken off the books, or the negotiation might have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay commission to other agents; and that no accommodation that might be afforded as to time of payment or advance should retard the payment of commission. A contract of sale having been arranged through A's agency, and duly executed, and a deposit paid on the 14th of October, 1862, the residue of the purchase-money being payable on the 31st of December,—Held, that A was entitled to his commission at all events on the 31st of December, although the full purchase-money had not, for some unexplained reason, then been paid. *Lara* v. *Hill*, 15 Com. B. Rep. N.S. 45.

A father by agreement took all his son's property, undertaking to pay his debts:—Held, that in the absence of proof to the contrary, the son was entitled to the surplus, if any. *May* v. *May*, 33 Beav. 81.

The trustees of a deed of composition executed by a debtor for the benefit of his creditors, under section 192. of the Bankruptcy Act, 1861, and duly registered,—Held, not to be entitled to claim to complete a building contract entered into by the debtor, prior to the date of such deed, where the debtor only contracted that he, "his executors and administrators" (omitting "assigns"), would execute the works, the subject of the contract. *Knight* v. *Burgess*, 33 Law J. Rep. (N.S.) Chanc. 727.

### (*b*) *Particular Words.*

#### (1) "*Forthwith.*"

By indenture of the 15th of May, the plaintiff covenanted with the defendant to procure a ship, to stow on board a certain telegraphic cable then lying at M Wharf, to provision and rig the vessel, to provide and pay the crew and workmen, &c., to lay down the cable; and that he, the plaintiff, would perform the several acts aforesaid and have the ship ready equipped for sea at the Nore on or before the 15th of July, and would proceed forthwith to T and lay down the cable; and if the plaintiff made default in having the ship ready with the cable on board at the Nore by the 15th of July, the defendant might deduct and retain as liquidated damages 20*l.* a week. The defendant covenanted, subject to his right to deduct and retain as liquidated damages, to pay the plaintiff 5,000*l.*, by instalments, that is to say, 1,000*l.*, part thereof, on or before the expiration of seven days after the arrival of the ship at M Wharf; 2,000*l.*, further part, on or before twenty-one days after the arrival of the ship at the wharf; the remainder when the ship should put to sea from the Nore. And it was by the same indenture agreed and declared, that for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing the penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days of the execution of these presents, give and execute to the defendant, his executors and administrators, a bond in the penal sum of 5,000*l.*; and for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, within ten days from the execution of these presents, give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5,000*l.*—It was held, by the Court of Exchequer Chamber, that the giving of the bond with sureties by the plaintiff to the defendant was a condition precedent to his right to recover against the defendant for not performing his part of the contract with relation to stowing the cable and paying the money; and this decision was affirmed by the House of Lords, on appeal, and it was also held, that the plaintiff was not released from his obligation to give a bond by reason of the defendant not having given a bond. *Roberts* v. *Brett* (House of Lords), 34 Law J. Rep. (N.S.) C.P. 241.

"Forthwith" held not to mean "immediately." Ibid.

#### (2) "*Russian black.*"

By an agreement between A and B, it was stipulated that A should receive half the profits arising from the sales of an article called "Russian black," manufactured by him from the produce of certain quarries of B:—Held, that A was not entitled to claim anything in respect of "Russian black" not sold as such, but used by B, in the proportion of about one-third, mixed with cement manufactured and sold by him. *Fullwood* v. *Akerman*, 11 Com. B. Rep. N.S. 737.

#### (3) "*Ship.*"

The plaintiffs were owners of ship W and one M of ship G, which was insured in two companies, one of which was represented by the defendants, the other by M himself. The G ran into the W, and was arrested in the Admiralty Court; and an agreement was entered into by the plaintiffs, M, and the insurers, that the plaintiffs should release the ship, and the other parties should pay "the amount of damage which the ship W had received from the collision," and that in case of dispute about "the amount of damages claimed by Heard Brothers (the plaintiffs) by reason of the collision," the matter should be referred:—Held, that "ship" in the first clause must be read "owner of ship," and that the plaintiffs were entitled to recover for loss of profits as they would have done in the Admiralty Court. *Heard* v. *Holman*, 34 Law J. Rep. (N.S.) C.P. 239; 19 Com. B. Rep. N.S. 1.

#### (4) "*Three months' bill.*"

Goods were sold upon the following terms:—"2*l.* 10*s.* per cent., or three months' bill," which was explained to mean cash at the expiration of the month succeeding the current month, deducting a discount of 2*l.* 10*s.* per cent., or, at the buyer's option, a bill at three months from the same period.

The buyer having refused to accept a bill at the end of the second month,—Held, that the seller might at once sue him for goods sold and delivered (*concessit solvere* in the Mayor's Court, London), and was not bound to wait the additional three months. *Rugg* v. *Weir*, 16 Com. B. Rep. N.S. 471.

(*c*) *Promise implied by Law.*

The plaintiff agreed to let, and the defendants to take, for one year, at a stipulated yearly rental, certain works and buildings, and the plaintiff further agreed to supply to the defendants the whole of the chlorine still-waste as it came from the still, neither adding to nor taking anything from the same, at the rate of 2*s.* 6*d.* for every 21 cwt. of waste so supplied, with the understanding that the defendants were to have the option of taking a lease for seven or fourteen years at the same rent, if they should feel disposed so to do, within three months from the date of the agreement; and the plaintiff agreed not to use or injure or part with any of the still-waste except to the defendants so long as they should hold the said works, the defendants to satisfy the plaintiff as to the payment of the rent, and account for still-waste previously to entering upon operations:—Held, that under this agreement the defendants were bound to take the whole of the chlorine still-waste during the year, and that it was no answer to an action for not accepting it, that the manufacture in which it was used failed and was discontinued, and the chlorine still-waste proved useless, and was no longer necessary for the manufacture. *Bealey* v. *Stuart*, 31 Law J. Rep. (N.S.) Exch. 281; 7 Hurls. & N. 753.

The plaintiffs—who had contracted with the East India Company to carry out some troops for them in their ship to Bombay, and to supply the troops with provisions and stores to be used and consumed during the voyage—entered into a contract with the defendant, a provision-dealer, by which the defendant engaged to supply the plaintiffs' ship with troop stores "guaranteed to pass survey of the East India Company's officers":—Held, that this express guarantee did not exclude the guarantee which, in the absence of an express stipulation, would have been implied by law on a contract to supply, that the stores should be reasonably fit for the purpose of being used and consumed by the troops during the voyage. *Bigge* v. *Parkinson* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 301; 7 Hurls. & N. 955.

(*d*) *Conditional Contracts.*

By a written agreement the defendant and B, who were in partnership as stone-merchants, appointed the plaintiff their sole London agent for a period of four years and a half, and the plaintiff agreed to undertake the appointment and duty upon the terms that B and the defendant should pay the plaintiff 2*l.* 10*s.* per cent. on all accounts received by them for stone sold by the plaintiff or supplied by B and the defendant, to any person originally introduced to them by the plaintiff; that the plaintiff should pay his travelling expenses, and attend upon any business in London of B and the defendant, when required by them, in writing; that B and the defendant should furnish the plaintiff with invoices for stone shipped by them, and should balance all business transactions with the plaintiff, and pay his commission every half year:—Held, by *Channell*, *B.*, and *Wilde*, *B.*, *(Martin*, *B.*, *dubitante)*, that the contract was subject to the condition that all the parties so long lived, and that the agreement did not contemplate the continuance of the agency by the executor after the death of the agent, or by the surviving partner after the death of either member of the firm, and therefore that a declaration on this agreement, alleging as a breach that the defendant would not employ the plaintiff as his sole agent for the whole period of four years and a half, and would not execute orders for stone procured by the plaintiff as agent, did not disclose any cause of action. *Tasker* v. *Shepherd*, 30 Law J. Rep. (N.S.) Exch. 207; 6 Hurls. & N. 575.

By an agreement between the plaintiffs, a Solvency Guarantee Company, and the defendants, in consideration of a certain sum, it was agreed that the funds of the company should be subject and liable to make good to the defendants the loss occasioned to them during the term of two years by reason of any of the purchasers of their goods becoming bankrupt, &c., within such time, and during any future period in respect whereof the company should consent to receive further payments, but subject to certain conditions indorsed on the instrument. One of the conditions indorsed was, that all guaranties, whatever might be the original term, should, from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the member interested therein or the board of directors should give two calendar months' notice of an intention not to renew the same:—Held, that the renewed contract was not itself to be deemed to contain this particular condition as to renewal, and that therefore, even in the absence of notice, the contract did not extend beyond one renewal. *The Solvency Mutual Guarantee Company* v. *Froane*, 31 Law J. Rep. (N.S.) Exch. 193; 7 Hurls. & N. 5.

The agreement was signed by three directors, on behalf of the company, and by the defendants, and also sealed with the company's seal:—Held, that the seal was only a statutory authentication of the contract, and that the instrument declared on was therefore not a deed, and that consequently the agreement might be rescinded by parol. Ibid.

By the conditions attached to a contract of indemnity against losses in trade, the guarantie became void on the death or retirement from trade of the person guaranteed:—Held, that this condition applied to the death or retirement of one of two partners guaranteed; and therefore that a plea alleging such death of the partner was an answer to an action against the co-partner by the guarantors for the subscription or annual payments agreed to be paid by the assured. *The Solvency Mutual Guarantee Co.* v. *Freeman*, 31 Law J. Rep. (N.S.) Exch. 197; 7 Hurls. & N. 17.

The defendant pleaded, on equitable grounds, to an action for such payments, and also for a certain increased premium, that by certain printed rules and regulations delivered to him as the rules and regulations under and subject to which the agreement for guarantie was to be made, the amount of subscription payable by the assured was to be increased at a certain specified per-centage rate, according to the amount of admitted claims in the previous year, and that the defendant entered into the contract upon the basis and faith of such rules and regulations;

but that the contract did not contain them, and other and much less advantageous rules, with other rates, were substituted, of which the defendant had no notice:—Held, that the plea was bad, as the facts stated would not relieve the defendant from the performance of the contract, but would only entitle him to have it reformed. Ibid.

*(e) Condition Precedent.*

With a view to the transfer to the defendant of all the interest in the business of a loan and discount society, by an agreement made in 1856, between the defendant and the plaintiff and W, in consideration of 877*l.* 14*s.*, to be paid by the defendant on the 1st of July, 1860, viz., to the plaintiff 69*l.* 14*s.* for cash advanced to the society; 480*l.* for sixty shares held by him, and 40*l.* for five shares belonging to him, originally held by one T; to W 160*l.* for twenty shares; and to G 120*l.* for fifteen shares, with interest half-yearly, the plaintiff and W agreed that the entire property of the society, and all moneys standing to the credit of the society should, from the date of the agreement, be vested in and belong to and be held by the defendant, and all securities given up to him on the signing of the agreement. With the exception of shares already held by the defendant, the above were all the shares in the society. The five shares originally held by T, and the fifteen shares held by G, were never vested in the defendant, T and G repudiating the contract:—Held, that the defendant, having accepted performance of the rest of the contract, could not set up the non-delivery of T and G's shares as an answer to an action by the plaintiff for his part of the 877*l.* 14*s.*; and, therefore, to a declaration by the plaintiff setting out the agreement and averring performance of conditions precedent, a plea that the defendant entered into the contract on the faith and in consideration of all the shares in the society being vested in him, and that neither the plaintiff nor W were ready or willing or able to vest T and G's shares, and T and G repudiated the contract, whereby the consideration for the defendant's entering into the contract failed, was held bad. *White* v. *Beeton*, 30 Law J. Rep. (N.S.) Exch. 373; 7 Hurls. & N. 42.

Where a sum of money is agreed to be paid for work and materials upon the certificate of a third person, if such third person in collusion with and by the procurement of the person who has agreed to pay improperly neglects to certify, an action at law may be maintained against the latter for the agreed sum, notwithstanding the certificate was made a condition precedent to the payment of the money. *Batterbury* v. *Vyse*, 32 Law J. Rep. (N.S.) Exch. 177; 2 Hurls. & C. 42.

A declaration, after setting out a contract by which the plaintiff, a builder, agreed with the defendant to do work to the satisfaction of the architect and to receive payment upon the certificate of the architect, no payment to be considered due unless upon production of the architect's certificate, averred performance by the plaintiff of all things to entitle him to the certificate, and that he had completed the work to the satisfaction of the architect; and alleged as a breach that the architect unfairly and improperly neglected to certify, and so neglected in collusion with the defendant and by his procurement, by means of which the plaintiff had been unable to obtain payment of a balance due to him:—Held, that the words "collusion" and "procurement" imported fraud, and that the declaration disclosed a good cause of action. Ibid.

By a building contract the defendant agreed to pay the plaintiff, a builder, a specified sum for certain works, provided the defendant's architect should before such payment certify that the works had been carried out to his satisfaction:—Held, that to entitle the plaintiff to payment it was not necessary that the architect should certify in writing; but it was sufficient if he did so verbally. *Roberts* v. *Watkins*, 32 Law J. Rep. (N.S.) C.P. 291; 14 Com. B. Rep. N.S. 592.

By an agreement between the plaintiffs, described as the engineer and solicitors of an intended company to be incorporated by act of parliament, of the one part, and the defendants, as contractors, of the other, it was agreed that, provided the act was obtained, the defendants should carry out the works at a certain price, and that in the event of the act not being obtained, the defendants should psy a sum, not exceeding 300*l.*, towards the expenses in endeavouring to obtain the act. The plaintiffs expended 300*l.* in endeavouring to obtain the act, but then abandoned the prosecution of the bill on the ground that no one would supply them with funds. The defendants thereupon employed other solicitors, and expended above 300*l.* in trying to get the act passed, but ultimately failed. In an action by the plaintiffs to recover from the defendants the 300*l.*,—Held, that it was a condition precedent to the plaintiff's right to recover, that they should have used every reasonable exertion to obtain the act; and that having stopped merely from want of funds, they had no claim on the defendants. *Leakey* v. *Lucas* (Ex. Ch.), 32 Law J. Rep. (N.S.) C.P. 289; 14 Com. B. Rep. N.S. 491.

A declaration, after setting out an agreement by which the plaintiffs contracted with the defendants to do certain works for a certain sum to be paid them by the defendants on production by the plaintiffs of the certificate of the surveyor of the defendants that the works had been efficiently performed to his satisfaction, averred that, although all things had been done by the plaintiffs to entitle them to such certificate, yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, and the defendants had not paid the money payable on such certificate:—Held, on demurrer, bad as not disclosing any cause of action against the defendants. *Clarke* v. *Watson*, 34 Law J. Rep. (N.S.) C.P. 148; 18 Com. B. Rep. N.S. 278.

In a contract to sell "500 bales of cotton to arrive in Liverpool per ship or ships from Calcutta," there was the following stipulation: "the cotton to be taken from the quay; customary allowances of tare and draft, and the invoice to be dated from date of delivery of last bale":—Held, that the stipulation, "the cotton to be taken from the quay," was an independent stipulation for the seller's benefit, and not a condition precedent, which the purchaser had a right to insist on being performed. *Neill* v. *Whitworth*, 34 Law J. Rep. (N.S.) C.P. 155; 18 Com. B. Rep. N.S. 435.

A lease for years contained a covenant on the part

of the lessor, that if the lessee should be desirous at the expiration of the term of purchasing the premises, and should give to the lessor six calendar months' notice in writing of such desire, and should pay to him 2,000*l.*, the lessor would sell and convey the premises to the lessee; the expense of the preparation and verification of the abstract to be borne by the lessee, he expressly accepting the title. The lessee gave notice, but did not pay the 2,000*l.*:—Held, reversing a decree of the Master of the Rolls for specific performance, that the payment of the 2,000*l.* was a condition precedent to the right of purchase, and that the money not having been paid, no binding contract arose. *Weston* v. *Collins*, 34 Law J. Rep. (N.S.) Chanc. 353.

(*f*) *Time of the Essence of the Contract.*

T by deed covenanted to pay a composition of 6*s.* 8*d.* in the pound to all the creditors of his father and grandfather who should execute the deed within a given time, and charged certain estates with the amount of the composition. The deed contained a special provision that no creditor not executing within the prescribed time should be admitted to the benefit thereof. After the death of T, a bill was filed, by the trustees of the deed, praying that the trusts might be carried into execution by the Court. Various creditors who had not executed the deed within the given time, claimed to be entitled to the benefit of it:—Held, that in the absence of fraud, creditors who had executed the deed within the time prescribed were alone entitled to the benefit of it; that creditors were not entitled to any notice of the deed; that time was of the essence of the contract; and that as against creditors who had executed the deed neither T nor the trustees could waive actual execution of the deed within the prescribed period, and that any claim founded on allegation of fraud must be asserted by a distinct suit. *Williams* v. *Mostyn*, 33 Law J. Rep. (N.S.) Chanc. 54.

By an agreement entered into between the plaintiff, a landowner, and the defendants, a railway company, the defendants were to take portions of the plaintiff's lands, and it was agreed that they should make and maintain, for the convenience of the plaintiff, so many crossings, and of such kinds, as C, the plaintiff's surveyor, should direct and notify in writing "within one month after the company's obtaining possession of the land." In December 1858 the company entered into possession, but no award or notification of the works required was made until March following. In the mean time the company had made considerable progress in constructing their line, and they resisted the plaintiff's demand for the works notified. The plaintiff thereupon filed his bill claiming to have the notified works executed and performed. It was proved that in settling the terms of the agreement, the company had stipulated for a reduction from two months, the period originally proposed, to one month of the time within which C should notify:—Held, that the stipulation as to time must be regarded as of the essence of the contract; and the Court considering that there was no sufficient evidence of any agreement to enlarge the time, specific performance of the works mentioned in the award or notification was refused. *The Earl of Darnley* v. *the London, Chatham and Dover Rail. Co.*, 33 Law J. Rep. (N.S.) Chanc. 9; 1 De Gex, J. & S. 204.

The bill prayed specific performance of the agreement generally, but the case put forward by the plaintiff rested simply upon the award. At the bar the plaintiff claimed relief upon the footing of tha agreement independently of the award:—Held, that no such relief could be granted, since the defendants must necessarily have been led to suppose that the plaintiff relied upon the award only; but leave was given to amend. Ibid.

(*g*) *When for the Court.*

Goods were put on board a ship consigned for Calcutta at 39*s.* per ton, "payable in London":—Held, that it was for the jury to say from the surrounding circumstances whether the contract was a contract for "freight," contingent on the ship's arrival at her destination, or for a sum payable on the receipt of the goods on board her. *Lidgett* v. *Perrin*, 11 Com. B. Rep. N.S. 362.

By a contract for the purchase of a cargo of wheat afloat, to be supplied at 50*s.* per quarter, including freight and insurance, payment was to be made by "cash in London in exchange for shipping documents." The seller delivered to the purchaser, with other shipping documents, a provisional invoice which estimated the cargo of wheat, calculated at 50*s.* a quarter, at 4,626*l.*; the freight at 1,001*l.* He also delivered a policy of insurance on the same cargo of wheat, but valued at 3,600*l.* only. In an action by the purchaser to recover the price agreed to be paid, the defence was, that the policy was of an insufficient amount and was not a sufficient shipping document:—Held, that it was not a question of law, but a question of fact for the jury, whether, under all the circumstances, the policy was a sufficient shipping document within the meaning of the contract. *Tanvaco* v. *Lucas* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 296; 3 Best & S. 89.

(*h*) *Extras.*

The plaintiff had contracted with the defendant, who was the agent of the Portuguese government, within a certain time to build a ship complete and ready for sea in accordance with the regulations at Lloyd's; and the ship was to be built and constructed with the best materials of all kinds, and as prescribed by Table A of Lloyd's Register of ships of the class A 1. thirteen years, for which class the ship was to be constructed as to materials. And further, the ship was to be fitted, formed and equipped in manner similar in all respects to that which is practised with ships of the same class in Her Majesty's Navy under contracts with the Admiralty. And it was agreed that the purchase-money or contract price therein named should be inclusive of all charges for the said ship, finished and fitted perfectly in every respect, and that no charges should be demanded for extras, but any additions which might be made by order in writing of the defendant's agent should be paid for at a price to be previously agreed upon in writing. During the progress of the building of the ship various additions and alterations in the details of construction were made by the direction of the defendant's agent, but no written order for them was given, as required by the contract. When the ship was nearly completed, the defendant's agent gave notice to the plaintiff that he should require him to supply a quantity of articles for the use of the ship,

which the plaintiff considered he was not, under the contract, bound to do. These articles consisted of an additional quantity of spare as well as standing rigging, spare masts, yards, sails, sailing and other gear, spare anchors, cables, cordage and other articles, with all of which similar vessels in Her Majesty's Navy are usually supplied when commissioned for active service. With respect to vessels built for Her Majesty's Navy by private ship-builders under contract with the Admiralty, the invariable course of proceeding is for the shipbuilder to build and deliver the hull only, with certain hull fittings and fixtures, but all the rigging, masts, cables, boats and other movable things are furnished under Admiralty warrants from the government stores. The Portuguese government being very anxious that the ship should be delivered as soon as possible, the defendant's agent requested that all the articles usually supplied to ships of the same class as that now building under Admiralty warrants should be supplied by the plaintiff, without prejudice to the question whether the plaintiff was bound to supply them under his contract or not. The plaintiff accordingly supplied these articles:—Held, that for alterations and additions during the performance of the contract the plaintiff could not recover, not being able to shew written orders for the same in accordance with the provisions of the contract; but that as between the plaintiff and the defendant, so far as related to the articles which the plaintiff disputed his liability to supply, and which were supplied by him without prejudice to the question of his liability, they must be taken to have been supplied *after* the contract was completed and the vessel delivered, and that for these, therefore, the defendant had incurred a liability wholly independent of the contract. *Russell* v. *Bandeira*, 32 Law J. Rep. (N.S.) C.P. 68; 13 Com. B. Rep. N.S. 149.

Held, also, per *Byles, J.* that these disputed articles were so entirely *dehors* the contract, that the plaintiff might recover for them, even if they were to be considered as delivered during the execution of the contract. Ibid.

By the contract for building the vessel it was provided that if the said ship should not be delivered complete on a certain day, a penalty of 5*l.* a day should be paid by the plaintiff to the defendant as liquidated damages; but that if the ship should not be so delivered for any cause not under the control of the plaintiff, the same to be proved to the satisfaction of the defendant's agent, and to be certified by him in writing, then the said penalty should not be enforced for such number of days or for such time as the defendant's agent should in such certificate name. The ship was not delivered till long after the time appointed, but a large portion of that delay was occasioned by the interference of the defendant or his agents in the course of the performance of the contract:—Held, that, under these circumstances, no penalties were recoverable by the defendant, and that therefore none could be set off against the plaintiff's claim. Ibid.

A agreed to do for B & Co. all the woodwork on an iron ship which B & Co. were building for M & Co., according to a certain tender, the whole to be completed for 3,800*l.* The contract, or tender, contained the following clause,—"Any important work not mentioned in this tender that may be required to be done by the owners, to be paid for by them in addition to the amount herein specified." The work was undertaken by A for B & Co. upon the faith of guarantee by C, as follows:—"In consideration of your contracting with Messrs. B & Co. for the woodwork of an iron ship now building by them for Messrs. M & Co., we hereby guarantee the payment to you according to the contract." The word "important" in the contract was inserted by A, with the consent of B & Co., after the guarantie was signed by C.:—Held, that the contract bound B & Co. for extra work done, they being the persons referred to therein as "the owners"; and that the insertion of the word "important" had no material effect upon the liability of C under the guarantie. Affirmed in the Exchequer Chamber. *Andrews* v. *Lawrence*, 19 Com. B. Rep. N.S. 768.

### (D) RESCISSION, DETERMINATION, AND ABANDONMENT OF CONTRACTS.

The defendants agreed to sell and the plaintiffs agreed to purchase certain land, the defendants to deliver an abstract of the title, and the plaintiffs within twenty-one days of the delivery thereof to return their objections to and requisitions on the title; in case of any objections or requisitions being delivered with which they were unable or unwilling to comply, the defendants to have the option to rescind the contract and return the deposit-money without interest, cost or other compensation, "notwithstanding any attempt made to remove or comply with any such objection or requisition." The sum of 285*l.* was deposited by the plaintiffs in the hands of a third person as a security for the contract being performed on their part, and the day named for the completion of the purchase was the 29th of October. The defendants delivered a proper abstract on the 6th of September, and on the 22nd of September the plaintiffs delivered their objections and requisitions. The replies of the defendants were delivered on the 4th of November. On the 29th of November the plaintiffs claimed and received the deposit from the person by whom it was held. On the 11th of December the defendants delivered to the plaintiffs a notice of their intention to rescind the contract, upon which the plaintiffs brought this action against the defendants for not completing their agreement:—Held, that the defendants had a right to rescind the contract, and that they were not bound to do so before the 29th of October. *The Vestry of Shoreditch* v. *Hughes*, 33 Law J. Rep. (N.S.) C.P. 349; 17 Com. B. Rep. N.S. 137.

The plaintiff agreed with the defendant to empty a mill-pool for 5*d.* a cubic yard of mud, the admeasurement of the mud removed to be settled by N, and if any dispute arose, the dispute to be referred to N, to be by him decided:—Held, that although the former part of the agreement was not revocable, the latter part was revocable. *Mills* v. *Bayley*, 32 Law J. Rep. (N.S.) Exch. 179; 2 Hurls. & C. 36.

The declaration, after setting out the above agreement, stated that the plaintiff afterwards alleged that he had removed a part of the mud, and that while proceeding with the removal of the remainder, the defendant wrongfully caused water to flow into the pool, and a dispute having arisen between the plaintiff and the defendant touching those allegations, the plaintiff required N, pursuant to the agreement, to

determine their truth, and if he should find them proved, to determine further the admeasurement of the mud and the damage sustained by the plaintiff by reason of the committal by the defendant of such aforesaid grievance. Averment, that N awarded and adjudged that the plaintiff had removed a part of the mud, and that the defendant should pay the plaintiff 8*l.* 6*s.* 8*d.* in respect of it, and further that N awarded and adjudged that the defendant wrongfully caused water to flow into the pool, and that in respect of the damage so occasioned to the plaintiff the defendant should pay the plaintiff 10*l.* 2*s.* 1*d.*, and alleged as a breach the non-payment. The defendant pleaded that before the making of the award he revoked the submission and reference to arbitration and the authority of N as arbitrator:—Held, that the plea was an answer to the action. Ibid.

A contracted to sell to B a specific cargo of wheat, described in the bought and sold note as "shipped per D M, as per bill of lading dated September or October," and which was all on board at the date of the contract:—Held, that this did not necessarily entitle the buyer to rescind the contract on its turning out that all the wheat was not shipped before the bill of lading was given. *Gattorno* v. *Adams*, 12 Com. B. Rep. N.S. 560.

By a contract of work, as to certain excavations to be done at so much per cubic foot by the plaintiff for the defendants, the plaintiff agreed to execute the work to the satisfaction of the defendants or their agent, provided that if the works should not proceed as rapidly and satisfactorily as required by the defendants or their agent, they should have full power to enter upon and take possession of the works, and pay whatever number of men should be left unpaid by the plaintiff, and might set to work whatever number of men they might consider necessary; and the amount so paid, and the costs of the men so set to work, should be deducted from whatever money should be due to the plaintiff. To a declaration for work and labour, the defendants pleaded that the work had not proceeded as rapidly and satisfactorily as they and their agent required, and that they had therefore acted on the proviso, claiming to deduct the costs so incurred from the plaintiff's demand; to which the plaintiff replied that the works did proceed as rapidly and satisfactorily as the defendants reasonably and properly could require, and that the defendants and their agent unreasonably, improperly and capriciously required the work to proceed as in the plea alleged:—Held, that the intention to be collected from the agreement was, that the defendants, if dissatisfied, whether with or without sufficient reason, should have the absolute power to put on additional hands and get the work done, and deduct the cost from the contract price payable to the plaintiff; and, therefore, that so long as the defendants were acting *bona fide* under an honest sense of dissatisfaction they were entitled to insist on the proviso; and consequently that the replication, which only alleged that the dissatisfaction was unreasonable and capricious, and did not allege *mala fides*, was no answer to the plea. *Stadhard* v. *Lee*, 32 Law J. Rep. (N.S.) Q.B. 75; 3 Best & S. 364.

A contract was made, on the 9th of July, by the agents of A and B, for the carriage of A's goods by B's vessel from London to Kustendjie, the shipment of which goods was to commence on the 1st of August. On the 21st of July B denied the authority of his agent to make such contract, whereupon A's attorneys gave B a written formal notice that A was ready to perform his part of the contract, and that he would hold B responsible if he refused to perform his part. In reply to this B wrote, denying the existence of such contract and tendering another contract for the acceptance of A. This was answered on the 24th of July by a letter from A's attorneys, stating that A declined to sign any other contract than the one concluded by the agents, and that he held B responsible for the consequences. Between the said 24th of July and 1st of August A entered into a treaty with C to take A's goods to Kustendjie in one of C's vessels; but the contract, which was the result of such treaty, was only finally concluded between A and C on the 2nd of August, and on the 1st of August B informed A that he was ready to receive the goods on board his vessel:—Held, that there had been an express renunciation of the contract by B; and that, upon the above facts, A was entitled to sue B for not receiving the goods according to the contract. *The Danube and Black Sea Rail. Co.* v. *Xenos*, 31 Law J. Rep. (N.S.) C.P. 84; 11 Com. B. Rep. N.S. 152.

Held, also, that A. was not liable in a cross-action by B for damages for not shipping the goods on board B's vessel; and that a plea, in such last action, of discharge by B, was proved by the above evidence of B's renunciation of the contract. Ibid.

P agreed to purchase from K a patent for purifying paraffine, and to work it during fourteen years, "in case it could be so long worked, at a profit," and to pay a royalty of one-third of the difference between the market price of crude paraffine and the price it sold at. It turned out, that although it could be worked at a profit, yet, deducting the royalty reserved, there would be a loss:—Held, that the agreement was at an end. *Kernot* v. *Potter; Potter* v. *Kernot*, 30 Beav. 343.

### (E) BREACH OF CONTRACT.

It is no answer to an action for breach of an agreement to enter into partnership with the plaintiff that, after the agreement, and before breach, the defendant discovered that the plaintiff had, before the making of the agreement, acted with fraud and dishonesty towards a former partner in the conduct of a partnership business, and that such fraudulent and dishonest acts were unknown to the defendant at the time of his entering into the said agreement. *Andrewes* v. *Garstin*, 31 Law J. Rep. (N.S.) C.P. 15; 10 Com. B. Rep. N.S. 444.

On the 9th of July B, by his agent, contracted to carry goods for A by his ship, the shipment to commence on the 1st of August. On the 21st of July B wrote to A denying the authority of his agent to make the contract. A answered that he should hold B responsible for breach of contract, and that if he did not next day withdraw his letter A would make other arrangements for carrying the goods. B reiterated that there was no contract made, and proposed another contract, and stated that if that was not acceded to he should send his ship on another voyage. On this A made arrangements with C to carry his goods, but did not sign any contract with C until the 2nd of August. On the 1st of August B wrote to A stating that the ship was ready to receive A's

goods, but A declined then to send them:—Held, that B having absolutely refused to perform the contract before the time for performance came, it was at the option of A to treat that refusal as a breach of contract; that A might sue B for the damage received by such breach; and that B had no cause of action against A for the refusal to send the goods by B's ship. *The Danube and Black Sea Rail., &c. Co.* v. *Xenos* (Ex. Ch.), 31 Law J. Rep. (N.S.) C.P. 284; 13 Com. B. Rep. N.S. 825.

The defendants agreed to let certain gardens and music-hall to the plaintiff, on four specified days to come, for the purpose of giving a series of concerts, at and for a specified rent for each of the said days. The defendants were to provide a band of music and certain specified entertainments, and to issue advertisements of the entertainments. The plaintiffs were to pay 100*l.* in the evening of each of the said days, to receive and take all the money paid by persons entering the gardens, and to provide the necessary artistes for the entertainments. After the agreement was entered into, and before the day arrived for the first concert, the music-hall was accidentally destroyed by fire:—Held, that as the existence of the hall was necessary for the performance of the contract, the defendants were excused from liability in respect of its non-performance, and that no action would lie against them. *Taylor* v. *Caldwell*, 32 Law J. Rep. (N.S.) Q.B. 164; 3 Best & S. 826.

An instrument is not a demise, although it contain the usual words, if its contents shew that the parties did not intend it to operate as a demise. Ibid.

Declaration on a contract, by which the plaintiff agreed to sell and the defendant to purchase as many of the plaintiff's gas coals equal to sample as could be carried from S to L in one steam-vessel during nine months, the vessel to be sent by the defendant. Breach, that the defendant did not and would not send a vessel, and would not accept the cargoes of coals as he ought. Pleas, first, that before any breach by the defendant, the plaintiff broke his contract by delivering coal which was no part of it gas coal equal to sample; upon which the defendant refused to fetch or accept any more. Secondly, that before any breach by the defendant, the plaintiff broke his contract by detaining the defendant's vessel an undue and unreasonable time; upon which the defendant refused to fetch or receive any more of the coal:—Held, that neither of the pleas was an answer to the declaration. *Jonassohn* v. *Young*, 32 Law J. Rep. (N.S.) Q.B. 385; 4 Best & S. 296.

An action will lie for the breach of a written contract, by which A, for a valuable consideration, agrees with B that B may dig and carry away cinders from a cinder-tip forming part of A's land, though the contract is not under seal. *Smart* v. *Jones and others*, 33 Law J. Rep. (N.S.) C.P. 154; 15 Com. B. Rep. N.S. 717.

A contract for the sale of cotton of a given quality is not performed on the part of the seller by a tender of a larger quantity, out of which the buyer is required to select those bales which answer the description of the cotton contracted for. *Rylands* v. *Kreitman*, 19 Com. B. Rep. N.S. 351.

The defendants being employed as agents for the plaintiffs (a foreign company) to negotiate sales of candles for them in this country, conveyed to them an order from one S for 2,500 cases, to be delivered in London "free on board export ship: 2*l.* 10*s.* per cent. discount against bill at three days' sight, goods, invoice, and draft for acceptance to be sent to us." The plaintiffs did not in terms accept this proposal, but wrote to the defendants, on the 19th of June, as follows:—"Les informations sur S sont telles que nous ne pouvons lui livrer les 2,800 caisses que contre connaissement. Si vous voulez, nous vous enverrons les connaissements, et vous ne *les* lui délivrerez que contre payement." The defendants informed S that the plaintiffs accepted the order on condition that he handed them (the defendants) a cheque in exchange for the bill of lading; and to this S assented, provided he was allowed a discount of 3*l.* per cent. instead of 2*l.* 10*s.*, to which the plaintiffs agreed. On the arrival of the goods in London, the defendants caused them to be transhipped on board a vessel called the Laurel (named by S), bound for Melbourne, taking the mate's receipt in their own names. They afterwards tendered that document to S and demanded payment, which he promised to make on the following Saturday. S, however, failed to pay according to his promise, and the Laurel sailed to Melbourne with the goods on board. Under the instruction of the Judge, the jury found that the meaning of the plaintiff's letter of the 19th of June was, that the defendants were not to part with the goods out of their possession or control until they had received the price thereof from S:—Held, that the conduct of the defendants amounted to a breach of their contract with the plaintiffs; that there was no misdirection; and that the proper measure of damages was the value of the goods. *The Stearine Co.* v. *Heintzmann*, 17 Com. B. Rep. N.S. 86.

It is not competent to a witness who is called to interpret a foreign document to give an opinion as to its construction; that is for the Court. Ibid.

### (F) EVIDENCE TO EXPLAIN OR VARY.

The defendant, at the request of M, signed the following order, which M also signed:—"Insert my advertisements for one year in Hotson's (the plaintiff's) local time-tables, 'The Great Northern,' (and six others, naming them). Charge per insertion to be ten shillings each monthly book." The plaintiff's time-tables consisted of separate books, published monthly, one for each of the seven railways. M was not employed by the plaintiff to obtain orders for him, but upon such orders as he obtained, provided they were approved of by the plaintiff and the advertisements inserted, the latter allowed him a commission. M brought the defendant's order to the plaintiff, who approved of it, and allowed M his commission, and, having inserted the advertisements for one year in each of the seven books, brought his action to recover from the defendant 70*s.* per month. At the trial it was proposed to ask the defendant what representations M had made to him to induce him to enter into the written contract; the defence being that the defendant was liable only for 10*s.* per month as for one advertisement in one book, and not for 70*s.* as for seven advertisements in seven books:—Held, that the order having been adopted in terms by the plaintiff, the effect of the evidence was to vary a written contract, and was inadmissible. *Hotson* v. *Browne*, 30 Law J. Rep. (N.S.) C.P. 106; 9 Com. B. Rep. N.S. 442.

Held, also, that if the issue had been whether the defendant was induced to sign the contract by the fraud of the plaintiff's agent (assuming M to have been the plaintiff's agent) the evidence would have been admissible. Ibid.

The declaration alleged a contract between the plaintiff and the defendants, that the defendants would tow the plaintiff's smack for reward, to be paid by the plaintiff, and that by the defendants' negligence the plaintiff's smack was damaged. In support of this contract, the plaintiff's evidence was, that he had engaged the master of a steam-tug belonging to the defendants to tow his smack out of harbour to sea; that the master took the smack in tow, but before getting clear of the harbour cast off the tow-rope, as the plaintiff alleged negligently, and the smack was stranded and damaged; that he (the plaintiff) had on previous occasions employed the defendants' tug in the same way, and when paying for the services then rendered, had been furnished by the defendants with receipts, on the backs of which were printed notices to the effect that the defendants would not be liable for any loss or damage arising from any supposed negligence of their servants, &c. The plaintiff, on cross-examination, admitted having had these receipts, but denied having read the notices on the backs, or that the effect of such notices had come to his knowledge in any way. On these facts, the Judge nonsuited the plaintiff on the ground that the plaintiff must be taken to have contracted on the terms contained in these printed notices, the defendants' servants having no authority to bind them by a contract on any other terms:—Held, making absolute a rule for a new trial, that the nonsuit was wrong, for that it was a question for the jury, and ought to have been left to them to say what was the contract between the parties, and whether a knowledge of these notices had been brought home to the plaintiff. *Symonds* v. *Pain*, 30 Law J. Rep. (N.S.) Exch. 256; 6 Hurls. & N. 709.

To a declaration, alleging that by an agreement, dated the 21st of July, 1857, the defendants bought of the plaintiff certain bark at 6*l.* per ton, and alleging the delivery of the bark and non-payment of the price, the defendants pleaded, as an equitable plea, that the plaintiff was employed to sell, and did sell the bark as agent of C, and on his behalf, at the prices which had been paid in the preceding year for bark, with an additional sum equal to the expenses of carting and ricking the bark in the then present year; and the plaintiff then represented that the expenses of carting and ricking could not then be correctly ascertained, but that the expenses, added to the price, averaged between 5*l.* and 6*l.* per ton, and upon such representation, and upon the plaintiff agreeing that the defendants should be liable to pay only such prices and expenses when they were ascertained, the defendants were induced to and did make the agreement, and they were then requested by the plaintiff to pay the prices and expenses to C. The plea then alleged that the said expenses, added to the said price, averaged only 5*l.* 2*s.*, and that the defendants, before action, paid to C, who then had notice of the premises, the whole amount due, at the said prices, together with the expenses, and C accepted the sum in full discharge and satisfaction of the same and of all liability of the defendants for and in respect of the said bark and expenses, of all which the plaintiff had notice before action:—Held, that the plea was an answer to the action, and that parol evidence was admissible to support it. *Rogers* v. *Hadley*, 32 Law J. Rep. (N.S.) Exch. 241; 2 Hurls. & C. 227.

*Semble*—The facts alleged in the plea shewed that no such contract as alleged in the declaration was made by the defendants. Ibid.

To a count for not accepting goods described in the contract as "to arrive ex *Peerless* from Bombay," a plea that the defendants meant another ship of the same name, which sailed from Bombay two months earlier, and that the plaintiff was not ready to deliver any goods which arrived by that ship, was held on demurrer to be a good answer. *Raffles* v. *Wichelhaus*, 33 Law J. Rep. (N.S.) Exch. 160; 2 Hurls. & C. 906.

A contract made by the defendants, who were brokers, in their own name, for the purchase of iron for the plaintiffs, was contained in bought and sold notes. The notes differed only in these particulars, that while the bought-note delivered by the brokers to the plaintiffs had the words "Deposit 5*s.* per ton, brokerage 0 per cent.," the sold-note contained the words "Deposit (blank); brokerage 10*s.* per cent.":—Held, that parol evidence was admissible to shew an arrangement between the brokers and the plaintiffs, by which they required the latter to pay a deposit of 5*s.* per ton, and that the apparent variance between the notes, so explained by the usage of the parties, was not material. *Kempson* v. *Boyle*, 34 Law J. Rep. (N.S.) Exch. 191; 3 Hurls. & C. 763.

Where parol evidence has been improperly received to explain a supposed latent ambiguity in a written document, the Court will decide upon the construction of the instrument without regard to the finding of the jury upon such evidence. The plaintiff, an engineer, had been professionally concerned in promoting a scheme for converting the Chard Canal into a railway, and three successive acts were obtained for carrying it into effect, but were allowed to expire. The defendant, also an engineer, being desirous of constructing a railway over the same line of country, entered into a negotiation with the plaintiff, the result of which was reduced into writing and signed by the defendant, as follows:—"Chard Canal and Railway Company.—In consideration of your transferring all the interest you may have in this company, and handing me all the plans, papers and documents in your possession, I hereby undertake to pay you the sum of 600*l.*, provided my friends succeed in carrying out the undertaking. The amount, 600*l.*, is to be paid as follows: 300*l.* on the first portion of the land required for the railway being acquired by the company, and the balance out of the three first payments received by me on the foot of construction account." On the following day the defendant wrote upon the document (signing it), at the plaintiff's suggestion, the following: "It is understood that the 600*l.* herein is to become payable on the obtaining of the act,—one moiety in six months, and the residue in three annual instalments":—Held, that the two writings together formed the agreement, and that the defendant's liability to pay the 600*l.* was contingent upon "the undertaking" (whatever that might mean) being carried out by his friends, so that he might be employed as the engineer in the construction of the line. *Bruff* v. *Conybeare*, 13 Com. B. Rep. N.S. 263.

Where a contract is to be made out partly by written documents and partly by parol evidence, the whole becomes a question for the jury. A having entered into a contract for the supply of iron rails for Vera Cruz, applied to B & Co., shipowners and brokers, to procure vessels to carry it thither; whereupon B & Co., on the 19th of November wrote to A,—"We hereby engage to find tonnage for about 5,000 tons of rail to load at M for Vera Cruz, subject to the following conditions, viz., 1,000 tons to be delivered at Vera Cruz in three months from this time, and 1,000 tons per month afterwards," &c. After a long correspondence and several interviews as to the class of vessels to be chartered, and the flag, B & Co., on the 11th of December, wrote to A as follows: "Our eogagement to procure tonnage for Vera Cruz is the letter addressed to your Mr. B on the 19th of November, and, in accordance therewith, we are arranging to take up vessels for the first shipment of 1,000 tons. We cannot restrict ourselves to vessels of any particular flag or class, but will of course give a preference to neutral ships of high class." On the 15th of December B & Co. wrote to A saying that they would prefer abandoning the contract altogether. And afterwards, on the same day, A wrote: "We accept your offer of the 19th of November last, coupled with the initialed offer of the 18th. Messrs. E hold us to our contract, and therefore we must hold you to yours and cannot consent to your abandoning it as intimated:"—Held, that these letters did not constitute a complete contract, but that recourse must be had to parol evidence, and consequently that it was properly left to the jury to say whether or not a binding contract, as alleged in the declaration, was to be inferred from the whole. *Bolckow* v. *Seymour*, 17 Com. B. Rep. N.S. 107.

## CONVERSION OF ESTATE.

(A) What amounts to a Conversion.
(B) Extent of its Operation.

### (A) What amounts to a Conversion.

[See Waste.]

A testator gave to his children, in succession, the option of purchasing his real estate, and in the meanwhile the rents were to be divided equally between them. Before an option had been exercised, and while some of the children were still infants, a corporation purchased part of the property for public improvements, under compulsory parliamentary powers:—Held, that the shares of children who had died infants remained real estate until the option had been exercised, and that in the meanwhile the income of the purchase-money belonged to their heir-at-law. *The City of London Improvement Act, ex parte Hardy*, 30 Beav. 206.

A testator devised several freehold houses to his children specifically, and bequeathed the residue to other parties. After the date of his will a notice was served upon him by a railway company to treat for the purchase of the houses under their act of parliament, but no step was taken under the notice during his lifetime:—Held, that the notice to treat did not entitle the company to specific performance and did not operate as a conversion of the freehold houses into personalty. *Haynes* v. *Haynes*, 30 Law J. Rep. (N.S.) Chanc. 578; 1 Dr. & S. 426.

A testator gave his real and personal estate to persons whom be appointed his executors, in trust in the first place to sell an advowson, and apply the proceeds in discharge of his debts and legacies, and if they should be insufficient then to cut timber to the value of 500*l.*, and if that should not be sufficient then to raise the deficiency by sale or mortgage of his real estate; and the testator directed his executors to retain their expenses, but he did not expressly declare any trust of his personal estate. A suit was instituted, in which it was decided that the personal estate was primarily liable to the payment of the testator's debts and legacies, and it was now held, upon petition in that suit, that the money raised by sale of the advowson and timber constituted personal and not real estate. *Bowra* v. *Rhodes*, 31 Law J. Rep. (N.S.) Chanc. 676.

A B being tenant for life of real estate under a marriage settlement and ultimate owner in fee, subject to intervening interests, contracted to sell the estate to a railway company absolutely. A B by his will, made previously to the contract, had specifically devised this estate, and there was no general devise in the will. No conveyance having been executed to the company, they paid interest upon the money to the tenant for life; and upon his death, and failure of all the intervening interests, the company paid the principal and arrears of interest into court under their special act, the clauses of which corresponded with the Lands Clauses Act:—Held, that there was no conversion of the real estate; that the specific devise failed; and that the purchase-money descended to the heir of A B; and the devisees under the will of the heir were now entitled. *In re Bagot's Settlement*, 31 Law J. Rep. (N.S.) Chanc. 772.

A B entered into a verbal agreement to sell certain real estate, but died intestate as to his real estate before the agreement was carried into effect. His heir-at-law took out letters of administration, and upon the request of the purchaser executed a conveyance of the estate, which recited the parol contract and the desire of the purchaser to have it completed, and the consent of the heir to do so. Upon passing the residuary accounts of A B's estate the heir, as administrator, gave credit for the sale moneys as "produce of property contracted to be sold in A B's lifetime, and purchase completed after his death." The heir subsequently claimed the proceeds of the sale as arising from property coming to him as heir-at-law:—Held, that although the heir might have repudiated the verbal contract, and claimed the lands as heir and sold them himself in that character, yet as he had in fact adopted and carried out the contract of A B the land must be considered as retrospectively well converted into personal estate, and that the proceeds of sale belonged to the next-of-kin. *Frayne* v. *Taylor*, 33 Law J. Rep. (N.S.) Chanc. 228.

Commissioners having compulsory powers to purchase lands, gave notice to an owoer of freeholds of taking them and to treat. He, in reply, stated the price he was willing to take, but he died before the acceptance of the offer. The purchase was afterwards completed at that price:—Held, that the real

estate had not been converted into personalty at the death of the owner, and that the purchase-money belonged to his heir-at-law. *In re the Battersea Park Acts, in re Arnold*, 32 Beav. 591.

Freeholds in which a lunatic was interested were taken compulsorily by a company, and the purchase-moneys, which under the act of parliament were liable to be invested in land, were paid into court, and laid out in government funds. The existence of the fund was overlooked, and it went on accumulating. A B, who became tenant in tail in possession, with immediate remainder to her in fee, by her will devised her real estate and bequeathed "all such capital stock and moneys as she should be possessed of or interested in, at her death, in the public government or parliamentary funds," but she expressed no further intention as to conversion:—Held, that the principal fund passed as real estate, and the accumulations as personal estate. *Dixie* v. *Wright*, 32 Beav. 662.

Real estate was settled by a marriage settlement, not comprising any personal estate. The tenant for life sold part of the land to a company under the powers of their act, and the proceeds were paid into court. Afterwards the tenant for life, under power in the settlement, appointed by will to his son the whole estate and the purchase-money of the part which had been sold. The son by will disposed of his residuary personal estate, including "all moneys to which I may be entitled under the marriage settlement of my father and mother," and he declared that he did not intend by his will to dispose of any real estate. The widow of the tenant for life, who was entitled to a jointure, was still living:—Held (*dubitante* the *Lord Justice Knight Bruce*), that the will did not dispose of the fund in court. *In re Skegg's Settlement*, 2 De Gex, J. & S. 533.

### (B) Extent of its Operation.

Land which, from being impressed with an absolute trust for sale, is personal estate in equity, cannot be re-converted into real estate by persons having only a defeasible title to the proceeds of sale. To effect a re-conversion, there must be the concurrence of the absolute owners. *Sisson* v. *Giles*, 32 Law J. Rep. (N.S.) Chanc. 606.

A testator devised and bequeathed real and personal estate to trustees upon the usual trusts for sale and conversion, and directed them to hold the proceeds in trust for A (a married woman) and B, as tenants in common; and declared that, if either died without leaving issue, the share of the one dying should go to the survivor; and that, if both died without leaving issue, the property should go to the testator's next-of-kin. The testator died in 1839. In 1851 A and her husband and B executed a deed (not acknowledged by A), by which they professed to discharge the trustees from the trusts of the will, without prejudice to their right to require a conveyance of the real estate. The rents of the property were received by A and B in moieties until the death of B. B died in 1858 leaving issue. At B's death A was still a married woman:—Held, that there had been no re-conversion, and that the real estate had still the character of money, and was subject to the trusts for sale contained in the will. Ibid.

A real estate was devised to two trustees, to sell and divide the produce between A, B, and C. The trustees being dead, A entered into possession, and received the rents for three and a half years, accounting to B and C for their shares. A then died, and at his death the estate remained unsold:—Held, that there had been no re-conversion, but that the estate in equity retained its character of personalty. *Brown* v. *Brown*, 33 Beav. 399.

## CONVICTION.



### (A) Under one Statute on a Summons under another.

On a summons under the Municipal Corporation Act, for assaulting a constable in the execution of his duty, the accused cannot be convicted of a common assault under the 24 & 25 Vict. c. 100. s. 42. *R.* v. *Brickhall*, 33 Law J. Rep. (N.S.) M.C. 156.

### (B) Proof of Scienter.

A conviction against a person found in possession of naval stores marked with the broad arrow cannot be sustained, when the jury say that they have not sufficient evidence before them to shew that the prisoner knew that the stores were so marked, though he had reasonable means of knowledge. *R.* v. *Sleep*, 30 Law J. Rep. (N.S.) M.C. 170; 1 L. & C. 44.

*Semble*—If he wilfully shut his eyes to the fact of their being marked, the case might be different. Ibid.

### (C) For Offence on a Day not named in the Information.

Where an information charged the defendant with having on the 5th of October, and on divers other days and times between the said 5th of October and the laying the information (16th of November), being then the occupier of a certain house in the said city, knowingly and wilfully kept and used the same for the purpose of his betting with persons resorting thereto; a conviction for so keeping and using the house on the 8th of November was held good and valid. *Onley* v. *Gee*, 30 Law J. Rep. (N.S.) M.C. 222.

### (D) Single Offence: several Oaths.

Under the 19 Geo. 2. c. 21. a conviction that, "A B did, on the —— day of ——, profanely curse one profane curse," setting it out, "twenty several times repeated," and adjudging him to pay "for such his offence the penalty of 2*l.*,"—being a cumulative penalty at the rate of 2*s.* for each repetition,—is good. *R.* v. *Scott*, 33 Law J. Rep. (N.S.) M.C. 15; 4 Best & S. 368.

The using several oaths on one and the same occasion, is one offence only; and Jervis's Act (11 & 12 Vict. c. 43), s. 10, therefore, does not apply. Ibid.

(E) By Interested Justice.

A prosecution under the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), having been instituted and conducted by the agents of an association for the preservation of salmon, and a conviction obtained before Justices who were active members of the association,—the Court quashed the conviction, on the ground of the Justices' interest. *R.* v. *Allen*, 33 Law J. Rep. (N.S.) M.C. 98; 4 Best & S. 915.

(F) Certiorari to remove.

Saturday, the 22nd of August, being the last day of the six months for obtaining a *certiorari* to remove a conviction, notice of the intention to apply to a Judge on that day was duly served on the convicting Justices. The vacation Judge being only at chambers on Tuesdays and Fridays, on Friday the 21st of August the defendant's agent left affidavits at the Judge's chambers to be laid before the Judge, with an intimation of the nature of the application, and called again on the Saturday, when the Judge had not returned the affidavits; and on his next attendance, on Tuesday the 25th of August, all the parties went before him:—Held, that the application was made within the meaning of the 13 Geo. 2. c. 18. s. 5. on the Saturday, and that the *certiorari* ought to issue. *R.* v. *Allen*, 33 Law J. Rep. (N.S.) M.C. 98; 4 Best & S. 915.

## COPYHOLD.

[The Copyhold, Inclosure and Tithe Commission continued by 25 & 26 Vict. c. 73.]



(A) Custom.

(*a*) *Validity of.*

A custom in a manor that copyholders of inheritance may break the surface and dig and get clay, without stint, out of their copyhold tenements, for the purpose of making bricks, to be sold off the manor, is good in law (*dubitante Lord Wensleydale*). So held by the House of Lords, affirming the decision below, 30 Law J. Rep. (N.S.) Exch. 3; 6 Hurls. & N. 123. *The Marquis of Salisbury* v. *Gladstone* (House of Lords), 34 Law J. Rep. (N.S.) C.P. 222.

A custom for copyhold tenants to fell timber or other trees upon their customary lands, and to retain the same for their own use, without licence from the lord, although such timber may not be felled for necessary repairs, is not unreasonable. And such a custom is not the less admissible in evidence, because it also professes to entitle the customary tenants to plough up meadow land and to suffer their houses to decay, which might be a bad custom, if pleaded. Where the customary tenants hold under a corn rent, or an annual sum of money in lieu thereof, in the absence of a custom to the contrary, the election is with the tenant to pay either in money or in corn. Where, therefore, the Assistant Commissioner, under the Copyhold Acts, upon evidence that for sixty years past the payments had invariably been made in money, decided that the election was with the tenant,—the Court, upon a case stated by way of appeal, affirmed his decision. *Bleuett* v. *Jenkins*, 12 Com. B. Rep. N.S. 16.

(*b*) *Evidence of.*

The 1st section of the Prescription Act (2 & 3 Will. 4. c. 71.) applies only to cases where a person claims by custom, prescription, or grant, a profit or benefit from the land of another, and has no application to the case of a right claimed by a copyholder on his own tenement according to the custom of the manor. Consequently, where copyholders claimed a customary right to dig and carry away sand from their tenements, and the evidence was such that an inference of the existence of the custom might be readily drawn therefrom, it was held, reversing the decision of one of the Vice Chancellors, that it was not necessary to prove that the right had been enjoyed for the period of thirty years. *Hanmer* v. *Chance*, 34 Law J. Rep. (N.S.) Chanc. 413.

*Semble*—Where a custom has been enjoyed for a shorter period than is required by the act for its establishment, the 6th section of the act does not preclude the Court from taking the fact of such enjoyment into consideration along with other circumstances as evidence of the existence of the custom. Ibid.

(*c*) *Cesser of.*

If a lessee of a manor demises lands otherwise than by custom, his right to grant lands by the custom will be extinguished during the continuance of his interest. But on the determination of the interest of the lessee, the lord of the fee may re-grant the lands according to the custom of the manor, and a re-demise by the lord of the fee to the lessee or to a stranger will resuscitate the right of re-granting the lands according to the custom of the manor. But if the lord of the fee demises lands otherwise than by custom, the right to re-grant according to the custom is extinguished wholly and for ever. *Ex parte Lord Henley, in re the London and South-Western Rail. Co.*, 31 Law J. Rep. (N.S.) Chanc. 54; 29 Beav. 311.

If a lessee of a manor assigns his legal interest therein to a mortgagee, the estate of the mortgagee will preserve to the mortgagor his right to re-grant lands according to the custom, though he has let them some on lease and some from year to year, in contravention of the custom. Ibid.

(B) Surrender and Admittance.

(*a*) *Of Purchaser.*

By will a testator authorized, empowered and directed his executors to sell and dispose of his copyhold estate, and to convey and assure such copyhold hereditaments unto the purchaser or purchasers thereof. The executors put up the estate at auction and sold it to C, conveying it to him by bargain and sale:—Held, that C had a right to be admitted as tenant of the copyhold, without any

previous admittance of either the heir or the executors. *R.* v. *Wilson*, 32 Law J. Rep. (N.S.) Q.B. 9; 3 Best & S. 201.

(*b*) *Upon Grant of a Lord Farmer to himself.*

Three successive Dukes of Buckingham had been for many years lessees of the manor of M, of which the plaintiffs were owners in fee. The lessee for the time being had, by custom, as lord farmer, the right of making grants for three lives of certain copyholds within the manor, and renewing these lives as they dropped; but the lease contained a proviso against alienation without the lessor's licence. In the year 1833, the then Duke, lessee of the manor, assigned, together with other real and personal property, in general terms, his "manors," &c., whether freehold or leasehold, to trustees, upon trust to sell the same, and in the mean time to manage the property; but this deed was never acted on. Shortly after this deed of assignment, the lease of the manor of M was renewed for twenty-one years by the plaintiffs to the then Duke. He died in the year 1839, leaving his son his successor and universal devisee and legatee. In the year 1842 the lease of the manor of M was again renewed for twenty-one years by the plaintiffs to the late Duke. The plaintiffs had no notice of the existence of the assignment of 1833, until after the year 1863. In the year 1840, certain copyholds of the manor held by one H were surrendered to the use of the late Duke, the then lord farmer, for a valuable consideration, and the late Duke was admitted to these copyholds for his own life and that of two other persons. In 1845, one of these lives dropped, and the late Duke then granted these copyholds to himself for the life of his son, the defendant, and was himself admitted to these copyholds accordingly. In the year 1849 the persons for whose lives certain other copyholds of the manor had been granted were all dead, and thereupon the then lord farmer granted these copyholds to himself, for three lives, and was admitted to these copyholds accordingly. In the year 1811, the then Duke, as lord farmer, granted certain copyholds of the manor to himself for the lives of himself and two other persons. After his death in 1839, the late Duke, as lord farmer, on two occasions, granted the same copyholds to himself for the life of another, in order to fill up the lives as they dropped. The late Duke died in 1861, and all his interest in this property vested in the defendant:—Held, that these grants, as being made by the lord to himself, were all void, and that there could be no presumption that the grants since 1833 were made by the lord as agent of the trustees under the deed of that year. *Christchurch, Oxford*, v. *the Duke of Buckingham*, 33 Law J. Rep. (N.S.) C.P. 322; 17 Com. B. Rep. N.S. 391.

(*c*) *Lord's Right to a Fine.*

The co-heiresses of a copyhold tenant, being trustees of the tenements for R, surrendered to C, a trustee for and nominated by R. The solicitor for R and the surrenderors sent the surrender to the steward as instructions for the admission of C, and thereupon the steward, according to the custom, delivered the rod to a person nominated by him to receive admission for C. At the time of taking the admission, the steward also, according to the custom, made an entry or minute of the admission according to the surrender, from which the court-rolls were afterwards made up. A draft admission was prepared, and a stamped copy sent for C, but which was returned to the steward, as it contained a different description of the land to that in the surrender. No entry was made in the court books until after action brought. By the custom of the manor an arbitrary fine was payable on admission, and the steward demanded 122*l.* 10*s.* from the co-heiresses for a fine on surrender without admission, and 70*l.* from C as a fine upon admission. Actions being brought by the lord to recover these fines, the claim indorsed on one will being 120*l.* and on the other 70*l.*, the facts were turned into a special case, with power to the Court to draw inferences of fact; it being agreed that if the plaintiff recovered any fine, the amount should be 60*l.* from the surrenderors and 60*l.* from C. The Court having found that the fines assessed and demanded were unreasonable,—Held, that the actions were not maintainable, and that the lord could not recover the agreed sum as on a *quantum meruit*, the alterations in the rules of pleading not affecting the necessity for an assessment and demand of a sum certain. *Hayward* v. *Raw*; and *Hayward* v. *Cruden*, 30 Law J. Rep. (N.S.) Exch. 178; 6 Hurls. & N. 308.

*Quære*—Whether the entry of admission made by the steward at the time could be treated, as between the lord and the tenant, as evidence of a complete admission on the court-rolls. Ibid.

A being the trustee of copyhold estates was admitted tenant on the roll, and died leaving B his heir. B was never admitted, and devised his trust estates to C; and C was accordingly admitted. During the life of A the *cestui que trust* for life voluntarily came in and was admitted on behalf of himself and the *cestui que trust* in remainder, and paid the fine as on an admittance in fee; the *cestui que trust* in remainder survived B:—Held, that the lord was entitled to a double fine on the admittance of C, viz., the fine that would have been paid had B been admitted, as well as the fine payable on the admittance of C himself. *Londesborough* v. *Foster*, 32 Law J. Rep. (N.S.) Q.B. 225; 3 Best & S. 805.

Held, also, that the lord was not estopped from claiming on the ground that the property was held on trust, and that he had admitted some of the *cestuis que trust* on payment of the fines. Ibid.

W R, a testator, devised copyholds to his son absolutely, subject to an executory devise over in case of his death without issue living at his death. The son paid a fine, was admitted, and died without issue. On the son's death (a receiver having been previously appointed by the Court of Chancery) the lord of the manor of which the copyholds were holden presented a petition in the cause, praying that he might be at liberty (notwithstanding the order for the appointment of the receiver) to receive the rents of the estate until further order, that is, to seize *quousque* the executory devisees should claim admission and pay the proper fine:—the *Vice Chancellor Kindersley* decided that the admission of the primary devisee was the admission of the executory devisees, and that the lord had no right to a further fine, and that the Court ought not to leave him to his legal remedy, but to decide the point at once: and His Honour dismissed the petition with costs. On appeal, a custom of the manor was proved to exist for devisees in

remainder to come in and be admitted and pay a full fine on admission, and thereupon it was held by the Lords Justices that on the custom the lord of the manor was entitled to a fine from the executory devisee under W R's will, and must be left at liberty to seize *quousque*, and they ordered all costs of the petition both in the court below and on the appeal to be paid out of a fund in court paid in by the receiver, without prejudice to any question, and discharged the order of the Vice Chancellor. *Randfield* v. *Randfield*, 31 Law J. Rep. (N.S.) Chanc. 113; 1 Dr. & S. 310.

A custom that the lord of a manor, in assessing the fine upon admittance of one not being a copyhold tenant on the court-rolls (except a customary heir claiming admittance as such), if not restricted in amount to any number of years' value of the tenement to which such admittance is made, is unreasonable and bad. *Douglas* v. *Dysant*, 10 Com. B. Rep. N.S. 688.

## COPYRIGHT.

[The law relating to copyright of designs amended by 24 & 25 Vict. c. 73.—The law relating to copyright in works of the fine arts, and for repressing the commission of fraud in the production and sale of such works, amended by 25 & 26 Vict. c. 68.]

(A) Proprietorship of.
(B) International Copyright.
(C) Copyright of Designs.
(D) Piracy and Infringement of.
  (*a*) *Descriptive Catalogue of Books.*
  (*b*) *Photographic Copies of Engravings.*
  (*c*) *Dramatic Compositions and Pieces.*
(E) Assignment of.

### (A) Proprietorship of.

The right of the author of an article in a periodical under the 18th section of the act to prevent a separate publication is not copyright, within the meaning of the 24th section, and it is no objection to a motion for injunction in such a case that the author has not entered his work at Stationers' Hall. *Mayhew* v. *Maxwell*, 1 Jo. & H. 312.

By the effect of section 18. of the Copyright Act (5 & 6 Vict. c. 45), the proprietor of a periodical is precluded from republishing without the consent of the author articles written by the latter for and published in such periodical in any other form than as reprints of the entire numbers of the periodical in which those articles appeared. *Smith* v. *Johnson*, 33 Law J. Rep. (N.S.) Chanc. 137; 4 Giff. 632.

A republication in supplemental numbers of a selection of various tales previously published in a periodical, is a separate publication within the section. Ibid.

Where the solicitor of a company writes a letter, apparently on behalf of the company, he has no such property in it as to entitle him to prevent its publication, although he swears that it was written in his private capacity. *Howard* v. *Gunn*, 32 Beav. 462.

### (B) International Copyright.

A foreign author, who first publishes within the British dominions, being at the time resident within any part of the British dominions (whether the place of publication or not), acquires a general copyright throughout the whole of those dominions. *Low* v. *Routledge*, 33 Law J. Rep. (N.S.) Chanc. 717.

*Semble*—That a foreign author, who first publishes here, though while resident in foreign parts, is entitled to copyright under the 5 & 6 Vict. c. 45. Ibid.

Errors in the registry of proprietorship under the 5 & 6 Vict. c. 45, as to the date of first publication and name of publisher, held to invalidate a subsequent assignment under the act. Ibid.

By the International Copyright Act (7 & 8 Vict. c. 12. s. 19), a British subject, who first publishes abroad, is, equally with a foreigner, deprived of any copyright save such as he may acquire under that act; and if there be no treaty in force giving effect to the act in his particular case, he has no copyright in this country; and in reference to the right of dramatic representation, first representation abroad is a first publication abroad within the meaning of section 19. of the act. *Boucicault* v. *Delafield*, 33 Law J. Rep. (N.S.) Chanc. 38; 1 Hem. & M. 597.

B, a British subject, brought out a drama in New York; he afterwards represented it in this country, having duly registered it. There being no arrangement in force between this country and the United States as to international copyright,—Held, that B had no exclusive right to perform his drama in this country. Ibid.

### (C) Copyright of Designs.

[See (D) Piracy and Infringement of.]

The 5th section of the "Copyright of Designs Act, 1858," provides, that the registration of any pattern or portion of an article of manufacture to which a design is applied, instead or in lieu of a copy, drawing, &c., shall be as valid and effectual as if such copy, drawing, &c. had been furnished to the registrar under the "Copyright of Designs Act":—Held, that this enactment authorizes the simple registration of a pattern of an article of manufacture, where the design claimed is a new combination the parts of which are not new, in like manner as if the whole design were new. *M'Crea* v. *Holdsworth*, 33 Law J. Rep. (N.S.) Q.B. 329; 5 Best & S. 495.

The proprietor of a design duly registered under the Acts for the Copyright of Designs, whether he be a British subject or a foreigner, forfeits the benefits of the acts unless the proper registration marks are attached to all articles and substances to which the design is applied, whether the same are sold abroad or in the British dominions. *Sarazin* v. *Hamel*, 32 Law J. Rep. (N.S.) Chanc. 380; 32 Beav. 151.

The 6 & 7 Vict. c. 65. applies only to new designs having reference to some purpose of utility; and in order to obtain the benefit of the act, the purpose must be specified in the description supplied for registration. *Windover* v. *Smith*, 32 Law J. Rep. (N.S.) Chanc. 561; 32 Beav. 200.

A coachmaker caused to be registered, under 6 & Vict. c. 65. a design for a dog-cart, specifying as the purpose of utility that "higher front wheels could be used or closer coupling effected." The design consisted of parts 1, 2, 3, 4, of which 1, 2, and 3. had nothing to do with front wheels or closer

coupling, and No. 4. was not new:—Held, that no exclusive privilege was gained by registration. Ibid.

### (D) PIRACY AND INFRINGEMENT OF.

#### (*a*) *Descriptive Catalogue of Books.*

A bookseller, H, wrote and published a descriptive catalogue of books; another bookseller, A, published a descriptive catalogue in which many of the descriptions were copied verbatim from H's catalogue:—Held, that such copying was an infringement of H's copyright. *Hotten* v. *Arthur*, 32 Law J. Rep. (N.S.) Chanc. 771; 1 Hem. & M. 603.

#### (*b*) *Photographic Copies of Engravings.*

If a print, the copyright of which is conferred on the engraver or publisher by the Engraving Copyright Acts, 8 Geo. 2. c. 13. and 7 Geo. 3. c. 38, be copied by the process of photography, this is a copying for which an action may be maintained under the 17 Geo. 3. c. 57. *Gambart* v. *Ball*, 32 Law J. Rep. (N.S.) C.P. 166; 14 Com. B. Rep. N.S. 306.

*Quære*—Whether single copies by hand, or a transfer of the design to an article of manufacture, would be within the 17 Geo. 3. c. 57. Ibid.

*Semble*—per *Willes, J.*, that this statute only applies to a production of copies by some process capable of multiplying the number of copies indefinitely. Ibid.

#### (*c*) *Dramatic Compositions and Pieces.*

Copyright or protection to works of literature, after they have been published, exists only by statute. *Reade* v. *Conquest*, 30 Law J. Rep. (N.S.) C.P. 209; 9 Com. B. Rep. N.S. 755.

Representing the incidents of a published novel in a dramatic form upon the stage, although done publicly and for profit, is not an infringement of copyright in the novel. Ibid.

The declaration stated that the plaintiff was the registered proprietor of copyright in a certain registered book, viz., a novel, entitled 'It is never too late to Mend,' and that the defendant, after the passing of the 5 & 6 Vict. c. 45, without the consent of the plaintiff, dramatized the said book, and publicly represented it as a drama at a theatre for profit, whereby the sale of the book was injured, &c.:—Held, on demurrer, that the declaration disclosed no cause of action, either at common law or under the statute, for infringement of the plaintiff's copyright. Ibid.

The plaintiff, who was the author of a drama, published a novel founded thereon, containing in substance the same incidents, characters and language. The defendant's son dramatized the novel, and in so doing took many of the characters and incidents and much of the language of the novel, and, consequently, much which was the same as in the drama, but without having seen or in any way known of the drama; and the defendant then represented what his son had so dramatized at his theatre:—Held, that such representation was an infringement of the plaintiff's stage copyright in his drama, as the defendant's son was not the author in respect of such parts of his drama copied from the novel which were the same as the corresponding parts of the drama. *Reade* v. *Conquest*, 31 Law J. Rep. (N.S). C.P. 153; 11 Com. B. Rep. N.S. 479.

*Quære*—Whether a publication by the defendant's son of his drama would have been an infringement of the plaintiff's book copyright in his novel or drama. Ibid.

Whether it is an infringement of the copyright in a novel to dramatize it—*quære*. But it is an infringement of the copyright in a play by the same author on which such novel was founded, notwithstanding the passages complained of may have been taken from the novel, and not directly from the play. *Reade* v. *Lacy*, 30 Law J. Rep. (N.S.) Chanc. 655; 1 Jo. & H. 524.

Thus, where the owner of copyright in a play wrote a novel founded upon it, to which he transferred several scenes from the play, and afterwards another person dramatized the novel, taking the same scenes from the novel, this was held to be an infringement of the copyright in the play. Ibid.

Certain novels, the copyright in which belonged to T, were dramatized and the dramas, containing some of the most important scenes and incidents of the novels, copied verbatim, were printed and published by L. On an application, by T, for an injunction to restrain the sale of the dramas,—Held, that printing and selling the dramas was an infringement of T's copyright. *Tinsley* v. *Lacy*, 32 Law J. Rep. (N.S.) Chanc. 535; 1 Hem. & M. 747.

If a plaintiff shews that his copyright has been infringed, the Court will grant an injunction without proof of actual damage. Ibid.

The statute 3 & 4 Vict. c. 15. s. 2. imposes a penalty upon any person who, during the continuance of the sole liberty which another person has of representing a dramatic piece or entertainment, represents or causes it to be represented without the consent in writing of, &c. The defendant, the proprietor of a theatre, allowed D to have the use of it for the purpose of dramatic entertainments. The defendant provided the band, the scene-shifters, the supernumeraries, the money-takers, and paid for printing and advertisements. D employed his own company of actors and actresses, and selected the pieces which were to be represented, free from any control by the defendant. It was arranged that the money taken at the doors should be divided equally between the defendant and D. During the period of such occupation of the theatre by D certain pieces were performed which the plaintiff had the sole liberty of representing or causing to be represented:—Held, in an action to recover the penalties imposed by the above section, that the plaintiff could not recover, inasmuch as under the above circumstances the defendant was not shewn to have represented or caused to be represented the said dramatic pieces. *Lyon* v. *Knowles*, 32 Law J. Rep. (N.S.) Q.B. 71; 2 Best & S. 556.

The defendant, who was proprietor of a theatre, let the use of the same with his company of actors and actresses, lights, scenery and properties, to his son, the stage-manager, for a benefit night, who paid the defendant a fixed sum for the letting, and took all the profits of such night, and selected what pieces should be performed. A dramatic piece having been performed on such occasion by the defendant's company without the consent of the author,—Held, that the defendant caused such piece to be represented, and was liable therefore to the penalty for doing so, under the 3 & 4 Will. 4.

c. 15. s. 2. *Marsh* v. *Conquest*, 33 Law J. Rep. (N.S.) C.P. 1; 17 Com. B. Rep. N.S. 418, 432.

The author of a dramatic piece may assign the sole right of representing the same, without such assignment being by deed, or registered according to 5 & 6 Vict. c. 45, so as to enable the assignee to sue for the penalty payable under 3 & 4 Will. 4. c. 15. s. 2, for a representation without his consent. Ibid.

Where by the same deed the administrator of the author assigned to the plaintiff, after the passing of 5 & 6 Vict. c. 45, the copyright and acting-right in a dramatic piece first published after the passing of the 3 & 4 Will. 4. c. 15, the plaintiff can maintain an action for penalties under the latter act against the defendant for performing the piece without his licence, within twenty-eight years of its publication, although the deed has not been registered; as the plaintiff's right is under the act 3 & 4 Will. 4. c. 15, and there is nothing in the 5 & 6 Vict. c. 45. which renders registration necessary in the case of an assignment of such a right of representation. *Lacy* v. *Rhys*, 33 Law J. Rep. (N.S.) Q.B. 157; 4 Best & S. 873.

*Quære*—Whether registration would have been necessary if the piece had been published more than twenty-eight years. Ibid.

Held, also, that the admissibility of the letters of administration in evidence could not be objected to on the ground that they had not been stamped within six months of the discovery of the mistake in omitting to get them stamped. Ibid.

K, the licensed proprietor of a theatre, under the statute 6 & 7 Vict. c. 68, entered into an arrangement with D, whereby D had the use of the theatre for dramatic entertainments. D provided the company, had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. K, on his part, paid for printing and advertising, furnished the lighting, doorkeepers, scene-shifters, and supernumeraries; and hired the band, music being a necessary part of the performance. The money taken at the doors was taken by servants of K, who retained one-half of the gross receipts as his remuneration for the use of the theatre, and handed the other half to D. Among the pieces represented were two which L had the sole liberty of representing or causing to be represented, &c., as assignee of the author, under the Dramatic Literary Property Acts, 3 & 4 Will. 4. c. 15. and the 5 & 6 Vict. c. 45:—Held (by the Exchequer Chamber), affirming the judgment of the Queen's Bench, that no action under those statutes was maintainable by L against K, as the above facts did not shew that those pieces had been represented, &c. by him, or that there was a partnership between D and him so as to render him liable for the representation of them by D. *Lyon* v. *Knowles*, 5 Best & S. 751.

### (E) Assignment of.

An assignment of a copyright, made after the 54 Geo. 3. c. 156. and before the 5 & 6 Vict. c. 45, need not be attested,—So held, by the Exchequer Chamber, reversing the decision below, 31 Law J. Rep. (N.S.) Exch. 19; 7 Hurls. & N. 118. *Cumberland* v. *Copeland* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 353; 1 Hurls. & C. 194.

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## CORONER.

### *Powers and Privileges.*

If a coroner's inquest on a dead body be adjourned, and on the day appointed the Court be not formally opened and further adjourned, the proceedings drop and the Court is dissolved, and everything else done in the matter of the inquest is *coram non judice;* and this is the case, even where the adjournment takes place only for the purpose of drawing up a formal inquisition after the jury have, in substance, agreed upon their verdict. *R.* v. *Payn*, 34 Law J. Rep. (N.S.) Q.B. 59.

*Semble*—That no action is maintainable against a coroner for anything said by him while he is acting as coroner, and addressing a jury impannelled before him, although he uses defamatory language falsely and maliciously; and held that, at any rate, a declaration is insufficient which does not aver that the words were spoken without reasonable and probable cause. *Thomas* v. *Chirton*, 31 Law J. Rep. (N.S.) Q.B. 139; 2 Best & S. 475.

### *Inquisition.*

By the 24 & 25 Vict. c. 100. s. 6, it shall not be necessary in any "indictment" for murder or manslaughter to set forth the manner in which, or the means by which, the death of the deceased was caused:—Held, that the word "indictment" comprehends inquisitions taken before coroners, and therefore that such an inquisition was not bad by reason of its not setting forth the manner or means of the death. *R.* v. *Ingham*, 33 Law J. Rep. (N.S.) Q.B. 183; 5 Best & S. 257.

Held, also, that the omission to state the time at which the offence was committed was cured by the 6 & 7 Vict. c. 83. s. 2. Ibid.

Held, also, that it is not necessary that the jury should all be sworn at the same time, or that they should be sworn *super visum corporis*, or that they should all view the body at one and the same time. Ibid.

### *Misbehaviour in Office.*

A sudden death having occurred in a coroner's district he summoned a jury, but on the day appointed he attended in a state of intoxication, and without swearing the jury dismissed them for no adequate reason. On petition to the Lord Chancellor, under the 23 & 24 Vict. c. 116, the coroner was ordered to be removed on the ground of "misbehaviour in his office." *In re Ward*, 30 Law J. Rep. (N.S.) Chanc. 775.

The practice of issuing the writs *De coronatore exonerando* and *De coronatore eligendo* at the same time continued. Ibid.

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## CORPORATION.

[See Company—Municipal Corporation.]

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## COSTS, AT LAW.

[See Quo Warranto.]

[The provisions of 18 & 19 Vict. c. 90. as to the payment of costs to and by the Crown, extended to the Isle of Man by 25 Vict. c. 14.]

## (A) PLAINTIFF'S RIGHT TO.

### (a) *In general.*

Where a defendant withdraws his former pleas, and pleads a matter of defence which arises after such former pleading, and the plaintiff confesses the plea, he is entitled to his costs up to the pleading of such plea, under 23 Reg. Gen. Trin. Term, 1853, although the plea contains no allegation that the matter of defence arose after the last pleading. *Howarth* v. *Brown*, 32 Law J. Rep. (N.S.) Exch. 99; 1 Hurls. & C. 694.

The bringing an action on a judgment under 20*l.* with the object of obtaining a judgment above 20*l.*, and issuing execution thereon against the person, is an evasion of the 7 & 8 Vict. c. 96. s. 57, and the Court, in the exercise of their discretion under the 43 Geo. 3. c. 46. s. 4, will not allow the plaintiff his costs. *Adams* v. *Ready*, 6 Hurls. & N. 261.

### (b) *Certificate.*

#### (1) *For Costs, under* 3 & 4 *Vict. c.* 24. *s.* 2.

In an action for slander, imputing felony to the plaintiff, the jury found for the plaintiff, damages 1*s.* The Judge certified under the 3 & 4 Vict. c. 24. s. 2:—Held, that the effect of the certificate was to take the case out of the enacting part of the 2nd section of the 3 & 4 Vict. c. 24, and to remit the plaintiff to his rights as to costs under 21 Jac. 1. c. 16, which entitles him to only so much costs as damages. *Evans* v. *Rees*, 30 Law J. Rep. (N.S.) C.P. 16.

#### (2) *To deprive Plaintiff of Costs, under* 23 & 24 *Vict. c.* 126. *s.* 34.

Plaintiff, in an action for false imprisonment and slander, had a verdict for 40*s.* damages; the Judge at Nisi Prius, on the application of the defendant, under section 36. of 23 & 24 Vict. c. 126, certified, *inter alia*, that the trespass and grievance in respect of which the action had been brought, was not malicious (omitting the words "wilful and"), and that the action ought not to have been brought:—Held, that the certificate was sufficient to deprive the plaintiff of his costs. *Saunders* v. *Kirwan*, 30 Law J. Rep. (N.S.) C.P. 351; 10 Com. B. Rep. N.S. 514.

The Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 34, which enacts, that when the plaintiff in any action for an alleged wrong in any of the superior Courts recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to any costs in case the Judge certifies that the action was not really brought to try a right, &c., applies to actions tried after although commenced before that act came into operation. *Wright* v. *Hale*, 30 Law J. Rep. (N.S.) Exch. 40; 6 Hurls. & N. 227.

The certificate to deprive the plaintiff of costs, under 23 & 24 Vict. c. 126. c. 34, where, in an action for a wrong, he recovers less than 5*l.*, must negative not only the trespass being wilful and malicious, but also that the action was brought to try a right, and that it was not fit to be brought. *Gooding* v. *Britnall*, 31 Law J. Rep. (N.S.) C.P. 5; 11 Com. B. Rep. N.S. 148.

The plaintiff sued in debt and detinue; on the count in debt the defendant paid 162*l.* into court, and to the count in detinue he pleaded a return of the goods with payment into court of damages, 1*s.*, and also *non detinet*. On the issue on *non detinet* the plaintiff had a verdict, with damages, 1*s.*:—Held, that the Judge had no power to grant a certificate, under the 23 & 24 Vict. c. 126. s. 34, as detinue was clearly "an action brought to try a right besides the mere right to recover damages." *Danby* v. *Lamb*, 31 Law J. Rep. (N.S.) C.P. 17; 11 Com. B. Rep. N.S. 423.

#### (3) *That Refusal to admit was reasonable; Time of granting.*

The plaintiff, after notice, refused to admit a document purporting to be a receipt for cash and for a promissory note. The jury found that the receipt was valid as to the cash, but not as to the promissory note. The Court, on the ground that the document was not proved, refused to set aside a certificate that the refusal to admit was reasonable, granted by the Judge four months after the trial and after the taxation of costs by the Master. *Day* v. *Vinson*, 33 Law J. Rep. (N.S.) Exch. 171.

The Court will not in any such case interfere till

an application has been made to the Judge himself to reconsider the matter. Ibid.

(c) *Operation of County Courts Acts and London Small Debts Acts.*

(1) *Concurrent Jurisdiction with the Superior Courts.*

A body corporate may "dwell" within the meaning of the County Courts Act, 9 & 10 Vict. c. 95. s. 128, which gives concurrent jurisdiction to the superior Courts, when the plaintiff dwells more than twenty miles from the defendant. *Adams v. the Great Western Rail. Co.*, 30 Law J. Rep. (N.S.) Exch. 124; 6 Hurls. & N. 404.

A railway company is to be deemed to dwell at the principal office, and not at every station on the line. Ibid.

Therefore, in an action against the Great Western Railway Company, where the plaintiff dwelt more than twenty miles from Paddington, the principal office of the company, the plaintiff was held to be entitled to an order for costs under the 15 & 16 Vict. c. 54. s. 4. Ibid.

A registered joint-stock company for the manufacture and sale of goods, dwells and carries on business, within section 128. of the 9 & 10 Vict. c. 95, at the place of manufacture and sale, and not at the registered office of the company. *The Keynsham Blue Lias Lime Co. (Lim.)* v. *Baker*, 33 Law J. Rep. (N.S.) Exch. 41; 2 Hurls. & C. 729.

A registered joint-stock company, established for quarrying and calcining limestone and making and selling lime, and carrying on the business of a lime, cement, brick and manure company and the purchasing land in Somerset or elsewhere, incidental to those objects, sold and delivered goods to the defendant; the works of the company and the order, sale and delivery of the goods, and the defendant's dwelling and place of business being within the jurisdiction of the Bristol County Court. The registered office of the company under the memorandum of association, and where the meetings of the directors were held and all their business transacted, was in London. The company being wound up, the official liquidator, who dwelt and carried on business in London, sued the defendant in the superior Courts, and the defendant having suffered judgment by default for an amount under 20*l.*,—Held, that the plaintiff was not entitled to costs. Ibid.

The superior Courts have concurrent jurisdiction with the County Court if one of several plaintiffs dwells more than twenty miles from the defendant. *Hickie* v. *Salamo* confirmed. *Bennett* v. *Benham*, 33 Law J. Rep. (N.S.) C.P. 153; 15 Com. B. Rep. N.S. 616.

The defendant had two residences, one in London, which was within, and the other in the country, which was more than twenty miles from the plaintiff's residence. At the time the action was brought, the defendant was at his London house, but two days before he had written to the plaintiff's attorney from his house in the country:—Held, that the superior Court had concurrent jurisdiction with the County Court within the meaning of 9 & 10 Vict. c. 95. s. 128. *Pigrim* v. *Knatchbull*, 34 Law J. Rep. (N.S.) C.P. 257; 18 Com. B. Rep. N.S. 798.

Where a registered joint-stock company sells goods through an agent who sells them in his own name at his place of business within twenty miles of the defendant's residence, the company are nevertheless entitled to costs under the County Courts Acts if their place of business is more than twenty miles from the defendant. *The Oldham Building and Manufacturing Co. (Lim.)* v. *Heald*, 33 Law J. Rep. (N.S.) Exch. 236; 3 Hurls. & C. 132.

The plaintiff had supplied grocery continuously to the defendant in the usual course of business, for which one account was sent in. To this account was added the balance of an old account for salt which had always been kept separate, and upon which payments had been separately made from time to time. The cause of action as to the salt arose within the jurisdiction of the County Court within which the defendant dwelt; but as to the grocery, it did not arise wholly or in any material point within that jurisdiction:—Held, on the authority of *Wood* v. *Perry*, that the whole claim, including the balance of the old account, formed one cause of action; and that, inasmuch as one item arose within the jurisdiction of the defendant's County Court, it was not a case in which the cause of action "did *not* arise in some material point within the jurisdiction of the Court"; that a superior Court, therefore, had not concurrent jurisdiction under the 9 & 10 Vict. c. 95. s. 128, and that the plaintiff, having brought his action in a superior Court, and recovered less than 20*l.*, was deprived of his costs by section 129. *Copeman* v. *Hart*, 33 Law J. Rep. (N.S.) C.P. 107; 14 Com. B. Rep. N.S. 731.

The defendant, within the district of the county court of B, agreed with A to give C a mortgage security for a debt then due to C from the defendant, and A afterwards, at a place beyond the district of such county court, retained the plaintiff, a solicitor, to prepare such mortgage deed. The plaintiff brought an action against the defendant for his charges of preparing such deed, and obtained a verdict for less than 20*l.*:—Held, that the cause of action arose in a material point within the jurisdiction of the County Court of B, and therefore, as the superior Courts had not concurrent jurisdiction with the County Court, the plaintiff was not entitled to recover his costs. *Jackson* v. *Grimley*, 33 Law J. Rep. (N.S.) C.P. 238; 16 Com. B. Rep. N.S. 380.

On an application by the plaintiff, in an action for goods sold and delivered, for costs, under the County Courts Act, on the ground that the cause of action did not wholly, or in a material part, arise within the jurisdiction of the County Court in the district of which the defendant resided, it appearing, by the affidavit of the defendant, as to the principal parcel of goods, that they were delivered there by a carrier, who was to be paid by the plaintiff, and (there being on the part of the plaintiff no positive affidavit as to the disputed facts, but only an affidavit of "information and belief,") it was held, that the delivery must be deemed to have been in that district in which the defendant resided, and, therefore, that the plaintiff was not entitled to costs. *Arndt* v. *Porter*, 30 Law J. Rep. (N.S.) Exch. 19.

And, *semble*, that in such a case an affidavit of mere "information and belief" as to the facts on which the jurisdiction depends, is not sufficient or admissible. Ibid.

(2) *Judgment by Default.*

Under the 30th section of the County Courts Amendment Act (19 & 20 Vict. c. 108), a plaintiff in an action of contract who obtains judgment by default for a sum not exceeding 20*l.*, is entitled to an order for costs under the same circumstances as would have entitled him to costs under the early County Courts Act where he had recovered the like amount by a trial and verdict. *Baddeley* v. *Bernard*, 11 Com. B. Rep. N.S. 421.

The application should be made at chambers. Ibid.

(3) *Where Plaintiff sues in the Superior Court and recovers a Sum not exceeding* 20*l.* *or* 50*l.*

If a plaintiff applies for costs to a Judge at chambers, under section 4. of the statute 15 & 16 Vict. c. 54, and is refused, he cannot afterwards apply to the Court as having an independent jurisdiction to grant costs, but must come by way of appeal from the Judge's decision; and in such case must apply in a reasonable time, and draw up his rule on reading the affidavits used at chambers. *Warman* v. *Halahan*, 30 Law J. Rep. (N.S.) Q.B. 48.

Where the Judge's refusal was on the 24th of May, *semble*, that a rule to review that decision, moved for in Michaelmas Term, is too late. Ibid.

Where a plaintiff in an action in a superior Court proves a debt for a sum exceeding 20*l.*, and the defendant proves a set-off for a less amount, leaving a balance not exceeding 20*l.*, the plaintiff "recovers" the balance only within the meaning of the 13 & 14 Vict. c. 62. s. 11; and he is therefore deprived of all costs by that section. So held, in accordance with *Ascroft* v. *Foulkes*, and on this point overruling *Tonye* v. *Chadwick*. *Beard* v. *Perry*, 31 Law J. Rep. (N.S.) Q.B. 180; 2 Best & S. 493.

The usual compulsory order of reference to the Master, made under the Common Law Procedure Act, 1854, by which the costs of the cause are to "abide the event," does not prevent the operation of the London Small Debts Act (15 & 16 Vict. c. lxxvii.), s. 120, from disentitling the plaintiff to costs; and a plaintiff in an action of contract who has awarded to him on such reference an amount not exceeding 20*l.* is a plaintiff who "recovers a sum not exceeding 20*l.*" within the meaning of that statute, and as such may be thereby deprived of his costs. *Robertson* v. *Sterne*, 31 Law J. Rep. (N.S.) C.P. 362; 13 Com. B. Rep. N.S. 248.

By 13 & 14 Vict. c. 61. s. 11, if in any action commenced after the passing of that act in a superior Court, in covenant, debt, detinue or assumpsit, &c., the plaintiff shall recover a sum not exceeding 20*l.*, &c., he shall have judgment to recover that sum only and no costs:—Held, that this enactment applies to a case where such an action is brought, and the defendant pays into court a sum not exceeding 20*l.*, which the plaintiff accepts in satisfaction of the action, and therefore that the plaintiff in such case cannot recover costs. *Boulding* v. *Tyler*, 32 Law J. Rep. (N.S.) Q.B. 85; 3 Best & S. 472.

Where money is paid into court and the plaintiff accepts it in satisfaction of his claim, he "recovers" the amount within the meaning of the statute 13 & 14 Vict. c. 61. s. 11, which deprives a plaintiff of costs where he "shall recover a sum not exceeding 20*l.*" *Chambers* v. *Wiles* overruled. *Parr* v. *Lillicrap*, 32 Law J. Rep. (N.S.) Exch. 150; 1 Hurls. & C. 615.

In an action of debt, a verdict was entered for the plaintiff, damages 13*l.*, subject to the award of an arbitrator, who, by the order of reference, which was in terms drawn up by consent, was to have the powers of a Judge at Nisi Prius as to certifying, and to enter the verdict as he thought fit; the costs of the cause to abide the event of the award. The arbitrator awarded that the verdict should be vacated, and that the defendant should pay to the plaintiff 2*l.* 16*s.* 1½*d.*, but did not certify:—Held, that the plaintiff had recovered less than 20*l.* within the meaning of the 11th section of the County Courts Act, and was therefore deprived of his costs by that section. *Smith* v. *Edge*, 33 Law J. Rep. (N.S.) Exch. 9; 2 Hurls. & C. 659.

An application to amend the postea should be made to the Judge who presided at Nisi Prius, and not to the Court. Ibid.

Where a cause is referred to arbitration, by consent of the parties, after issue joined, the costs of the cause to abide the event of the award, and the arbitrator finds all the issues for the plaintiff, and awards that a sum not exceeding 20*l.* is due from the defendant to the plaintiff in respect of the breaches of contract alleged in the declaration, the plaintiff "recovers" that sum within the meaning of the 13 & 14 Vict. c. 61. s. 11, and is deprived of costs by that section. So held by the Court of Queen's Bench after conference with the Judges of the Courts of Common Pleas and Exchequer. *Cowell* v. *the Amman Colliery Co. (Lim.)*, 34 Law J. Rep. (N.S.) Q.B. 161; 6 Best & S. 333.

Where an action of detinue is brought for the detention of goods exceeding the value of 50*l.*, the jurisdiction of the County Court is ousted, and the plaintiff is entitled to his costs under 15 & 16 Vict. c. 54. s. 4, although, in consequence of the goods being returned in the course of the cause, he obtains a verdict for only nominal damages. *Leader* v. *Rhys*, 30 Law J. Rep. (N.S.) C.P. 345; 10 Com. B. Rep. N.S. 369.

Where a plaintiff recovers by verdict a sum not exceeding 20*l.* in contract, or 5*l.* in tort, and the Judge who tried the cause refuses to certify, under the 13 & 14 Vict. c. 61. s. 12, that it appeared to him at the trial there was sufficient reason for bringing the action in the superior Court, the Court will not, upon the same facts, interfere with the opinion of the Judge, by exercising the power given by the 15 & 16 Vict. c. 54. s. 4, to direct that the plaintiff shall recover his costs. To induce the Court to interfere, it must appear that the facts relied upon were not disclosed before the Judge at the trial, or that the Judge had adopted some erroneous view, in point of law affecting his decision, in refusing the application. *Hatch* v. *Lewis*, 31 Law J. Rep. (N.S.) Exch. 26; 7 Hurls. & N. 367.

In an action against attorneys for negligence in defence of the plaintiff on a criminal charge, the plaintiff recovered 40*s.* damages, and the Judge refused to certify. The Court discharged a rule for costs obtained on an affidavit of the nature of the action, and that the damages were laid at 5,000*l.*; and that the action was brought, not merely to

recover damages, but to re-establish the plaintiff's character; that the Judge and counsel treated it as an important case, and of the first impression; that it lasted four days, and short-hand notes were taken at the Judge's request; and that it was made a special jury cause by the defendants, who had also changed the venue to Middlesex, on an affidavit that Judges and barristers would be called as witnesses. Ibid.

In an action brought to recover a sum beyond the jurisdiction of the County Court, the defendant paid into court a sum under 20*l.*, which the plaintiff accepted in satisfaction and discharge of his claim:—Held, that the 43 Eliz. c. 6. s. 2. did not apply, and that the plaintiff was entitled to his costs under the 15 & 16 Vict. c. 54. s. 4. *Wayleti* v. *Windham*, 33 Law J. Rep. (N.S.) Exch. 172; 2 Hurls. & C. 982.

In an action commenced under the Summary Procedure on Bills of Exchange Act, 1852, if the plaintiff has a verdict for an amount not more than 50*l.*, and the action be one for which a plaint might have been entered in the London Small Debts Court, he will not be entitled to his costs. *Harris* v. *Swinburn*, 33 Law J. Rep. (N.S.) Q.B. 313; 5 Best & S. 370.

The statutes which give plaintiffs in the superior Courts a right to their costs in cases "for which no plaint could have been entered" in the inferior Courts, apply to those cases for which no plaint can be legally entered, and not to actions which, although legally brought, cannot be successfully maintained in the inferior Courts. *Noble* v. *the Governor and Company of the Bank of England*, 33 Law J. Rep. (N.S.) Exch. 81; 2 Hurls. & C. 355.

To an action against the Bank of England on a 10*l.* note, the defendants pleaded that the note was lost. Upon the plaintiff giving an indemnity under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 87, the plea was set aside, and the defendants thereupon paid the amount of the note into court. The parties being resident, and the cause of action arising, within the jurisdiction of the Sheriff's Court of the city of London (15 & 16 Vict. c. lxxvii.), —Held (*Martin, B.* doubting), that the plaintiff was not entitled to costs. Ibid.

In an action by a husband and his wife, the first count was for a trespass by the defendant in breaking and entering the husband's house. The second count was for an assault on the wife. The defendant, as to the trespass, denied the plaintiff's title to the house, and as to the assault, alleged that the wife was unlawfully within a certain dwelling-house of the defendant, and that the assault was committed in an effort to remove her. To this plea the plaintiffs new assigned. At the trial of the cause, the jury found for the plaintiffs upon the new assignment only, with 40*s.* damages:—Held, that the plaintiffs were not entitled to a certificate under 13 & 14 Vict. c. 61. s. 12. or the 15 & 16 Vict. c. 54. s. 4, that the cause of action was one for which a plaint could not be entered in the county court, the plaintiffs not having succeeded in establishing any cause of action in respect of the title to land. *Blackmore* v. *Higgs*, 33 Law J. Rep. (N.S.) C.P. 157; 15 Com. B. Rep. N.S. 790.

### (*d*) *Action on a Judgment.*

The 43 Geo. 3. c. 46. s. 4,—which enacts that in all actions which shall be brought upon any judgment, the plaintiff in such action on the judgment shall not be entitled to any costs of suit, unless the Court or a Judge otherwise order,—applies only to an action on a judgment alone, and not to an action on a judgment and also on a distinct cause of action; and in the latter case if a plaintiff succeed on both causes of action, he is entitled to the whole costs of suit without any order. *Jackson* v. *Everett*, 31 Law J. Rep. (N.S.) Q.B. 59; 1 Best & S. 857.

In an action upon a judgment, the Court in which the action is brought, or a Judge thereof, have a discretion vested in them, by the 43 Geo. 3. c. 46. s. 4, as to whether the plaintiff shall have his costs of the action or not; and that discretion is not taken away by the 7 & 8 Vict. c. 96. s. 57, by reason of the sum recovered in the original action not exceeding the sum of 20*l.* *Dickinson* v. *Angell*, 32 Law J. Rep. (N.S.) Q.B. 183; 3 Best & S. 840.

### (*e*) *Upon Writs of Injunction.*

Where the plaintiff in an action for a nuisance, under section 82. of the Common Law Procedure Act, 1854, obtained an order for an injunction, *ex parte*, which was silent as to costs, and the writ issued to restrain the nuisance, and also, under section 32. of the Common Law Procedure Act, 1860, for the payment of the costs,—Held, that the plaintiff ought not to be allowed to proceed to recover the costs of the injunction before the trial. *Grindley* v. *Booth*, 34 Law J. Rep. (N.S.) Exch. 135; 3 Hurls. & C. 669.

### (*f*) *Rule to deprive Plaintiff of Costs under 12 & 13 Vict. c. 106. s. 86.*

Where an action has been removed from an inferior Court, by the defendant, by *certiorari*, the provision in the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106. s. 86), for depriving the plaintiff of his costs in case he shall not recover the full amount of the sum for which he shall have filed an affidavit of debt, does not apply. *Woodhall* v. *Voight*, 30 Law J. Rep. (N.S.) Exch. 31; 6 Hurls. & N. 153.

### (*g*) *Order of the Court for Costs under 15 & 16 Vict. c. 54. s. 4.*

Although the Court is not bound by the exercise of discretion by the Judge who tries the cause, in refusing to certify for costs where the verdict is under the limit, yet it will not upon light grounds interfere. *Courtenay* v. *Wagstaff*, 16 Com. B. Rep. N.S. 110.

In an action for wrongfully dismissing the plaintiff from his employment as a parliamentary reporter for a newspaper, and also for work and labour, it was sought to fix the defendant with liability as a partner, upon the ground that he had advanced money for starting the paper, under a written agreement with one H, containing very stringent stipulations shewing that the defendant was to have unlimited control nver the publication, with the option of declaring himself a partner at any time within twelve months, and to trust solely to the profits for the repayment of his advance, with interest, and by parol evidence of personal interference in the management. At the trial, it was assumed that the agreement alone did not constitute

a partnership between the defendant and H; and the jury, having found that the plaintiff's engagement was not for the session, but a weekly engagement only, and negatived that the defendant had prior to the plaintiff's engagement allowed himself to be held out as a partner, but affirmed that he had done so since,—returned a verdict for the plaintiff for 15*l.* 15*s.*, and the Judge, though he certified for a special jury, refused to certify under the 13 & 14 Vict. c. 61. s. 12, that there was a sufficient reason for bringing the action in the superior Court. The Court, considering that the plaintiff was justified in resorting to the superior Court, made an order for costs under the 15 & 16 Vict. c. 54. s. 4. Ibid.

(B) DEFENDANT'S RIGHT TO.

(*a*) *Upon Affidavit under* 12 *&* 13 *Vict. c.* 106. *s.* 86.

The plaintiff sued the defendant for an alleged balance of 178*l.* 7*s.* 7*d.* for work and labour and money paid; and he also filed an affidavit in bankruptcy in which he alleged that the defendant was indebted to him in that sum for work and labour and money paid. At the trial, the jury found a verdict for 100*l.* only:—Held, that the defendant was entitled to costs under the 12 & 13 Vict. c. 106. s. 86, there being no reasonable or probable cause for swearing to that as a debt which, as to a part at least, was only a claim for unliquidated damsges. *Pratt* v. *Goswell*, 9 Com. B. Rep. N.S. 710.

(*b*) *On Nonsuit.*

The 4 Jac. 1. c. 3. enacts, that in any action of trespass, or *ejectione firmæ*, or any action whatsoever, wherein the plaintiff might have costs in case judgment should be given for him, if the plaintiff be nonsuited, the defendant shall have judgment to recover his costs. A mortgagee of turnpike tolls brought ejectment to recover the toll-gates, &c., and one of the trustees of the road was admitted to defend as landlord. The plaintiff having been nonsuited, the defendant signed judgment for costs:—Held, that the judgment was right: for that, assuming the statute to make it a condition to the defendant's right to costs that the plaintiff would have had his costs if he had succeeded in the particular action, still the case was within the statute, inasmuch as the plaintiff might have had his costs, even if the defendant, as a trustee of the road, were protected from personal liability by section 74. of the Turnpike Act, 3 Geo. 4. c. 126. *Cobbett* v. *Wheeler*, 30 Law J. Rep. (N.S.) Q.B. 64; 3 E. & E. 358.

*Quære*, whether the 4 Jac. 1. c. 3. does more than define the classes of action, giving costs to the defendants in those classes of action in which plaintiffs in general would have costs. Ibid.

*Quære*, also, whether the 74th section of the 3 Geo. 4. c. 126. would have protected the defendant trustee from personal liability. Ibid.

*Wormwell* v. *Hailstone* questioned. Ibid.

(*c*) *Costs of the Day.*

A cause having been entered for the first sittings in Middlesex during term, was during the sittings made a *remanet* to the third sittings, on the application of the defendant, on the ground of the absence of a material witness. More than four days before the third sittings the plaintiff countermanded the notice of trial:—Held, that the plaintiff was in the same position as if his notice of trial had originally been for the third sittings, and the countermand was therefore in time; and the defendant was not entitled to the costs of the day. *Sully* v. *Noble*, 32 Law J. Rep. (N.S.) Exch. 145; 1 Hurls. & C. 809.

If, when a cause is called on for trial, the plaintiff does not appear, the defendant, to secure the costs of the day, must have the jury sworn, and claim a nonsuit. If the defendant, though present in court, allows the cause to be simply struck out, he will not, under ordinary circumstances, be entitled to the costs of the day. *Smith* v. *Marshall*, 33 Law J. Rep. (N.S.) Q.B. 332.

(*d*) *From Person for whose Benefit Action is brought.*

In an action of ejectment the Court has power to order a person at whose instance and for whose benefit the action was brought, though not a claimant named in the writ, to pay costs to a successful defendant. *Mobbs* v. *Vandenbrande*, 33 Law J. Rep. (N.S.) Q.B. 177; 4 Best & S. 904.

(C) SECURITY FOR COSTS.

(*a*) *Foreign Plaintiff.*

Plaintiff, a foreigner, master of a foreign vessel, having no permanent residence in this country, being here when action brought, but having since left with his vessel on a voyage to a foreign port, was ordered to give security for costs. *Nelson* v. *Ogle* commented on. *Nylander* v. *Barnes*, 30 Law J. Rep. (N.S.) Exch. 151; 6 Hurls. & N. 509.

(*b*) *Increasing.*

A rule of court having been made, directing that legal proceedings might be taken in the name of a corporation against certain commissioners by certain ratepayers interested in the matter, on their giving security to indemnify the corporation against costs, two of the ratepayers entered into a bond in the usual amount of 200*l.*; a mandamus having accordingly issued against the commissioners, and the case having been taken by writ of error to the House of Lords, and the bond of indemnity being therefore of insufficient amount to cover the expenses incurred, the Court made absolute a rule to increase the amount to such sum as the coroner and attorney of the court should think reasonable. *R.* v. *the Southampton Harbour Commissioners*, 34 Law J. Rep. (N.S.) Q.B. 164; 6 Best & S. 407.

(D) TAXATION OF COSTS.

(*a*) *Scale of Taxation.*

In cross-actions by C against R, to recover the amount of a surgeon's bill, where the writ was indorsed for more than 20*l.*, and by R against C, for damages for negligence, the parties, before trial, agreed in writing as follows:—"Taxed costs of C to be paid in both actions; C to be paid 15*l.* in addition to what is paid into court (2*l.* 7*s.* 6*d.*); R to withdraw in writing the letter offensive to C." A Judge's order was thereupon obtained by C, and drawn up in the following terms: "Upon hearing, &c., I do order that upon payment of 15*l.* beyond the amount paid into court, for which this action was brought, together with costs to be taxed, and paid forthwith, all further proceedings in this cause to be

stayed":—Held, that whatever might have been the intention of the parties to the agreement, the Master, on taxation of costs, could only act on the Judge's order, which brought the case within section 7. of the "Directions to the Masters of Hilary Term, 1853," and that in the first action the plaintiff's costs against the defendant should have been taxed on the lower scale. *Cream* v. *Ray; Ray* v. *Cream*, 30 Law J. Rep. (N.S.) Exch. 110.

An action on contract was removed from the county court into the superior court, at the instance of the defendant, and the plaintiff obtained a verdict for less than 20*l.*:—Held, that as there was no indorsement on a writ of summons, and therefore no writ of trial could be issued, rule 7. of the Directions to the Taxing Masters, Hilary Term, 1853, did not apply, and the plaintiff was entitled to have his costs taxed on the higher scale. *Perry* v. *Bennett*, 33 Law J. Rep. (N.S.) C.P. 45; 14 Com. B. Rep. N.S. 402.

Where in an action of contract the plaintiff does not claim more than 20*l.*. and the cause is sent to be tried before the sheriff, under 3 & 4 Will. 4. c. 42. s. 17, the defendant, if he succeeds, is only entitled to have his costs taxed on the lower scale. *Copley* v. *Hemingway*, 33 Law J. Rep. (N.S.) C.P. 152; 15 Com. B. Rep. N.S. 447.

*(b) Plaintiff's Costs on Judgment by Default and no Notice of Trial.*

When judgment is signed for want of a plea, and no notice of trial has been given, the plaintiff is not entitled to the costs of preparing for trial, although the defendant by obtaining orders for time to plead has so prolonged the period as to necessitate such preparations being made by the plaintiff before issue joined in order to be able to try the cause at the assizes. *Freeman* v. *Springham*, 32 Law J. Rep. (N.S.) C.P. 249; 14 Com. B. Rep. N.S. 197.

*(c) Of one of several Defendants whose Name is removed from the Record.*

Where under the Common Law Procedure Act, 1852, s. 37, the name of one of two defendants is struck out of the record, at the trial, on the terms of the plaintiff paying the costs of such defendant, and the plaintiff obtains the verdict against the other defendant, the defendant whose name has been so struck out is entitled, in the absence of special circumstances, to a moiety of the joint costs of both defendants, although they both appeared and pleaded jointly by the same attorney. *Redway* v. *Webber*, 32 Law J. Rep. (N.S.) C.P. 84; 13 Com. B. Rep. N.S. 254.

*(d) Distributive Pleadings.*

In an action upon a policy of insurance effected upon an electric telegraph cable, the declaration alleged that the cable was totally lost by the perils of the sea. The defendant pleaded that the subject-matter of the said insurance was not, nor was any part thereof lost as alleged. It turned out that only 373 miles of the cable had been lost by the perils of the sea:—Held, that the plea ought to be construed distributively, and that the defendant was entitled to have the verdict entered for him upon the issue joined on the above plea in respect of the whole claim, except as to the 373 miles of cable. *Anderson* v. *Chapman* observed upon. *Paterson* v. *Harris*, 31 Law J. Rep. (N.S.) Q.B. 277; 2 Best & S. 814.

*(e) Defendant's Costs of preparing for Trial.*

In an action for the infringement of a patent an order was made giving further time for pleading, the defendant to take short notice of trial, and the plaintiff to be at liberty at once to set the cause down for trial by a special jury. Pleas were afterwards delivered in the action; but issue was never joined. A special jury was nominated by the plaintiff, but it was not struck. The plaintiff, having obtained a rule to discontinue without ever having given notice of trial,—Held, that the Master was right in refusing to allow the defendant any of the costs of preparing for trial. *Curtis* v. *Platt*, 33 Law J. Rep. (N.S.) C.P. 255; 16 Com. B. Rep. N.S. 465.

*Semble*, per *Willes, J.*, that the costs of inquiries as to the novelty of an invention, in an action for the infringement of a patent, cannot be allowed as between party and party. Ibid.

*(f) Shorthand Writer's Notes.*

Costs of a shorthand writer's notes of the opening statement of the defendant's counsel, cannot be allowed to the plaintiff. *The Duke of Beaufort* v. *the Earl of Ashburnham*, 32 Law J. Rep. (N.S.) C.P. 97.

*(g) Witnesses.*

A professional witness is entitled to his expenses on the scale allowed to persons of his profession, although he is not called to give professional evidence. *Parkinson* v. *Atkinson*, 31 Law J. Rep. (N.S.) C.P. 199.

Fees of an antiquary for searches after and translations of ancient documents having reference to the subject in dispute are proper to be allowed. *The Duke of Beaufort* v. *the Earl of Ashburnham*, 32 Law J. Rep. (N.S.) C.P. 97.

If a witness be so old and infirm that it is a prudent course to take his examination under 1 Will. 4. c. 22. s. 4, but he is afterwards able to attend the trial, the plaintiff may be allowed the costs of the commission as well as the costs of the witness's attendance at the trial. Ibid.

The costs of taking the evidence of a witness under the 1 Will. 4. c. 22. s. 4. cannot be allowed to the party taking it as costs in the cause under section 9, unless the deposition has been used at the trial by the party taking it. *Ridley* v. *Sutton*, 32 Law J. Rep. (N.S.) Exch. 122; 1 Hurls. & C. 741.

In an action against the lessee of a colliery two breaches of covenant were assigned: first, non-payment of a sleeping rent; and secondly, not properly working the mine. The defendant allowed judgment to go by default, and a writ of inquiry was issued. The jury found that the plaintiffs had sustained damages to the amount of 50*l.*, but that they were entitled to no damages in respect of dilapidations through the mine not having been properly worked:—Held, notwithstanding, that the Master was right in allowing to the plaintiffs, on taxation, the full costs of witnesses summoned by the plaintiffs to prove default in properly working the mine. *Dods* v. *Evans*, 33 Law J. Rep. (N.S.) C.P. 146; 15 Com. B. Rep. N.S. 621.

In an action by an engineer against an Indian railway company for wrongfully dismissing him from their service without notice, the defendants at the trial consented to a verdict being entered for the plaintiff for 350*l.*, being 200*l.* for a quarter's salary, and 150*l.* for the plaintiff's passage home to England; and, on taxing his costs, the Master allowed the plaintiff (who was a material and necessary witness) subsistence-money during his stay in England waiting for the trial (a year and a half), at the rate of 300*l.* a year, and also 150*l.* for his passage out to India,—it appearing that the company justified their dismissal of the plaintiff on the ground of alleged improper conduct, and that the trial had been delayed for twelve months in consequence of the defendants having obtained a commission for the examination of witnesses at Lahore, the execution of which had been unreasonably delayed; and the plaintiff swearing that he was going back to India, where he had left his wife and family:—Held, that the allowances were not excessive. *Calvert* v. *the Scinde Rail. Co.*, 18 Com. B. Rep. N.S. 306.

(*h*) *Set-off of Costs.*

Two causes, one in this court, and the other in a county court, between the same parties, together with all matters in reference, were referred to an arbitrator, the costs of the causes respectively and of a rule in the cause in this court to abide the event; costs of the reference and of the award to be in the discretion of the arbitrator. The arbitrator made his award, as to the cause in this court, in favour of the defendant. As to the cause in the county court, he found for the plaintiff, with damages 45*l.* 10*s.* 6*d.*, and gave the plaintiff the costs of the reference, and divided the costs of the award:—Held, that by Rule 93. Hilary Term, 2 Will. 4, the costs of the cause in this court and of the rule could not be set off against the money and costs payable to the plaintiff in the other action, so as to exclude the lien of the plaintiff's attorney. *Little* v. *Philpotts*, 31 Law J. Rep. (N.S.) Q.B. 125; 2 Best & S. 383.

(*i*) *Other Matters.*

In an action against a railway company for an injury resulting from the negligence of their servants, the Court directed that the costs of copying into the plaintiff's briefs the evidence given at an inquest held upon the bodies of other persons who had been killed on the same occasion should be disallowed. The number of counsel to be allowed, and the amount of their fees, is in the (almost uncontrolled) discretion of the Master. *Lockstone* v. *the London and Brighton Rail. Co.*, 12 Com. B. Rep. N.S. 243.

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## COSTS, IN EQUITY.

(A) In general.
(B) On Appeal.
(C) Motions.
(D) Petitions.
(E) Disclaiming Defendant.
(F) Exceptions.
(G) Administration Suits.
(H) Heir-at-Law.
(I) Infants' Suits.
(J) Upon what Fund chargeable.
(K) Taxation.
(*a*) *General Practice as to.*
(*b*) *Scale.*

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### (A) In general.

In contentious cases the costs of the litigation should, as a general rule, follow the result of it. *Bartlett* v. *Wood*, 30 Law J. Rep. (N.S.) Chanc. 614.

A defendant having, during the suit, offered to pay all that was ultimately found due from him, the plaintiff was ordered, by the Master of the Rolls, to pay all the subsequent costs of the suit. On appeal, it was decided that costs being in the discretion of the Judge, the Court of Appeal would not vary the order of the Master of the Rolls as to them, on the mere ground that if the case had originally been before this Court, it might have arrived at a different result as to the costs. *Remnant* v. *Hood*, 30 Law J. Rep. (N.S.) Chanc. 71.

As to costs, a letter was referred to which had been written by the defendant's solicitor, offering a compromise, "without prejudice," on the terms decreed in this suit:—Held, that the letter might be used in evidence by the defendant, and the plaintiff must pay the costs. *Williams* v. *Thomas*, 31 Law J. Rep. (N.S.) Chanc. 674; 2 Dr. & S. 29.

The expression "costs following the event" refers to an event produced by the decision of the Court, and not to one arising from a compromise between the parties. *Straker* v. *Ewing*, 34 Beav. 147.

On a defendant submitting to a plaintiff's demands, the plaintiff ought not to bring the cause to a hearing without first applying for defendant's consent to have the costs disposed of on motion. But if the defendant objects to that course, a motion that the defendant may pay the costs of the suit will be refused. *Morgan* v. *the Great Eastern Rail. Co.*, 1 Hem. & M. 78.

A plaintiff who was only entitled to an injunction and costs, insisted also on an account. The defendant offered to submit to the injunction without costs. The plaintiff having brought his cause to a hearing, the Court held both parties in the wrong, and gave no costs to either side. *Moet* v. *Couston*, 33 Beav. 578.

A bill was filed for an account. In his answer the defendant, throwing upon the plaintiff part of the blame of the circumstances which led to the institution of the suit, paid the amount due from him as agreed by the parties, and the plaintiff accepted the amount without prejudice to his rights to the costs of the suit. Afterwards the plaintiff moved to stay all proceedings, and that the defendant might be ordered to pay the costs of the suit; and one of the Vice Chancellors made the order as prayed; but, on appeal, the Lords Justices held, that the question of costs would depend upon the merits of the case, the time for deciding which had not arrived, when the proceedings were ordered to be stayed; and they, therefore, discharged the order of the Vice Chancellor, but expressed a doubt whether the plaintiff's right to costs was wholly gone by reason of his agreement to settle the dis-

pute. *Wilde* v. *Wilde*, 31 Law J. Rep. (N.S.) Chanc. 558.

A vendor resisted a bill for specific performance. He became bankrupt, and his assignee afterwards continued the resistance, but failed at the hearing:—Held, that the assignee must pay the plaintiff's costs of suit incurred subsequent to bankruptcy. *Foxwell* v. *Greatorex; Foxwell* v. *Turner*, 33 Beav. 345.

Where a security is set aside on the ground of undervalue, costs are not given against the mortgagee; otherwise, where there has been misconduct. *Tottenham* v. *Green*, 32 Law J. Rep. (N.S.) Chanc. 201.

A demand for certain rentcharges having been made before the bill was filed, and the defendants having made no offer to submit to payment, the decree was made with costs. *The Attorney General* v. *Naylor*, 33 Law J. Rep. (N.S.) 151; 1 Hem. & M. 809.

Where a bill is dismissed on a ground of defence that might have been taken by demurrer, the defendant will be allowed such costs only as if he had demurred. *Godfrey* v. *Tucker*, 33 Law J. Rep. (N.S.) Chanc. 559; 33 Beav. 280.

In a bill by one shareholder on behalf of himself and all others except the defendant to restrain the directors from improper dealings with the company's funds, such funds do not belong to the plaintiff as *cestui que trust* thereof, so as to entitle him in the event of success to his costs thereout as between solicitor and client. *Morgan* v. *the Great Eastern Rail. Co.*, 1 Hem. & M. 560.

An order having directed payment of separate sets of costs to two executors, A and B, from whom a balance was found due in respect of their joint receipts, and it being probable that A would have to pay the whole amount,—Held, that the costs payable to B must, in the event of A's discharging the whole balance, be carried over to a separate account, with liberty for A to apply. *Birks* v. *Micklethwait*, 33 Law J. Rep. (N.S.) Chanc. 510; 33 Beav. 409. (see as to this order 34 Law J. Rep. (N.S.) Chanc. 362.)

In a suit for partition of property in which an infant was interested, the estate was sold:—Held, that the costs, subsequent to the first decree, ought to be borne by the aggregate amount of the purchase-moneys. *Coventry* v. *Coventry*, 34 Beav. 572.

An executor may be deprived of his costs of suit upon a decree made on an administration summons and without a bill charging him with misconduct. *In re King; Gilbert* v. *Lee*, 34 Beav. 574.

### (B) On Appeal.

The judgment of the Court below being affirmed on different grounds from those proceeded on by the Vice Chancellor, no costs of the appeal were given. *The Oriental Inland Steam Co.* v. *Briggs*, 31 Law J. Rep. (N.S.) Chanc. 241.

The Court of Appeal will in its discretion give to a successful appellant his costs of appeal. *Baring* v. *Harris*, 34 Law J. Rep. (N.S.) Chanc. 105.

The general rule of the Court is that there cannot be a rehearing for costs alone unless some principle is involved in the mode of the dealing with them; and it is only in extreme cases that the Court will rehear the merits on the question of costs. *Chappell* v. *Gregory*, 2 De Gex, J. & S. 111.

### (C) Motions.

A defendant knowing that the plaintiff has used due diligence, is liable to pay the costs of his motion to dismiss for want of prosecution. *Ingle* v. *Partridge*, 33 Beav. 287.

### (D) Petitions.

[See Trust and Trustee; Trustee Act, and Trustee Relief Act.]

Where a tenant for life petitions the Court under the Trustees' Relief Act, the costs of the petitioner ought to be borne by himself, and those of the trustees by the corpus of the fund. It is not necessary in such a case to serve the remainderman. *In re Whitling's Settlement*, 30 Law J. Rep. (N.S.) Chanc. 862.

Costs of a petition by a tenant for life, to obtain the income of a fund paid into court under the Trustees' Relief Act, ordered to be paid out of the corpus. *In re Leake's Trusts*, 32 Beav. 135.

Upon a petition in a suit for payment of the income of a fund in court to the petitioner, the costs must be borne by the applicant. *Eady* v. *Watson*, 33 Beav. 481.

Where two petitions, with the same object, are *bona fide* prepared by different parties, the costs of both will be allowed; but where solicitors were aware that a petition had been presented and nevertheless persisted in presenting another for the same object, no costs were allowed on the second petition. *In re Chaplin's Trusts*, 33 Law J. Rep. (N.S.) Chanc. 183.

### (E) Disclaiming Defendant.

A devisee, being made a defendant, by his answer said that he had never claimed the gift, and always disclaimed and did disclaim it, and he offered to be dismissed without costs. He was brought to the hearing:—Held, that he was not entitled to his costs. *Furber* v. *Furber*, 30 Beav. 523.

A defendant disclaiming, but not stating that he never did claim any interest, is not entitled to his costs on having the bill dismissed. *Durham* v. *Crackles*, 32 Law J. Rep. (N.S.) Chanc. 111.

A judgment creditor whose debt had been satisfied, but who had not entered satisfaction on the rolls, was made a defendant to a foreclosure suit. He disclaimed:—Held, that he was not entitled to his costs, in consequence of his negligence in not entering up satisfaction of his judgment. *Thompson* v. *Hudson*, 34 Beav. 107.

### (F) Exceptions.

Costs of exceptions allowed, and of those disallowed apportioned and set off. *Dally* v. *Worham*, 32 Beav. 69.

### (G) Administration Suits.

In administration suits no costs ought to be given out of the estate, except for those proceedings which are in their origin reasonably directed for the benefit of the estate, or which have in their result conduced to that benefit.. *Bartlett* v. *Wood*, 30 Law J. Rep. (N.S.) Chanc. 614.

An administration suit was proceeding in one branch of the Court, while a society, in respect of which the estate then in course of administration had been declared a contributory, was being wound up in another. In an order made in the administration suit, refusing a motion by the official manager of the society, words were inserted, that the Court was of opinion that the official manager ought not to be allowed his costs of the motion out of the society's estate:—Held, that whether this expression of opinion was to be regarded as judicial or extra-judicial, the question as to the allowance of the costs was exclusively within the jurisdiction of the Judge in whose branch of the Court the society was being wound up; and that the words referred to must be struck out of the order. *Jones* v. *Jones*, 34 Law J. Rep. (N.S.) Chanc. 11; 2 De Gex, J. & S. 294.

Under an order in an administration suit to tax the costs of executors, including any costs, charges, and expenses properly incurred by them as executors not being costs in the cause, costs incurred by them in their fiduciary character, of litigation, though unsuccessful, in other suits, may be allowed; and the omission of any directions in those other suits respecting the executors' costs is not equivalent to a refusal of them out of their testator's estate. *Graham* v. *Wickham*, 34 Law J. Rep. (N.S.) Chanc. 220; 2 De Gex, J. & S. 497.

After the ordinary decree in a creditors' suit had been made at the Rolls against executors, a bill was filed, in the Court of one of the Vice Chancellors, against the executors, and against a former partner of their testator, to establish a claim arising out of a misrepresentation made by the testator and his co-partner, in respect of which the plaintiff had already recovered at law against the surviving partner. The executors, without applying for directions in the administration suit, defended this new suit, and a decree for an account, without costs, was ultimately made against their testator's estate:—Held, that having regard to the previous proceedings at law, the executors ought not to be allowed the costs of defending the second suit down to the hearing; but held, also, it appearing that a claim had been carried in, in the first suit, by the plaintiff in the second suit, but adjourned until after the decision in the second suit, that they ought to be allowed their costs of the second suit subsequent to the decree. Ibid.

In a bill by a legatee for the administration of an estate, it was probable that the assets would not even be sufficient to pay the costs:—Held, that the costs were payable in the following order: First, the costs of the legal personal representative, as between solicitor and client; secondly, the costs and expenses of the plaintiff in selling and getting in the estate, and the costs of the heir in executing deeds; and, thirdly, the other costs of all parties as between party and party *pari passu*. *Wetenhall* v. *Dennis*, 33 Beav. 285.

Where a suit was for general administration, but there being no personal estate and no debts, the only questions decided were as between the devisees *inter se* and between the devisees and heir-at-law or his representatives,—Held, that the costs of the suit must be borne by the devised estates and descended estates *pro rata*. *Bagot* v. *Legge*, 34 Law J. Rep. (N.S.) Chanc. 156; 2 Dr. & S. 259.

### (H) HEIR-AT-LAW.

Where, in an administration suit, the whole of the intestate's real estate is found to belong to the creditors, the heir-at-law is entitled to his costs out of the estate as between solicitor and client. *Tardrew* v. *Howell; Parry* v. *Howell*, 30 Law J. Rep. (N.S.) Chanc. 191.

The heir-at-law of a vendor, who refused to convey to the purchaser an estate sold by his ancestor, was ordered to pay the costs of a suit to compel him. *Haddel* v. *Pugh*, 33 Beav. 489.

### (I) INFANTS' SUITS.

Where a bill to administer an estate was filed by a next friend, on behalf of an infant, against persons who, as defendants in a suit previously instituted, had rendered sufficient accounts in reference to such estate; and the chief clerk, in answer to an inquiry directed by the Court at the same time that it made the usual administration decree, certified that no benefit had accrued to the infant from the institution of the suit, one of the Vice Chancellors refused to allow the next friend his costs. On appeal, the Lords Justices, considering the inquiry directed to be made unusual and inconsistent with directions for taking the accounts and making inquiries in the ordinary way, ordered that inquiry to be struck out, and the certificate thereupon became a nullity. Inasmuch as the next friend had not, as he should have done, moved to discharge the part of the original decree directing the special inquiry, he could not be allowed any costs of a motion to vary the certificate; but he was allowed his costs from the time of the original decree, though not before; and not any costs of the inquiry or of the appeal. *Clayton* v. *Clarke*, 30 Law J. Rep. (N.S.) Chanc. 657.

### (J) UPON WHAT FUND CHARGEABLE.

A bill was filed by an administrator against the solicitor of the intestate, who claimed a mortgage on his estate and against others, for administration and to ascertain the mortgage. The solicitor claimed 1,492*l.*, but his mortgage debt was ascertained to be 924*l.* only. The assets consisted for the most part of the produce of the mortgaged estate:—Held, that the costs of the suit were first payable out of that fund. *White* v. *Gudgeon*, 30 Beav. 545.

An executor, C D, died indebted to the estate of testator A B, and a suit was afterwards instituted by the administrator *de bonis non* of A B against the representatives of C D to administer his estate and to ascertain and recover the amount due in the estate of A B:—Held, that the costs must fall on the estate of C D. *Hyatt* v. *Hyatt*, 30 Beav. 630.

A suit by the heiress of a person interested under a will in which it was prayed that, if necessary, the personal estate might be administered and the debts paid, the sole contest being as to the construction of the effect of a devise,—Held, to be within the general rule throwing the costs on the personal residue. *Maddison* v. *Chapman*, 1 Jo. & H. 470.

Costs incurred in selling real estate in an administration suit before decree charged on such real estate, and not on the personal estate. *Barnwell* v. *Iremonger*, 1 Dr. & S. 255.

Where it is ordered that real estates which are

charged with incumbrances shall contribute rateably to the payment of costs, such estates must be valued for the purposes of such contribution at the net value, after payment of incumbrances. Ibid.

An estate was devised for sale, and a portion undisposed of descended on the heir:—Held, that the costs of a suit to administer the real estate fell on the devisees and heir *pari passu*. *Maddison* v. *Pye*, 32 Beav. 658.

Except in those cases where a general conversion of real and personal estate is directed so as to form a mixed fund, the whole costs of construing the will of a testator, as well in reference to the devises of real estate as to the bequests of personalty therein contained, are primarily payable out of the personal estate in exoneration of the real. *Randfield* v. *Randfield*, 32 Law J. Rep. (N.S.) Chanc. 668.

Where costs are ordered to be paid out of a particular fund, that does not determine that that fund is ultimately to bear them. *Sheppard* v. *Sheppard*, 33 Beav. 129.

Costs had been ordered to be paid out of income, instead of out of corpus:—Held, that this did not preclude the matter being afterwards set right. Ibid.

But an order to pay over a fund to persons, by name, is, incidentally, a determination that other persons who are not named, are not entitled. Ibid.

### (K) Taxation.

#### (*a*) *General Practice as to.*

At the hearing a decree was made in favour of the plaintiff, with costs. Upon taxation of the costs as between party and party, the expense of bringing the defendant's witnesses to London to be cross-examined in court, though plaintiff's counsel, in the exercise of their discretion, did not think fit to cross-examine them, and the costs of a shorthand writer for taking notes of the examination, were allowed, but those of taking notes of the judgment were disallowed. *Clark* v. *Malpas*, 32 Law J. Rep. (N.S.) Chanc. 313; 31 Beav. 554.

The expenses and costs of attendance in court of the country solicitor, whose agent had conducted the cause, and the costs of enrolling the decree made in the cause, were not allowed. Ibid.

The fee of 2*d.* per folio for revising the print of a defendant's answer can be allowed only in those cases where the defendant swears to and files a *printed* answer. *The Attorney General* v. *Etheridge*, 32 Law J. Rep. (N.S.) Chanc. 706.

The sums paid for office copies of answers at 4*d.* per folio, and for ordinary printed copies at ½*d.* per folio, are payable to the defendant, and when received by his solicitor must be applied in reduction of the cost of printing the answer. Ibid.

Costs of preparing interrogatories which were not used owing to admissions being put in, were allowed as between party and party. The 17th Rule of the 4th Consolidated Order empowering the Taxing Master to consider whether he will allow an affidavit to be settled by counsel, does not take the question of the costs of the affidavit out of the discretion of the Court. *Davies* v. *Marshall*, 1 Dr. & S. 564.

Costs of settling affidavit (which was an echo of the bill) by counsel, were allowed. Ibid.

Costs of drawing observations for counsel, when cause stood over, allowed. Ibid.

Term fee allowed, where the only proceeding was leaving copy of decree and bill of costs before Taxing Master. Ibid.

The Taxing Masters do not act under the 40th Consolidated Order, Rule 9, in relation to the unnecessary length of the pleadings, &c., unless directed by an order of reference. *In re Farington*, 33 Beav. 346.

Upon the taxation of costs as between solicitor and client, the costs of a consultation with Queen's counsel as to the frame of the bill were allowed, though the particular part of the bill, in reference to which the advice was sought, was struck out. *Forster* v. *Davies*, 33 Law J. Rep. (N.S.) Chanc. 185; 32 Beav. 624.

In the taxation of costs as between party and party the Taxing Master has a discretion to allow the expense of employing an interpreter to assist a defendant who is a foreigner in preparing instructions for his answer, but such allowance ought not to include the tavern or travelling expenses of an interpreter brought to this country for the special purpose. *The Earl of Shrewsbury* v. *Trappes*, 31 Law J. Rep. (N.S.) Chanc. 680.

In the absence of special arrangement, or of circumstances of special difficulty (as in winding up cases), the Court of Chancery will in the taxation of accountants' charges, adopt the scale fixed by the General Order of the Court of Bankruptcy of the 19th of May, 1855. *Meymott* v. *Meymott*, 33 Law J. Rep. (N.S.) Chanc. 686; 33 Beav. 590.

Biddings were opened upon an advanced price on payment by the applicant of the costs properly incurred of the purchaser:—Held, that the costs of perusing the abstract and of the examination of the title prior to the first purchase being confirmed ought not to be allowed on taxation. *Raymond* v. *Lakeman*, 34 Beav. 584.

A company who employed standing solicitors at a fixed salary, became the purchaser under the Court. The biddings were opened on payment by the applicant of the costs of the company:—Held, the applicant was not on the taxation entitled to the benefit of the private arrangement between the company and their solicitors. Ibid.

#### (*b*) *Scale.*

The lower scale of costs directed by the General Orders of the Court must govern the taxation, where a sum exceeding 1,000*l.* has been reduced below that amount by payments before suit. *Judd* v. *Plumm*, 30 Law J. Rep. (N.S.) Chanc. 94; 29 Beav. 21.

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## COUNSEL.

### *Authority of Counsel to bind their Clients.*

Counsel have no authority to bind their clients in the suit to the terms of a compromise made out of court. Such compromise, if enforceable at all, must be the subject of a separate suit for specific performance. *Green* v. *Crockett; Crockett* v. *Green*, 34 Law J. Rep. (N.S.) Chanc. 609.

### *Incapacity to contract for Services as Counsel.*

A promise by a client to pay money to a barrister for his advocacy has no binding effect. Therefore requests to a barrister for exertions as an

advocate and promises by a client to remunerate the barrister for such exertions, though followed by his services as an advocate, will create no obligation, and cannot be relied on in support of a count upon an account stated. *Kennedy* v. *Brown*, 32 Law J. Rep. (N.S.) C.P. 137; 13 Com. B. Rep. N.S. 677.

## COUNTY COURT.

[See COSTS—INFERIOR COURT.]

## COURTS OF JUSTICE.

[The expenses of providing Courts of Justice and the various offices belonging thereto, &c. provided for by 28 Vict. c. 48 (The Courts of Justice Act, 1865). —The Commissioners of Her Majesty's Works and Public Buildings enabled to acquire a site for Courts of Justice, and the various offices belonging thereto, by 28 Vict. c. 49.]

## COVENANT.

[See INJUNCTION—LEASE.]

(A) CONSTRUCTION OF COVENANTS.
  (*a*) *In Restraint of Trade.*
  (*b*) *Controlled by Recitals.*
(B) COVENANTS RUNNING WITH THE LAND.
(C) COVENANTS RUNNING WITH THE REVERSION.
(D) BREACH OF COVENANT; ANSWER TO.
(E) DAMAGES FOR BREACH OF.

### (A) CONSTRUCTION OF COVENANTS.

#### (*a*) *In Restraint of Trade.*

A covenant not to be engaged in a specific trade, "or in any matter or thing whatsoever in anywise relating thereto" within a given district, does not prevent the covenantor from lending money to a person engaged in such trade within the said limits upon mortgage of his trade premises, although he may know that the mortgagor has not means of paying the debt, except out of the profits of the business. *Bird* v. *Lake; Bird* v. *Turner*, 1 Hem. & M. 338.

*Semble*—A mortgage expressly charging the debt upon such profits would be a breach of the covenant. Ibid.

*Semble*, also—There is nothing in such a covenant to prevent the covenantor from buying any number of houses within the district, fitting them up and selling them for the purpose of the trade in question, provided he has no direct interest in the businesses carried on in them after such sales respectively. Ibid.

#### (*b*) *Controlled by Recitals.*

Where a deed contains an absolute covenant not to do an act, such covenant will not, in the absence of a bill to rectify the deed, be controlled by a recital in the deed, from which it appears that the parties intended that such act might be done on payment of a fixed sum for liquidated damages *Bird* v. *Lake*, 1 Hem. & M. 111.

A covenant in a deed if ambiguous will be controlled by the recitals. *Selby* v. *the Crystal Palace District Gas Co.*, 31 Law J. Rep. (N.S.) Chanc. 595; 30 Beav. 606.

### (B) COVENANTS RUNNING WITH THE LAND.

By a deed made in 1770, between the East India Company and Robert Lord Clive, after reciting that in 1766 five lacs of rupees, bequeathed to Lord Clive by a former Nabob of Bengal, and in 1767 three lacs of rupees, the gift of the then Nabob of Bengal, had been paid to the East India Company, and cash notes given to Lord Clive for the amount, and that in pursuance of a scheme therein recited for making a provision for officers and privates in the Company's service who might be disabled by age, war or disease, Lord Clive had delivered up the cash notes to be cancelled; it was agreed between Lord Clive and the Company that the eight lacs of rupees should remain in the hands of the Company, and that the Company should allow yearly a sum equivalent to 8*l.* per cent. thereon, and that the Company and their successors should be perpetual trustees, subject to the proviso therein contained, of the said fund of eight lacs of rupees for the due application and appropriation of the interest and produce thereof, for the relief of invalid and superannuated officers and soldiers in their military service, and upon the Company ceasing to employ a military force then for the relief of invalid and superannuated officers and seamen in their marine service; and the deed contained a covenant by the Company for repayment to Lord Clive, his executors, administrators or assigns, of the full sum of five lacs of rupees, subject to a due proportion of existing charges, in case it should happen that the Company should cease to employ a military force in their actual pay and service, and also ships for carrying on their trade. In 1834 the Company ceased to employ ships for carrying on their trade. In 1858 the property (except only the capital stock), liabilities and military forces of the Company were transferred to the Crown:—Held (reversing the decision of the Master of the Rolls), that the covenant was not to be regarded as a stipulation for the restoration of a trust fund, but as a covenant in gross, and that upon the true construction of the 21 & 22 Vict. c. 106. (the act transferring to the Crown the property and liabilities of the Company) five lacs of rupees were payable by the Secretary of State for India to the representative of Lord Clive; subject to the existing charges properly attributable to and payable out of the interest thereof. *Walsh* v. *the Secretary of State for India* (House of Lords), 32 Law J. Rep. (N.S.) Chanc. 585; 10 H.L. Cas. 367.

The conveyance of an estate to a purchaser and his heirs to the use that certain specified trades should not be carried on upon the premises,—Held, to be a stipulation in the nature of a covenant running with the land; but that the owner of the estate could alone be restrained from carrying on the trades, as his tenant was no party to the suit. *Hodgson* v. *Coppard*, 30 Law J. Rep. (N.S.) Chanc. 20; 29 Beav. 4.

Where there was a covenant by a purchaser of land not naming assigns that no building on the land should be used for the sale of beer,—Held,

not to run with the land. *Wilson* v. *Hart*, 2 Hem. & M. 551.

An incoming tenant from year to year was told that the house could not be used as a butcher's shop:—Held, sufficient to affect him with notice of a covenant against its use for the sale of beer, and injunction granted accordingly. Ibid.

A mining licence was granted by deed to three persons as joint tenants, and the licensees covenanted jointly and severally to pay compensation in respect of damage to the surface. Two out of the three licensees assigned over. Damage having been done, —Held, that the covenant was one running with the subject-matter of the grant, and that the assignee from the two licensees was liable under the covenant for the whole compensation due to the grantor. *Norval* v. *Pascoe*, 34 Law J. Rep. (N.S.) Chanc. 82.

(C) COVENANTS RUNNING WITH THE REVERSION.

By a lease some print-works and certain articles, matters, and things on the premises were demised, with power to the tenant to replace any of the articles, matters, and things when worn out, and to add new ones and additional ones, and to add improvements on the premises, and it was covenanted that at the end of the term a valuation of the articles, matters, and things, and of the improvements, should be made, and if they exceeded a certain sum the landlord should pay the tenant the difference:—Held, in an action by the tenant against the executor of the landlord to recover the excess, that as this was a covenant relating to chattels it did not run with the reversion, and that the executor was only liable on it in his representative character; and that as it appeared on the record that he was executor, the judgment should be that the plaintiff do recover the debt and costs *de bonis testatoris*, if the defendant have so much; and if not, then as to the costs, *de bonis propriis*. *Garton* v. *Gregory* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 302; 3 Best & S. 90.

(D) BREACH OF COVENANT; ANSWER TO.

The defendant covenanted with the plaintiff to use his best endeavours and all due diligence to forward certain works, so that the same works should be completed in as short a time as practicable. To a declaration alleging as a breach that the defendant did not nor would use his best endeavours or due or any diligence to forward the works, so that the same might be completed in as short a time as practicable, the defendant pleaded that he did use his best endeavours and all due diligence to forward the works, so that the same might be completed in as short a time as practicable, but by causes wholly beyond his control, and without any default on his part, he was hindered and prevented from forwarding the works:—Held, on demurrer, that the plea was good as a traverse of the breach. *Vickers* v. *Overend*, 30 Law J. Rep. (N.S.) Exch. 388; 7 Hurls. & N. 92.

(E) DAMAGES FOR BREACH OF.

J, by his will, bequeathed to B's children, on her death, a legacy of 400*l.*, to be paid at the age of twenty-one, the shares of children dying under that age to be paid to the survivors and the executors and administrators of any brother or sister who attained that age; and the testator devised part of his real estate, subject to and charged with the legacy, in moieties to his two daughters. The plaintiff, as heir-at-law of one of the testator's daughters, effected a partition of the real estate with the other daughter, each covenanting with the other to pay one moiety of the legacy. The plaintiff subsequently sold his part to the defendant, subject to the payment by the defendant of one moiety of the legacy to P, the only surviving child of B (who was dead), on his attaining the age of twenty-one, or to his personal representative in case of his death under age, and the defendant covenanted with the plaintiff to pay the moiety of the legacy accordingly, and to indemnify the plaintiff against all liability consequent on the non-payment thereof. P died under twenty-one, and his administrator claimed a moiety of the legacy, and filed a bill against the plaintiff, who having been advised that on P's death under twenty-one the legacy was no longer a charge on the estate, refused to pay and himself claimed payment of 200*l.* from the defendant and gave him notice not to pay P's administrator. The Chancery suit was decided in favour of the plaintiff, the bill being dismissed with costs, but the plaintiff had to pay some costs as between attorney and client. The plaintiff having brought an action on the covenant, alleging as breaches the non-payment of the moiety to P's personal representative, and non-indemnity of the plaintiff, whereby the plaintiff incurred costs, —Held, that the plaintiff was entitled, not merely to nominal damages for the non-payment, but to 200*l.*, and that the facts afforded no answer to the breach for not indemnifying. *Hodgson* v. *Wood*, 33 Law J. Rep. (N.S.) Exch. 76; 2 Hurls. & C. 649.

## CRIMINAL LAW.

[See the various Titles of OFFENCES. Also Titles INDICTMENT—MISDEMEANOUR.]

[The statute law of England and Ireland relating to offences against the person consolidated and amended by 24 & 25 Vict. c. 100.—The law as to the whipping of juvenile and other offenders amended by 25 Vict. c. 18.—An Act for the more speedy trial of certain homicides committed by persons subject to the Mutiny Act, 25 & 26 Vict. c. 65. —The statute law of England and Ireland relating to accessories to and abettors of indictable offences consolidated and amended by 24 & 25 Vict. c. 94.—Punishment of Whipping—The further security of her Majesty's subjects from personal violence provided for by 26 & 27 Vict. c. 45.]

## CROWN.

[Certain acts for quieting possessions and titles against the Crown, and for the like object relating to suits by the Duke of Cornwall, amended by 24 & 25 Vict. c. 62.—The law relating to the private estates of Her Majesty, her heirs, and successors, amended by 25 & 26 Vict. c. 37.]

## CUSTOM.

(A) Validity and Nature of.
(B) Mercantile Usage.
(C) When admissible to affect Written Contract.

### (A) Validity and Nature of.

To a declaration for having so wrongfully, negligently and improperly, and without leaving any proper or sufficient support, worked mines under the plaintiff's land, that great part of it fell in, the defendants pleaded, as to the working the mines without leaving any proper or sufficient support, that the lord of the manor of W, being entitled to the mines under the wastes of the manor, and certain persons being entitled to the right of common over the wastes, an Inclosure Act was passed, with the assent of the lord, under which the wastes were inclosed and allotted to the different owners of tenements within the manor in respect of which they had had rights of common; and that by the act all the previous rights of the lord were reserved, and the lord was to enjoy the mines under the wastes allotted, together with all necessary ways, &c., and liberty of working as fully as before the act, without making any satisfaction for so doing; and satisfaction was to be made for any damage to any particular allotment by the occupiers of the other allotments in the same township according to the direction of a Justice of the Peace. That from time immemorial up to the passing of the act, the lord and his assigns had been used and accustomed as of right to search for, win and work the mines under the waste lands without leaving any support for the lands under which the mines were situate, and without making any satisfaction for any injury caused by such working; that the *locus in quo* was part of such inclosed wastes, and the damage complained of was done by the defendants as lessees of the mines from the lord:—Held, that the plea was bad, as the alleged custom was void, on the authority of *Hilton* v. *Earl Granville*. *Blackett* v. *Bradley*, 31 Law J. Rep. (N.S.) Q.B. 65; 1 Best & S. 940.

The defendants also pleaded, as to the working the mines without leaving proper and sufficient support, that the lord of the manor of W was seised in fee of the mines within the manor, and that for the period of forty years next before action brought the lord and his tenants had been used and accustomed of right to work the mines without leaving any support for the lands under which the mines were situate, and justifying, as tenants of mines to the lord, in the exercise of the above customary right. The defendants also pleaded a similar plea, alleging the custom for twenty years:—Held, that the pleas were bad, as they did not shew any acts done on the plaintiff's land; and acts done under the land of another, although done as of right for twenty or forty years, could not affect the plaintiff's rights. Ibid.

A custom, for all the freemen and citizens of a neighbouring city to hold horse-races over the close of M on Ascension Day in every year is good; and in pleading such custom, it being claimed for a day certain, it need not be alleged that the day is a seasonable day. *Mounsey* v. *Ismay*, 32 Law J. Rep. (N.S.) Exch. 94; 1 Hurls. & C. 729.

A claim, by custom, for all the freemen and citizens of a neighbouring city to run horse-races over certain land on Ascension Day in every year, is not a claim to an easement within the meaning of the 2nd section of the Prescription Act. *Mounsey* v. *Ismay*, 34 Law J. Rep. (N.S.) Exch. 52; 3 Hurls. & C. 486.

### (B) Mercantile Usage.

There was a custom at Liverpool of allowing a discount of three months on freights payable on all bills of lading from ports in North America; when Texas was annexed to America, in 1846, the custom was in practice extended to ports in that territory:—Held, that this was evidence from which a jury might infer that the custom extended to ports in California after that country was also annexed. *Falkner* v. *Earle*, 32 Law J. Rep. (N.S.) Q.B. 124; 3 Best & S. 360.

### (C) When admissible to affect Written Contract.

F, a broker in mining shares, sold L, also a like broker, some shares in a mine. The sold note ran thus: "June 18, 1859. Sold L 250 5120th shares in Wheal Charlotte, at 2*l.* 5*s.* per share, 562*l.* 10*s.*, for payment half in two, half in four months." The bought note was in similar terms:—Held, in an action by F against L for not accepting and paying for the shares, that evidence was admissible of a usage among brokers in mining shares that on contracts for the sale and purchase of such shares, the delivery of the shares should take place concurrently with and at the time agreed upon for the payment; and that the purchaser was not at liberty to demand the delivery of them before the time of payment. *Field* v. *Lelean* (Ex. Ch.), 30 Law J. Rep. (N.S.) 168; 6 Hurls. & N. 617.

## CUSTOMS.

[See Revenue.]

## DAMAGES.

(A) When recoverable.
  (*a*) *In general.*
  (*b*) *In Actions for Breach of Contract.*
  (*c*) *In Actions for Accidental Death under 9 & 10 Vict. c. 93.*
(B) Nominal Damages.
(C) Assessment of, in Equity.
(D) Criterion and Measure of.
(E) Excessive Damages.

### (A) When recoverable.

#### (*a*) *In general.*

The defendants, a corporation, were empowered by a local act of parliament, to construct a reservoir for public purposes, and to divert to it the waters of certain rivers and streams, and were required (under

penalties) to discharge from the reservoir a certain specified quantity of water per second, for the use of mills on the river E. The act provided that the defendants should not divert any of the waters of the river E until the reservoir should be completed and filled, and water discharged therefrom in the quantity provided, and that, except as provided for, the rights of mill-owners should not be prejudiced. The defendants diverted a part of the waters of the river E, but from engineering difficulties the reservoir was not completed so as to be capable of being filled with water:—Held, that the mill-owners on the river E could not maintain an action for the non-supply of the statutable amount of water from the reservoir, but were confined to an action for damages occasioned by the wrongful diversion of the natural supply before the completion of the reservoir. *Waller* v. *the Mayor, &c. of Manchester*, 30 Law J. Rep. (N.S.) Exch. 293; 6 Hurls. & N. 667.

The plaintiff, being in treaty with C for the purchase of the goodwill of a business, was referred to B for the particulars of the business. The defendant, whom the plaintiff sent to B for particulars, represented to the plaintiff that B had told him that the returns were of a certain value, whereupon the plaintiff concluded his purchase. The value being afterwards found to be much less than had been so represented, the plaintiff, without further inquiry, sued C for a false representation, but failed in such action, on the ground that no such representation had, in fact, been made by either B or C. In an action against the defendant for so falsely representing what B had told him,—Held, that the plaintiff was not entitled to recover as damages the costs of the action against C, as such were not the natural and proximate consequence of such false representation by the defendant. *Richardson* v. *Dunn*, 30 Law J. Rep. (N.S.) C.P. 44; 8 Com. B. Rep. N.S. 655.

In an action for false imprisonment the plaintiff tendered, as evidence of special damage, that he had lost a situation which he should otherwise have got. The defendant imprisoned the plaintiff at half-past one and detained him till past two o'clock. The evidence tendered was, that if the plaintiff had appeared at a certain place at two o'clock he would have obtained a situation. When the plaintiff got out of prison, he did not go to seek for the situation, but went home instead, and did not make any application till the following day, when it was too late:—Held, that the damage was not the natural result of the unlawful act of the defendant, as it might not have happened at all if the plaintiff had gone to seek for the situation as soon as he got out, or if the intended employer had not engaged another person. *Hoey* v. *Felton*, 31 Law J. Rep. (N.S.) C.P. 105; 11 Com. B. Rep. N.S. 142.

The plaintiffs were owners of a vessel chartered as a general ship from London to Valparaiso, with liberty to touch at the Falkland Islands. She had on board goods consigned to the defendants at the Falkland Islands, and 400 barrels of gunpowder for Valparaiso. When she arrived at the Falkland Islands it was necessary for her to unload her gunpowder before she could enter the harbour. The defendants accordingly lent the captain a vessel in which temporarily to stow the powder. Subsequently, the defendants removed the powder into another vessel, which was not a proper one for the purpose, and the latter vessel went down with the powder on board. The captain went on to Valparaiso, and not having delivered the gunpowder or otherwise satisfied the consignees, he was sued by them. The captain defended the action and was defeated, incurring considerable costs in so doing:—Held, that, though the defendants were liable to the plaintiffs for the value of the gunpowder, they were not liable for the costs incurred in defending the action at Valparaiso.—(It is difficult to say whether the *ratio decidendi* in this case was, that the conduct of the captain in defending the action at Valparaiso was imprudent, or that the costs incurred in that action were too remote to be given as damages. Each *ratio* is sufficient, and each is referred to.) *Ronneberg* v. *the Falkland Islands Co.*, 34 Law J. Rep. (N.S.) C.P. 34; 17 Com. B. Rep. N.S. 1.

Where goods seized by the sheriff under a *fi. fa.* are claimed and subsequently sold under an interpleader order (which does not restrain any action except against the sheriff), the execution creditor is not liable to the claimant (who, having succeeded in the interpleader issue, sues the execution creditor in trespass) for damages sustained subsequent to the order. *Walker* v. *Olding*, 32 Law J. Rep. (N.S.) Exch. 142; 1 Hurls. & C. 621.

*(b) In Actions for Breach of Contract.*

By an agreement in writing the defendant agreed to serve the plaintiff as his assistant as a surgeon and apothecary for one month, and so on from month to month, until determined by one month's notice, at a certain salary, the plaintiff in addition thereto to provide for the defendant a dwelling-house at C to reside in; and in consideration of the premises and of the agreement for hiring the defendant promised and agreed that he should not nor would practise within the distance of five miles from C without the consent of the plaintiff, under the penalty or penal sum of 100*l.*, to be recoverable as liquidated damages, the said sum having been specified by the parties as the amount to be paid and recoverable by the plaintiff for the breach or non-observance by the defendant of the last-mentioned clause:—Held, that the providing the dwelling-house was not a condition precedent to the plaintiff's right to sue for the breach of the agreement not to practise at C, and that such agreement not to practise was not put an end to by a month's notice to determine the engagement. *Carnes* v. *Nisbett*, 31 Law J. Rep. (N.S.) Exch. 273; 7 Hurls. & N. 778.

Held, also, that the agreement was not void as being in restraint of trade, and that the plaintiff was entitled to recover the full sum of 100*l.* for a breach, but was not also entitled to an injunction to restrain the defendant from in future practising at C. Ibid.

(c) *In Actions for Accidental Death under* 9 *&* 10 *Vict. c.* 93.

P, having an estate of 4,000*l.* a year, was killed by the negligence of the servants of a railway company. On his death, his widow received, pursuant to a settlement, a jointure of 1,000*l.* a year for her life, charged on the estate; 800*l.* a year, the interest of a charge, went to the eight younger children. The estate, subject to these burdens, passed to the eldest son:—Held (affirming the decision below, 31 Law J. Rep. (N.S.) Q.B. 249; 2 Best & S. 759),

that an action lay, under the statute 9 & 10 Vict. c. 93, against the company in respect of the death, although there was no loss of income occasioned thereby, and the deceased, if only injured and not killed, could not have claimed damage for any pecuniary loss. *Pym* v. *the Great Northern Rail. Co.* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 377; 4 Best & S. 396.

Held, further, that, though the estate survived for the benefit of the family as a whole, yet that the jury had to look separately to the interests of the respective members of the family; and that, if the death occasioned the loss to any one of them of the reasonable expectation of future pecuniary benefit, the jury were bound to consider such loss, and award damages accordingly. Ibid.

### (B) NOMINAL DAMAGES.

In an action for an excessive distress the plaintiff is entitled to nominal damages, although he proves no actual damage. *Chandler* v. *Doulton*, 34 Law J. Rep. (N.S.) Exch. 89; 3 Hurls. & C. 553.

### (C) ASSESSMENT OF, IN EQUITY.

Damages in equity for loss occasioned by pulling up a railway will be computed upon a general view of the whole case, and an estimate and allowance will be made of such a sum as may be considered a recompense for the loss sustained. *Mold* v. *Wheatcroft*, 30 Law J. Rep. (N.S.) Chanc. 598.

Parties who make a claim for damages in equity must by evidence establish the facts on which they base their claim. Ibid.

### (D) CRITERION AND MEASURE OF.

In an action by a cap-manufacturer against a carrier for damages for the loss sustained by delay in the delivery of cloth, by which the plaintiff had lost the season for making it into caps, and so disposing of it,—Held, that, although in accordance with the principle laid down in *Hadley* v. *Baxendale*, the jury, in estimating the damages, could not give the plaintiff the loss of profits he might have made by the manufacture of the cloth into caps, yet they were justified in taking into their consideration the deterioration in the marketable value of the cloth by reason of the season having passed for making caps which the plaintiff might then have sold. *Wilson* v. *the Lancashire and Yorkshire Rail. Co.*, 30 Law J. Rep. (N.S.) C.P. 232; 9 Com. B. Rep. N.S. 632.

The defendant having obtained a rule to reduce the damages from 80*l.* to a nominal sum, the Court proposed to make the rule absolute for a new trial, unless the plaintiff assented to a reduction to 40*l.*:—Held, that the plaintiff was entitled to the costs of the rule, though he consented to the reduction. Ibid.

The plaintiffs caused to be delivered to the defendants, a railway company, some bales of cotton to be carried from Liverpool to Oldham. Instead of being delivered the following morning, which was the usual time occupied, the cotton was not delivered for four days. The plaintiffs made inquiry for it at the Oldham station, before and after the actual delivery of the cotton to the defendants, and told the defendants' manager that the plaintiffs' mill was at a stand-still on account of the non-delivery of the cotton, and that they would look to the company for compensation for the loss sustained; but the fact of the mill being at a stand-still was not communicated by the plaintiffs to the defendants or their agents at Liverpool at the time the cotton was delivered to them to be carried. In consequence of the delay, a new mill of the plaintiffs was prevented from being worked for two days and a half; and workpeople were kept idle, to whom the plaintiffs had to pay 7*l.* wages for the time. The plaintiffs also claimed 7*l.* 10*s.* for the profits they would have made by working their mill for the time in question. The Judge directed the jury that the plaintiffs had a right to charge as legal damage such loss as naturally and immediately arose from the stoppage of their mill; that the question was what had been the actual loss and actual detriment that the plaintiffs had suffered by the non-arrival, in due course, of the cotton; and that the plaintiffs were entitled to the money they had actually paid as wages, and that the profit they would have made was a fair subject of calculation:—Held, that this was a misdirection, the wages and loss of profit not being the legal measure of damages. *Gee* v. *the Lancashire and Yorkshire Rail. Co.*, 30 Law J. Rep. (N.S.) Exch. 11; 6 Hurls & N. 211.

The case of *Hadley* v. *Baxendale* commented upon. Ibid.

In an action for a wrong, whether arising out of trespass or a negligent act, the jury, in estimating the damages, may take into consideration all the circumstances attending the committal of the wrong. *Emblen* v. *Myers*, 30 Law J. Rep. (N.S.) Exch. 71; 6 Hurls. & N. 54.

In an action for wrongfully and injuriously pulling down a building adjoining the plaintiff's stable in a negligent and improper manner, and with such a want of proper care that by reason thereof a piece of timber fell upon the plaintiff's stable and destroyed the roof, and by reason of the defendant's negligence, carelessness and unskilfulness, part of the building fell upon and injured the plaintiff's horse, evidence was given shewing that the defendant had acted wilfully and with the object of forcing the plaintiff to give up possession of the stable:—Held, that the jury were properly directed that if they thought the defendant had acted with a high hand, wilfully, and with the object of getting the plaintiff out of possession, the damages might be higher than if the injury was the result of pure negligence. Ibid.

The defendant, on the 26th of July, sold, by sample, to the plaintiff 3,000 gallons of naphtha, at 2*s.* 2*d.* per gallon, to be delivered 1,000 gallons on the 30th of July, 1,000 on the 8th of August, 1,000 on the 15th of August; the plaintiff, on the 27th of July, re-sold same naphtha, by sample, to H, at 2*s.* 6*d.* per gallon, to be delivered on the same days. The defendant having failed to deliver any of the naphtha to the plaintiff, the plaintiff could not deliver it to H, and, according to the evidence for the plaintiff, a rise to 5*s.* 9*d.* a gallon in the market price of naphtha occurring about the end of July, the plaintiff was unable to deliver to H naphtha of an equal quality to that which defendant had contracted to sell, except at the enhanced price of 5*s.* 9*d.* a gallon. On a writ of inquiry, to assess the damages, the jury, under the direction of the presiding officer, gave the plaintiff the difference of the price of the 3,000 gallons at 2*s.* 6*d.* a gallon and 2*s.* 2*d.* a gallon, and also the difference of the price of 3,000 gallons at 2*s.* 6*d.* a gallon and 5*s.* 9*d.* a gallon, amounting

together to 537*l.* 10s., as damages:—Held, on making absolute a rule for a new writ of inquiry, obtained on the ground that the enhanced value set upon the naphtha ought not to have been taken into consideration in estimating the damages, per *Bramwell, B., Channell, B.* and *Wilde, B.*, that the defendant was liable to the plaintiff in damages for non-delivery of the naphtha, and that the measure of damages would be the sum of the differences between the contract price and the market price (when ascertained) of 1,000 gallons of naphtha of equal quality with that contracted to be delivered on the 30th of July, the 8th of August and the 15th of August respectively. Per *Martin, B.*, that the plaintiff being liable to H on his contract, the defendant was liable to the plaintiff, although H had not recovered against the plaintiff, according to the rule in *Randall* v. *Roper;* and that the damages the plaintiff would be entitled to recover in the present action would be the difference between the contract price of 3,000 gallons and the price of the same quantity of equal quality at 5*s.* 9*d.* per gallon (assuming 5*s.* 9*d.* to have been the market price per gallon) when the plaintiff's contract with H was broken. *Josling* v. *Irvine,* 30 Law J. Rep. (N.S.) Exch. 78; 6 Hurls. & N. 512.

In consequence of a railway embankment the flood waters of a river were pent back and flowed over land of the plaintiff, doing injury to a certain amount; had the embankment not been constructed the waters would have flowed a different way, but would have reached the plaintiff's land, and would have done damage to a lesser amount:—Held, that the measure of damages recoverable by the plaintiff against the railway company was the difference only between the two amounts. *Workman* v. *the Great Northern Rail. Co.,* 32 Law J. Rep. (N.S.) Q.B. 274.

The defendant having assigned to the plaintiffs a policy of insurance on his own life, and covenanted to pay the annual premium and not to do anything by which the policy should be forfeited, caused a forfeiture of it by going beyond the limits of Europe without the licence of the assurers, contrary to a condition in the policy:—Held, that the measure of damages for such a breach of covenant is the present value of the policy at the time of forfeiture, taking into consideration that the defendant had covenanted to pay and would have paid the annual premium. *Hawkins* v. *Cbulthurst,* 33 Law J. Rep. (N.S.) Q.B. 192; 5 Best & S. 343.

Plaintiffs bought caustic soda of the defendant, part to be shipped in June, part in July, and the rest in August. The defendant knew at the time of the sale that the plaintiffs bought to sell again on the Continent, and that it was to be shipped from Hull, but not that it was for Russia, although he learned this also before the end of August. The defendant neglected to deliver any such soda during the time contracted for, but he delivered a portion in September and October. There was no market for caustic soda, and the plaintiffs, who had contracted for the re-sale of the soda to H, a merchant in Russia, lost the profit on such re-sale in respect of the soda which was not delivered at all, and, by reason of the approach of winter in the Baltic, were obliged to pay an increased rate of freight and insurance on the shipment of the soda which was delivered in September and October:—Held, that the damages which the plaintiffs were entitled to recover for the defendant's breach of contract were the loss of profit on the sale to H, and also the cost of such increased rate of freight and insurance, but not the damages the plaintiffs paid H in respect of a sub-sale made by him to a consumer of the article. *Borries* v. *Hutchinson,* 34 Law J. Rep. (N.S.) C.P. 169; 18 Com. B. Rep. N.S. 445.

### (E) Excessive Damages.

The jury having found a verdict for five guineas in an action for a trifling assault, evidently acting upon information given to them by the plaintiff's counsel that a verdict for less would not give the plaintiff her costs,—the Court granted a new trial without imposing any terms. *Poole* v. *Whitcomb,* 12 Com. B. Rep. N.S. 770.

An infant under the age of seven years cannot incur the guilt of felony. The defendant caught a child in the act of stealing a piece of wood from his premises, and gave him into custody. The child was discharged by the magistrate on the ground that he was under the age of responsibility, and he afterwards, by his next friend, brought an action against the defendant for false imprisonment:—Held, that a plea of felony was no answer, and that the Court would not interfere on the ground of 20*l.* damages being excessive. *Marsh* v. *Loader,* 14 Com. B. Rep. N.S. 535.

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## DEBTOR AND CREDITOR.



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### (A) Rights of the Creditor.

Where default has been made in performance of a covenant to pay a sum of money, the Court will allow interest at 5*l.* per cent. *Knapp* v. *Burnaby,* 30 Law J. Rep. (N.S.) Chanc. 844.

A creditor cannot have a decree for the administration of real estate, unless he sues on behalf of all creditors. *Ponsford* v. *Hartley,* 2 Jo. & H. 736.

A tradesman mortgaged a freehold house in which he carried on his trade, being his only real estate, to

secure an existing debt of 1,100*l.*, for which he was liable—a sum which exceeded the value of the mortgaged property. His other property was of very trifling amount. He was at the time liable as surety on a promissory note for 2,000*l.*, and afterwards the other makers having become insolvent, he was called upon for payment, and became bankrupt:—Held, that the mortgage was void as against the assignees in bankruptcy, as being an assignment made to defeat or delay creditors. *Goodricke* v. *Taylor*, 2 De Gex, J. & S. 135.

A non-professional person, in the absence of a specific agreement, will not be placed in a better position than attorneys and solicitors. Where, therefore, a military outfitter alleged services performed in passing an act of parliament,—Held, that he must prove the services, and proof failing, that he was not entitled to a sum of 3,850*l.* secured by a judgment given to him by a young and inexperienced man. *Ex parte Isaac, in re Carew's Estate Act*, 1857, 31 Law J. Rep. (N.S.) Chanc. 214; 30 Beav. 274.

A creditor obtained a judgment against the executor, and, on the same day, a decree was made for the administration of the estate:—Held, that the judgment creditor had obtained no priority. *Parker* v. *Ringham*, 33 Beav. 535.

Where a debtor gave authority by parol to his creditor to take certain goods, passing by delivery, and sell them, and out of the proceeds to retain his debt,—Held, that the creditor against the administrator of the debtor had a lien on such goods to the extent of his claim. *Gurnell* v. *Gardner*, 4 Giff. 626.

An executor, who was the obligor of a bond for 2,000*l.* found in the testator's possession at his death, charged with the whole sum notwithstanding his oath that he had only received 1,500*l.*, it appearing that shortly before his death he had paid interest on the 2,000*l.*, and that the testator in a letter tied up with the will mentioned the bond as a part of his assets. *Inskip's case*, 3 Giff. 352.

A judgment creditor, who has sued out an *elegit* without effect, is entitled (independently of the statute of 1 & 2 Vict. c. 110.) to equitable relief, though the year from entering up the judgment has not expired. But whether he is entitled to relief under the statute as regards the leaseholds of the judgment debtor, which are wearing out, *quære*. But the Court will within the twelve months interfere and protect the property charged by a judgment from destruction. *Partridge* v. *Foster*, 34 Beav. 1.

The defendant borrowed money of the plaintiff, and he gave his promissory note for the amount with interest at 60*l.* per cent., together with an equitable charge on copyholds, as a collateral security for the note. The plaintiff sued at law on the note, and by mistake he claimed and recovered interest at 5*l.* instead of 60*l.* per cent., which was paid:—Held, that the plaintiff could not afterwards sue in this Court upon the mortgage to recover the deficiency, and his bill for that purpose was dismissed with costs. *Darlow* v. *Cooper*, 34 Beav. 281.

### (B) ASSIGNMENT OF DEBTS.

P owed a sum to C, which, under a letter of licence, was payable by instalments, subject to a proviso enabling C to sue for the whole sum at once on failure in punctual payment of any instalment. C assigned this debt to A, who afterwards gave notice to P and called upon him to pay the instalments to him. C thereupon told P that the assignment was invalid, and that if P did not continue to pay to C he would, under the proviso, determine the letter of licence:—Held, that P was justified in continuing to pay C until A had obtained an injunction. *Aplin* v. *Cates*, 34 Law J. Rep. (N.S.) Chanc. 6.

### (C) DISCHARGE OF DEBTS.

#### (*a*) *By Appropriation of Payment.*

Under a will of which some of the partners of a bank were executors the estate was made liable for the debt of a customer of the bank due at the testatrix's death up to a specified fixed amount. The account was continued in the ordinary form of banking accounts, charging the customer with the whole debt from time to time in the half-yearly balances; but it appeared that the parties were ignorant of the fact that the legal rule of appropriation would carry subsequent payments to the discharge of the earlier guaranteed debt. At a later period one of the executors, also a partner in the bank, wrote a letter to the customer amounting to a representation that the payments into his account were appropriated to the latter (unsecured) items of debt:—Held, that the ignorance of the parties did not prevent the operation of the rule in *Clayton's case*. *Merriman* v. *Ward*, 1 Jo. & H. 371.

Held, also, that an appropriation of part-payments could not be made by an executor so as to revive a lapsed liability of his estate and that the letter had no retrospective operation. Ibid.

Held, also, that the subsequent payments by the creditor, made on the faith of the representations in the letter must be appropriated to the later items of debt. Ibid.

A B & C jointly incurred a debt; after the death of A the account was continued by B & C and further debt incurred. Leave had been given to prove the whole debt against each of the estates of B & C and the earlier debt against the estate of A, and dividends were received from all three estates to an amount exceeding in the aggregate the debt proved against A's estates. No special appropriation was made on the receipt of these dividends:—Held, that A's estate had no right to have the dividends from the estates of B & C wholly or rateably appropriated to the earlier debt, and that the creditors were at liberty to avail themselves of the proof against A's estate until either the whole debt was paid or A's estate had contributed the full amount of the proof against it. *Denison* v. *Avison*, 2 Hem. & M. 647.

H, a commission agent, being employed by B to effect sales of goods at B's risk, had certain goods consigned to him by B to be forwarded to W. H fraudulently sent these goods to R on his own account, and afterwards assigned his property to trustees for the benefit of his creditors. A balance was due from R to H; and it was held (affirming the decision of one of the Vice Chancellors), that B was entitled to the balance due from R, in part discharge of the amount due to him (B) from H, and to prove under the assignment for the balance. *Broadbent* v. *Barlow*, 30 Law J. Rep. (N.S.) Chanc. 569; 3 De Gex, F. & J. 570.

#### (*b*) *By Set-off.*

A tenant having obtained judgment and issued

execution against his landlord, afterwards became indebted to him for arrears of rent and dilapidations: —Held, that the landlord was not entitled, by injunction, to restrain proceedings upon the ground of set-off. *Maw* v. *Ulyatt*, 31 Law J. Rep. (N.S.) Chanc. 33.

A *cestui que trust*, under a will, being indebted to a debtor of the testator's estate, is not bound to pay off his debt before claiming under the will. *Avison* v. *Holmes*, 30 Law J. Rep. (N.S.) Chanc. 564; 1 Jo. & H. 530.

(c) *By Appointment in Satisfaction.*

J W, by the settlement made on the marriage of his son C., covenanted with trustees to bequeath by his will to his son, if living, or to his then intended wife if he were dead, a legacy or sum of not less than 2,500*l.* to be held upon the trusts of the marriage settlement. By his will, J W, after reciting a power of appointment he had over a sum of 10,000*l.* comprised in his own marriage settlement in favour of his children (which sum, in default of appointment, was settled upon the children in equal shares), appointed to C 2,500*l.* in full discharge of his (the testator's) covenant for payment or bequest of that sum contained in the settlement: —Held, first, that the appointment made by the testator in exercise of the power contained in his own settlement could not operate as a satisfaction of the personal liability created by his covenant; and, secondly, that the covenant did not merely confer a right to receive a legacy of the amount named after payment of simple contract debts, but created a specialty debt in favour of those claiming under the settlement. *Graham* v. *Wickham*, 32 Law J. Rep. (N.S.) Chanc. 639; 1 De Gex, J. & S. 474; 31 Beav. 447.

(D) Deed of Inspectorship.

[See *post*, (G), *Hartley* v. *Mare*.]

J M, a trader, executed a deed of inspectorship, and directed the inspectors to manage and get in his estate and divide the same by instalments for the benefit of his creditors. It recited that J M owed W & Co. on a bill of exchange 1,218*l.*, and that they had taken proceedings in bankruptcy, but that the same had been abandoned on the guarantee of some of the persons who were appointed inspectors to pay the amount found due on the bill by arbitration. Among his creditors were W & Co. for 3,336*l.* for a trade debt. The deed provided, among many other things, that the inspectors might do all necessary acts for carrying into effect the arrangement respecting the 1,218*l.* bill, and should pay W & Co. whatever might be found due; there were also provisions for the indemnity of the inspectors and for contributions by the creditors for the same. W & Co. executed the deed for the debt of 3,336*l.* only. Before the estate was wholly realized the first instalment became due, and an award was made in favour of W & Co. for the amount claimed on the bill of exchange. The inspectors not having money in hand borrowed money on their own responsibility, and paid the whole 1,218*l.* awarded. The estate turned out to be insufficient, and the inspectors filed a bill against the creditors who had executed the deed for contribution. A decree was made at the Rolls in the plaintiffs' favour, and an account was directed against the several defendants in respect of their several debts in the pleadings mentioned. W & Co. appealed; and, on appeal,—Held (by declaration), that W & Co. stood, in respect to the bill of exchange, as mere strangers to the deed, and that they were liable to contribute in respect of the debt of 3,336*l.* only. *Cheesebrough* v. *Wright*, 31 Law J. Rep. (N.S.) Chanc. 226.

A deed of inspectorship is not bad merely because it contains such provisions as the following, no one of which is unreasonable:—(1) That the proceeds of the debtor's estate be first applied to the payment of all costs, &c. incurred, or to be incurred, in or relating to his suspension of payment, &c., the costs of the deed, and of carrying the same into effect. (2) That every creditor, before being entitled to a dividend, shall, if required by the inspectors, deliver a statement in writing of his claim, with all the particulars usual in a proof in bankruptcy. (3) That when any dividends shall be made before all the creditors have executed or assented to the deed, a sufficient sum shall be set apart for paying the dividends of such creditors, and also the dividends of creditors whose debts have not been ascertained; and that, if no such sum be set apart, then such creditors shall receive dividends out of the first moneys applicable thereto, not disturbing former dividends. (4) That the deed shall be binding on creditors executing, assenting to or approving of it, though it cannot operate as a deed of inspectorship under the statute. (5) That the estate and effects of the debtor shall be administered on the principles of the Bankruptcy Laws, and the rights of the creditors dealt with and regulated on the same principles; and that anything in the deed to the contrary may be treated as expunged. *Strick* v. *De Mattos*, 32 Law J. Rep. (N.S.) Exch. 276; 3 Hurls. & C. 22.

The creditors, parties to an inspectorship deed, severally covenanted to indemnify, to a certain extent, the inspectors against liabilities incurred in carrying on the business of the debtor, which they were empowered to do. One of the creditors who had executed the deed, and to whom the inspectors had incurred a large debt for goods supplied and advances made for the purpose of the business, filed a bill against the inspectors, the debtor and all the other acceding creditors, to have the inspectorship wound up and the accounts taken, and to have the assets applied in payment of his claim, and the deficiency made good by rateable contributions of all the acceding creditors (including the plaintiff) in proportion to their debts:—Held, there was no right to contribution, and a decree for accounts having been made in a previous suit the bill was dismissed. *Selwyn* v. *Harrison*, 2 Jo. & H. 334.

Inspectors acting under the provisions of an ordinary deed of inspectorship are accountable as trustees to the creditors. *Coppard* v. *Allen*, 33 Law J. Rep. (N.S.) Chanc. 475; 2 De Gex, J. & S. 173.

(E) Trust and Composition Deeds.

(*a*) *General Points.*

Trustees of a composition deed, before they allow a creditor to sign, are bound to ascertain the validity of his claim, as by signing he becomes a *cestui que*

*trust*, and the trustees, except in case of fraud, cannot refuse to pay such dividends as may be declared. *Lancaster* v. *Elce*, 31 Law J. Rep. (N.S.) Chanc. 789; 31 Beav. 325.

J L, by a deed, conveyed to a trustee all his real and personal estate, upon trust for conversion, and to divide the net proceeds rateably amongst all the creditors of the said J L who should execute or accede to the deed within three calendar months after the date thereof. The plaintiffs were creditors, but never executed the deed; they however had, within the three months, joined with other creditors in giving J L a letter of licence to come and go for three months, without molestation, for the purpose of giving his assistance in explaining the state of his affairs; but they did not in any other way accede to the deed. Five years after the date of the deed they filed a bill, claiming to be entitled to the benefit thereof:—Held, by one of the Vice Chancellors, and affirmed on appeal, that, never having done anything contrary to the deed, they were not precluded from claiming the benefit of it in this Court, though the three months had long since expired. *Whitmore* v. *Turquand*, 30 Law J. Rep. (N.S.) Chanc. 345; 3 De Gex, F. & J. 107; 1 Jo. & H. 444.

Held, also, that the joining in the letter of licence was not an accession to the deed. The authorities upon the subject have determined, first, that the mere standing by, or doing of any act which does not preclude a creditor from afterwards acting in opposition to the deed, is not accession; secondly, if the time has arrived when it is too late for the debtor to have the benefit of the deed, it is too late for a creditor to accede to it. Ibid.

The distinction in reference to letting in creditors after the prescribed time, between a deed by which a third party covenants to pay a certain composition to the creditors of A B, and a conveyance by A B of property upon trust for his own creditors, pointed out and explained. *Williams* v. *Mostyn*, 33 Law J. Rep. (N.S.) Chanc. 54.

The means of knowledge by which any person is to be affected with notice, must be means of knowledge which are practically within reach, and of which a prudent man might have been expected to avail himself. *Broadbent* v. *Barlow*, 30 Law J. Rep. (N.S.) Chanc. 569; 3 De Gex, F. & J. 570.

A debtor conveyed property to a trustee upon trust to sell and pay to the incumbrancers (who were parties), and to the creditors, parties thereto of the twelfth part, the sum due to them, but so that the trustees might apply the moneys from time to time in paying wholly or partially any one or more of the creditors in preference to any others; and it was declared that nothing contained in the deed should charge the property with any of the debts the psyment of which was thereby intended to be provided for, or give to the creditors (other than the incumbrancers) any right of action or suit, lien, charge or demand on account of any such debt upon or against the property, the debtor, or the trustee. C, a creditor who was not an incumbrancer, executed the deed and received under it a payment on account of his debt:—Held, reversing the decision of the Court below, that C could maintain a suit for the execution of the trusts of the deed. *Cosser* v. *Radford*, 1 De Gex, J. & S. 585.

### (b) *Form and Requisites of.*

A debtor assigned by deed all his effects to trustees, upon trust for all his creditors, parties to the assignment, who should assent thereto within three months from its date. The execution of the assignment by the debtor and the trustees was attested by a solicitor, as required by the 68th section of the Bankrupt Law Consolidation Act, 1849, and notice of it was given in the *London Gazette* and otherwise, as required by that section:—Held, that the assignment was within the provisions of the above-named section, and therefore valid. *Harris* v. *Pettit*, 31 Law J. Rep. (N.S.) Chanc. 552.

In order that a trust deed for the benefit of creditors may be a protection against proceedings in Bankruptcy, all the conditions of the 192nd section of the Bankruptcy Act, 1861, must be complied with, and it must be registered and advertised under that and the 193rd section, and a deed registered under the 194th section does not confer the same protection. *Ex parte Morgan, in re Woodhouse*, 32 Law J. Rep. (N.S.) Bankr. 15; 1 De Gex, J. & S. 288.

A deed not registered under the 192nd section is not binding upon creditors who are not parties to it. Ibid.

The 192nd section is applicable only to deeds which contain provisions for the benefit of all the creditors; therefore a trust deed for the benefit of those creditors only who shall execute the same within twenty-eight days is not within that section, and cannot be registered except under section 194, and dissenting creditors are entitled to treat such a deed as an act of bankruptcy. Ibid.

It is not, however, required by the 192nd section that a deed for the benefit of creditors should comprise the whole of a debtor's property—*Tetley* v. *Taylor* (1 El. & B. 521; s. c. 21 Law J. Rep. (N.S.) Q.B. 346) disapproved of. Ibid.

A creditor having commenced proceedings in Bankruptcy against his debtor by trader-debtor summons, under which the debtor signed an admission of the debt, and four days after executed a composition deed, which was afterwards duly registered, it was held by one of the Commissioners, that such debtor was not protected by the certificate of registration from an adjudication of bankruptcy, upon the petition of the creditor, the act of bankruptcy being non-payment of the debt within the time limited by the act of 1849. On appeal to the Lords Justices, it was held, that the certificate of registration of a composition deed by a trader is not conclusive evidence that all the conditions of section 192. of the Bankruptcy Act, 1861, have been complied with; and on a question arising whether the necessary assents of creditors had been actually given, these assents were ordered to be produced; and as it then appeared that they were in part conditional and not absolute, and that on the condition not being fulfilled the necessary proportion of creditors would not have assented, the deed was held to be not a valid ground for annulling an adjudication subsequent to the date of the deed; and that the bankrupt seeking to annul the adjudication may adduce further evidence; and (per the *Lord Justice Turner*) the 192nd section extends to deeds of composition, although they neither contain, nor are accompanied by, any *cessio bonorum;* but the words

"between a debtor and his creditors" in that section refer to all the creditors, and not some of them only. The appeal was therefore dismissed. *Ex parte Rawlings, in re Rawlings,* 32 Law J. Rep. (N.S.) Bankr. 27; 1 De Gex, J. & S. 225.

A deed executed between the debtor of the one part, and the several other persons whose names and seals were subscribed and set, being severally creditors of the debtor, of the other part, whereby a composition was paid in cash to the creditors upon their executing the deed, was declared by one of the Commissioners to be within the 192nd section of the statute 24 & 25 Vict. c. 134; and was also declared, upon being duly registered and the certificate of registration obtained, to be a protection to the debtor within the 198th section of the same act. After certificate of registration, the amount of composition was tendered to the only dissenting creditors and to their solicitors, and refused; and those creditors (knowing of the deed and of its registration) having, without the leave required by that section, arrested the debtor upon a judgment before obtained, the same Commissioner ordered his release:—Held, upon appeal to the Lords Justices, that the Commissioner had jurisdiction to order the debtor's release; but that the word "creditors," in the first condition to the 192nd section, comprised the secured as well as the unsecured creditors; and it appearing that the necessary proportion in value of creditors had not assented to the arrangement, and that the deed would enure to the benefit of those creditors only who executed it (the true interpretation of the act being that the deed should be for the benefit of all the creditors), the order of release was discharged. *Ex parte Godden, in re Shettle,* 32 Law J. Rep. (N.S.) Bankr. 37; 1 De Gex, J. & S. 260.

A power in a deed of assignment for the benefit of creditors enabling the trustees to make such arrangements with the creditors whose debts are under 10*l.* as they may deem expedient, is inconsistent with the provisions in the Bankruptcy Act, 1861; but where the deed shewed a clear intention that the estate should be administered as in Bankruptcy,—Held, that the particular power might be rejected as repugnant to the general tenor of the deed, and that its existence formed no objection to the validity of the deed nor to the capacity of registering it under the statute. *Ex parte Spyer, in re Josephs,* 32 Law J. Rep. (N.S.) Bankr. 62; 1 De Gex, J. & S. 318.

Secured creditors under such a deed rank for the amount remaining after the deduction of the value of their securities. Ibid.

The words in the 197th section, "except where the deed shall expressly provide otherwise," refer to the insertion in the deed of a proviso for questions being settled by arbitration, or for the adoption of some different rule of administration from that in Bankruptcy; as, for example, with respect to joint and separate creditors. Ibid.

A and B, after trading as co-partners, dissolved partnership, and subsequently executed separate deeds of composition:—Held, that joint creditors of the partnership could not (in the absence of proof of the existence of joint estate) object to the deeds as not binding on them, on the ground of their not being executed by a proper majority of joint creditors. *Ex parte Cockburn, in re Smith and Laxton,* 33 Law J. Rep. (N.S.) Bankr. 17.

An assignment or surrender of the debtor's estate is not necessary for the validity of a deed of composition or release, under the 192nd section of the Bankruptcy Act, 1861, but to render such a deed binding on the minority of creditors, who have not executed or assented to or approved of it, it is necessary that they should stand under the deed in the same situation and with the same advantages as the creditors forming the majority. Ibid.

A deed of composition was made between a debtor of the first part, the creditors executing the deed of the second part, and all other the creditors (if any) of the debtor of the third part, whereby the parties of the second part, in consideration of the payment of 3*d.* in the pound on their debts, released the same, and the debtor covenanted with the parties of the second and third parts to pay to all his creditors the like composition:—Held, that there was an inequality between the positions of the executing and non-executing creditors which was fatal to the validity of the deed, under the 192nd section of the Bankruptcy Act, 1861. Ibid.

M, the alleged bankrupt, had contracted with H & B for the purchase of a quantity of wine, subject to a stipulation that H & B were not to be obliged to deliver it before payment of a bill of exchange held by them, unless they chose so to do, or unless M absolutely required the wine for the purposes of his business. M afterwards executed a deed of composition under the 192nd section of the Bankruptcy Act, 1861; and in the schedule filed in pursuance of the General Order of May 1862, the debt set opposite the names of H & B, who were assenting creditors, included the price of the wine which was not yet delivered:—Held, that if the right to retain the wine was to be regarded as a security, it was a security for the payment of the bill and not for the price of the wine, and consequently that H & B were entitled to sign the deed as creditors for the full amount of the unpaid purchase-money. *Ex parte Middleton, in re Middleton,* 33 Law J. Rep. (N.S.) Bankr. 36.

In estimating whether the deed has been assented to by the proper majority in number and value of the creditors, all the creditors and debts returned in the schedule must be taken into consideration, whether such debts are disputed or not. Ibid.

The certificate of registration under section 192. of the Bankruptcy Act, 1861, is only *prima facie* evidence of the fulfilment of the requisites of that section. *Ex parte Page,* 1 De Gex, J. & S. 283.

The execution, by a debtor resident abroad, of a trust deed, by attorney, the execution of the power of attorney by the debtor, and of the deed itself by the attorney, being both attested as required by the Bankruptcy Act, 1861,—Held, to be sufficient. *Ex parte Bell, in re Bell,* 34 Law J. Rep. (N.S.) Bankr. 36.

A deed of arrangement, under the 192nd section of the Bankruptcy Act, 1861, must comply strictly with the conditions of that section, and the Court has no jurisdiction to dispense with the execution by one of several trustees. *Ex parte King, in re King,* 34 Law J. Rep. (N.S.) Bankr. 20.

The Court has no jurisdiction to extend the time for registration of a trust deed for the benefit of creditors executed under the 192nd section of the

Bankruptcy Act, 1861. *In re Skinner*, 34 Law J. Rep. (N.S.) Bankr. 9.

The appointment of a trustee is not necessary to the validity of a composition deed under the Bankruptcy Act, 1861. *Dewhurst* v. *Jones*, 33 Law J. Rep. (N.S.) Exch. 294; 3 Hurls. & C. 60.

By a composition deed made between the debtors (by name) and J, and the several persons who were creditors of the debtor,—reciting that it had been agreed that the debtors should pay to their creditors a composition of 6*s*. 8*d*. in the pound by two instalments, at three and six months, secured by promissory notes of the debtors and their surety, J, and reciting that the promissory notes had been delivered to the creditors,—the debtors assigned to J all their goods and chattels absolutely, J covenanting with the creditors to pay the composition in manner and by the instalments thereinbefore mentioned, the creditors covenanting that the composition should be, and that the same was, thereby accepted in full satisfaction and discharge of their debts and demands, and absolutely releasing the debtors:—Held, that the deed was a valid deed binding on non-executing creditors; and that the recital that the notes had been delivered to the creditors would not estop non-executing creditors from enforcing the covenant which included the making and delivery of the notes as well as their payment. Ibid.

It is not essential to the validity of a deed of composition under the Bankruptcy Act, 1861, that it should contain a schedule of creditors. *Stone* v. *Jellicoe*, 34 Law J. Rep. (N.S.) Exch. 11; 3 Hurls. & C. 263.

A deed of composition may be valid although the only effect of non-payment of the composition money be to remit the creditors to their original demand. Ibid.

By a deed of arrangement between a trader and his creditors, and which was signed by six-sevenths in number and value of such creditors, all the estate and effects of the trader (except certain specified leasehold premises, which were stated in the deed to be held at a rack-rent, and to be of no value, and which the trader covenanted to assign to the trustees under the deed when required by them to do so, and except also the necessary wearing apparel of the trader and his family,) were assigned to trustees, in trust to pay thereout the costs of the trustees or trader in preparing and executing the deed, including all costs about the negotiations for the arrangement or matters in reference to the winding-up of the estate and attending the execution of the trusts or incident thereto, and afterwards to apply the residue to the payment of the debts owing to the creditors of the trader rateably; and the deed contained a release by the several persons creditors of the said trader whose names and addresses were set forth in the schedule to the said deed:—Held, that it was a valid deed of arrangement under section 224. of the Bankrupt Law Consolidation Act, 1849, and binding on a creditor who had not signed it. *Spitzer* v. *Choffers*, 33 Law J. Rep. (N.S.) C.P. 7; 14 Com. B. Rep. N.S. 686.

By a deed intended to be a deed of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849, which provided for the distribution of a trader's estate under the inspection of certain of the creditors, the estate (with the exception of such allowances and payments or effects or moneys of the debtor as the inspectors might in their discretion authorize, but not exceeding in quantity or amount the allowances which might have been made to him out of his estate and effects, under the statutes relating to bankrupts, in case a petition had been filed on the day when the debtor and certain of his creditors had agreed to draw up the deed, and he had been thereupon adjudicated a bankrupt) was to be administered, as nearly as circumstances would admit, having regard to the provisions of the deed, upon the principle and according to the rules and practice of the Bankrupt Law, and as if such petition had been filed and adjudication had been made:—Held, that the deed was void as a deed of arrangement under the act; as the allowances to the bankrupt in the discretion of the inspectors prevented the distribution of the whole estate: affirming *Snodin* v. *Boyce*. *Dunlop* v. *Crüger* (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 42; *nom. Gruger* v. *Dunlop*, 7 Hurls. & N. 525.

A composition deed was made between certain persons, whose names were subscribed and seals affixed in the schedule thereunder written, on behalf of themselves and all and every other the creditors of the defendant of the first part, and the defendant of the second part, which, after reciting that the defendant was indebted to the said persons parties thereto of the first part in the several sums set opposite to their respective names in the said schedule thereunder written, and was also indebted to other persons in divers sums of money, and being unable to discharge his said debts in full, had agreed to pay a composition of 5*s*. in the pound, such payment or composition to be made and paid to all and every the creditors of the defendant, whether executing the deed or not, to be paid and payable on the 22nd of September 1865, and to be in full discharge of all and every the debts due and owing at the time of the executing of the said deed, provided that the said parties of the first part thereby did accept the said composition and release the debts:—Held, that the non-assenting creditors were not bound, as the release was absolute, and the deed did not provide any means by which these creditors could obtain their composition. *Gurrin* v. *Ropera*, or *Kopera*, 34 Law J. Rep. (N.S.) Exch. 128; 3 Hurls. & C. 694.

A deed of composition and inspection entered into by the defendants and their creditors, and purporting to be made under section 192. of the Bankruptcy Act, 1861, shewed that there were joint and separate creditors and joint and separate estates of the compounding debtors, and that both classes of creditors were to receive a uniform composition of 18*s*. in the pound:—Held, that, although the deed placed the joint and separate creditors on the same footing, it was a valid deed, under sections 192. and 197. of the Bankruptcy Act, 1861. *Walker* v. *Nevill*, 34 Law J. Rep. (N.S.) Exch. 73; 3 Hurls. & C. 403.

*Quære*—Whether the deed would have been valid if it had been a deed of assignment, and for a distribution of the debtors' estate. Ibid.

A plea of an arrangement by deed, under section 192. of the Bankruptcy Act, 1861, between the defendants and their creditors, shewing that there were joint and separate creditors and joint and separate estates, averred that "a majority in number,

representing three-fourths in value of the said creditors of the defendants, and each of them, &c. executed the indenture":—Held, that it was sufficiently averred in the plea, that the requisite majority of each class of creditors had assented to the deed, so as to make the deed binding on non-assenting creditors. Ibid.

A deed of composition and inspection contained a covenant, on the part of the creditors, not to sue within a time limited, viz. before the 20th of May 1865, accompanied by the following stipulation: "That these presents shall and may be pleaded and allowed in any court of law or equity as a bar, or in discharge of all and every action or actions, suit or suits, or other proceedings, judgments and executions which shall or may be brought, commenced, sued, prosecuted, or taken against the debtors, or either of them, or their, or either of their, goods or estates by the said several creditors, or any of them . . . . contrary to the true intent and meaning of these presents":—Held, that although a covenant not to sue for a limited time cannot be pleaded in bar, yet such a covenant accompanied by an express provision that during the limited time it may be so pleaded can be pleaded in bar. Ibid.

The affidavit required by the fifth condition of section 192. to be delivered to the chief Registrar, stating a majority in number representing three-fourths in value of the creditors of the debtors . . . . have in writing assented to or approved of such deed, and also stating the amount in value of the property and credits of the debtors comprised in such deed, need not distinguish the joint from the separate debts of the debtors. Ibid.

A deed for the benefit of creditors under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134. s. 192), to be binding on a non-executing party, must appear on its face to be a deed for the benefit of all the creditors. *Walter* v. *Adcock*, 31 Law J. Rep. (N.S.) Exch. 380; 7 Hurls. & N. 541.

To an action of covenant the defendant pleaded that, by a deed, dated the 12th of December, 1861, between the defendant of the first part, and the several other persons whose names and seals were thereunto subscribed and set of the second part,—reciting that the defendant had carried on business as a pork-pie maker, and in the course of such business had become indebted to the said several parties thereto of the second part in the several sums of money set opposite to their names, and that the defendant, being unable to pay the said sums of money in full, had proposed to pay to his said creditors a composition of 5*s.* in the pound, in full discharge of their said several debts, by one instalment, on the 1st of March next, which the said creditors had agreed to accept,—the defendant covenanted with the parties thereto of the second part that he would pay to each of the parties thereto of the second part the said composition on the day mentioned, and in consideration of the covenant the creditors, parties thereto of the second part, released the defendant from the debts set opposite to their names. The plea set out the memorandum of registration of the deed in the Bankruptcy Court, and averred that the creditors who executed the deed were a majority in number, representing three-fourths in value of all the creditors whose debts amounted to 10*l.* and upwards, and that all the conditions required by the Bankruptcy Act were complied with. A co-defendant pleaded a similar deed, only alleging payment of the composition, and the acceptance of the payment in satisfaction, and the release in consideration of the payment:—Held, on demurrer, that the pleas were no answer to the action, and by *Pollock, C.B.*, that a deed to be valid under the act must assign the property of the debtor for the benefit of his creditors. Ibid.

To an action for goods sold and delivered, &c., the defendant pleaded that after the accruing of the causes of action, &c., a certain deed was made between the creditors of the defendant of the one part, and the defendant of the other part, which deed was in the words and figures following, that is to say: "This indenture, made the 18th of April, 1863, between all and every the creditors and creditor (hereinafter called the creditors) of the defendant, &c. of the one part, and the defendant of the other part." The deed then recited that the defendant being embarrassed and unable to discharge in full the debts owing from him to the creditors, they had agreed to accept a composition at the rate of 12*s.* in the pound, to be paid by instalments and to be secured by promissory notes of the defendant, and an instalment of 2*s.* in the pound in cash, at or immediately before the execution of the deed, and that the creditors should execute such a release to the defendant as should be valid and binding on all the creditors pursuant to the provisions of the Bankruptcy Act, 1861. The deed then witnessed, that in consideration of the premises and the delivery to the creditors of the said promissory notes, and of the payment by the defendant to the creditors on their execution thereof of 2*s.* in the pound, the balance of the said composition, they, the creditors, for themselves, &c., did release to the defendant all actions, &c., which they had against the defendant, save and except the said promissory notes. The deed also contained a covenant to pay the sum intended to be secured by the promissory notes. The plea then alleged that a majority in number, representing three-fourths in value of the creditors whose debts respectively amounted to 10*l.* and upwards, did in writing assent to and approve of the said deed, and that the plaintiff was a creditor and became bound by the deed as if he had been a party thereto; that the defendant tendered to the plaintiff the promissory notes and the 2*s.* in the pound cash, and that the plaintiff refused to receive them; that the instalment of 2*s.* in the pound was paid into court, and that the defendant was ready to deliver the promissory notes to the plaintiff:—Held (by *Cockburn, C.J.*, and *Crompton, J.*), that the deed was invalid, and was not binding upon those creditors who did not execute it, as the promissory notes and the 2*s.* in the pound mentioned therein were only secured to those creditors who did execute it. Held (by *Blackburn, J.* and *Mellor, J.*), that the deed was valid and binding upon all the creditors, and that its effect was not to exclude from the benefit of it those creditors who did not execute it. *Dingwell* v. *Edwards*, 33 Law J. Rep. (N.S.) Q.B. 161; 4 Best & S. 738.

A deed of arrangement professed to be made between the defendant (a debtor) of the first part, E H (one of his creditors) of the second part, L J (a trustee) of the third part, E H and those

other creditors of the defendant who sealed or assented to the deed of the fourth part, and the non-assenting creditors of the fifth part; it contained covenants by the defendant and E H with L J to pay him, on registration of the deed, 7*s.* 6*d.* in the pound on all the debts, and before the expiration of twelve months from the date of the deed 2*s.* 6*d.* in the pound on all the debts but that of E H; a covenant by the defendant with E H to pay him, on the said registration and on or before the expiration of the said twelve months, the said dividends in respect of his debt; an undertaking by L J to stand possessed of the money so paid to him in trust after the said registration of the deed and demand in writing by E H and the other creditors to pay the first dividend, and after the expiration of the said twelve months and such a demand to pay the several creditors the second dividend; and a release by E H and the parties of the fourth part:—Held, that there was no such inequality in favour of E H as to avoid the deed, and that it was pleadable in bar as a release in an action brought by a non-assenting creditor. *Wells* v. *Hacon*, 33 Law J. Rep. (N.S.) Q.B. 204; 5 Best & S. 196.

A deed of composition made between J B (the debtor) of the first part, J K and B B (two sureties for securing the composition) of the second part, and the several other persons whose names are hereunto subscribed and seals affixed, of the third part, after reciting that the parties of the second and third parts, creditors of J B, had agreed to accept a composition of 3*s.* in the pound, on having the same secured by the joint and several promissory notes of J B, J K and B B, payable in two equal instalments on the 20th of August and the 20th of September, and that J B, J K and B B had made and delivered to each of the parties of the third part, their joint and several promissory notes, contained the following covenant and release: "J B, J K and B B do and each of them doth covenant with the parties of the third part, and with each and every of them, that they, J B, J K and B B, or one of them, shall pay the several promissory notes as they shall respectively become due, and shall also make and deliver to all the other creditors of the said J B like joint and several promissory notes, payable at the several times and in manner aforesaid, for the like composition of 3*s.* in the pound upon their respective debts, and shall pay such composition to each of the last-mentioned creditors at the several times and in manner aforesaid, and the several parties of the third part and J K and B B do and each of them doth covenant with J B that they and each of them have accepted and will accept the said promissory notes by way of composition and payment of 3*s.* in the pound upon the amount of their several debts in full discharge of their debts, and that upon the payment of the said promissory notes they and each of them will execute to J B a general release and discharge from their debts." Three-fourths in value of J B's creditors had in writing assented to and approved of the deed, but the only parties who had executed the deed were the debtor and the two sureties:—Held, that as the assenting creditors had not executed the deed, and the non-assenting creditors were not parties to it, neither class of creditors could sue on the deed, and that both classes were on an equality, and that the deed was valid. *Scott* v. *Berry*, 34 Law J. Rep. (N.S.) Exch. 193; 3 Hurls. & C. 966.

A deed of inspectorship, purporting to be made under section 192. of the Bankruptcy Act, 1861, contained the following clause: "Provided always, that in case any dividend shall be declared before all the creditors shall have executed or assented to these presents, or before the amount of dividends payable on all their respective debts shall have been ascertained, the said inspectors shall retain sufficient sums for the purpose of paying a like rateable dividend to any creditor or creditors who shall not have assented to or executed the same, or the amount of dividend payable on whose debts shall not have been ascertained, and shall afterwards pay or cause to be paid such dividend to such creditor or creditors, upon his or their request in writing," &c. By the deed the dividends were made payable unconditionally, and no necessity was imposed upon assenting creditors of making a demand in writing for the payment of their dividends:—Held, that no such inequality was created by the above clause between the two classes of creditors, as would make the deed invalid. *Hernulewicz* v. *Jay*, 34 Law J. Rep. (N.S.) Q.B. 201; 6 Best & S. 697.

The plaintiffs were trustees under a deed of assignment for the benefit of creditors, which purported to be made under the Bankruptcy Act, 1861, and was in the form given in Schedule D of that act. The deed was duly executed, attested, stamped and registered, according to the provisions of section 192, but was not assented to by the requisite majority of creditors. The defendants were assignees of the estate of certain bankrupt creditors of the debtor, and a *fi. fa.* having been issued against his property by the defendants, an interpleader issue was directed:—Held, by the Court of Exchequer Chamber, that the deed was valid to pass the property, and that the plaintiffs were entitled to the verdict. *Symons* v. *George* (Ex. Ch.), 34 Law J. Rep. (N.S.) Exch. 187; 3 Hurls. & C. 996.

A composition deed, made between the defendant of the first part and the undersigned J F, one of the creditors of the defendant, and also all the other undersigned creditors of the defendant of the second part, after reciting that the defendant was unable to pay his several creditors the full sum of 20*s.* in the pound, but was able and willing to pay each and all of them, on signing the deed, the composition of 5*s.* in the pound, and that the defendant had applied to the several parties of the second part to receive and take the composition of 5*s.* in the pound, payable on signing the deed, in full satisfaction and discharge of their several respective debts, which the parties of the second part had agreed to accept in full satisfaction and discharge, proceeded in consideration thereof to release the debts:—Held, that the deed was invalid, and not binding on the non-assenting creditors, as by the terms of the deed the composition was to be paid only to the creditors who signed, therefore those who assented were in a better position than those who dissented. *Martin* v. *Gribble*, 34 Law J. Rep. (N.S.) Exch. 108; 3 Hurls. & C. 631.

To an action on a promissory note, the defendant pleaded, by way of equitable defence, that, after the accruing of the plaintiff's claim, he was indebted to the plaintiff and divers other persons, and that a

deed was made and entered into by and between the defendant of the one part, and the several persons being creditors of the defendant who should execute the same of the other part, relating to the debts and liabilities of the defendant and his release therefrom. The deed was set out in the plea, and after reciting that the defendant, being unable to pay his debts in full, had applied to his said several creditors to receive a composition of 2*s.* 6*d.* in the pound, it went on as follows: "which we, the several creditors signing these presents, have agreed to do, and being a majority in number representing three-fourths in value of the creditors of the said (defendant) whose debts respectively amount to 10*l.* and upwards, have agreed to accept such composition as aforesaid, and in consideration thereof, and on payment thereof, or whenever thereafter called upon for the purpose, hereby severally undertake and agree to execute to the said (defendant) a good and sufficient release in the law of our several and respective claims and demands upon him." The plea then averred that a majority representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, did in writing assent to and approve of the execution of the said deed; that the deed was duly registered, and that the plaintiff was bound thereby as if he had been a party thereto, and had duly executed the same:—Held (affirming the judgment below, 33 Law J. Rep. (N.S.) Q.B. 81), that the plaintiff, though a non-assenting creditor, was barred by the deed from maintaining his action; that the deed was a valid deed within section 192. of the Bankruptcy Act, 1861, as it sufficiently shewed that it was intended to be an arrangement between the debtor and the whole body of his creditors, as all had the option of coming in and signing it; that it was not unequal, although there was no compulsory clause directing the debtor to pay the composition; and that it was not necessary to the validity of a composition deed that there should be any *cessio bonorum*. *Clapham* v. *Atkinson* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 49; 4 Best & S. 730.

A composition deed, expressed to be made between the debtor of the first part, and the several persons creditors of the said debtor, whose names and seals were thereto affixed, of the second part, witnessed that the said several creditors parties of the second part covenanted that if the debtor paid to each of the said several creditors parties of the second part a composition of 2*s.* 6*d.* in the pound, the same should operate as a release and discharge in full from all the debts due to the said creditors parties thereto:—Held, by the Court of Exchequer Chamber (*Blackburn, J. dubitante*), that the deed was not a valid deed within section 192. of the Bankruptcy Act, 1861, so as to bind a creditor who had not executed it, since it did not provide for all the debts and liabilities of the debtor, or for paying a composition to all the creditors, but only to those who executed the deed. *Ilderton* v. *Jewell* (Ex. Ch.), 33 Law J. Rep. (N.S.) C.P. 148; 16 Com. B. Rep. N.S. 142: and in the Court below, *nom. Ilderton* v. *Castrique*, 32 Law J. Rep. (N.S.) C.P. 206; 14 Com. B. Rep. N.S. 99.

The deed of arrangement contemplated by the 192nd section of the Bankruptcy Act, 1861, is one which is made for the benefit of all the creditors of the debtor, and to which all may become parties. A deed, therefore, which in terms excludes all creditors who do not execute within a given time, affords no defence to an action by a creditor not a party thereto. *Berridge* v. *Abbott*, 13 Com. B. Rep. N.S. 507.

In estimating the number and value of the assenting creditors to a deed under the 192nd section of the Bankruptcy Act, 1861, secured as well as unsecured creditors are to be taken into account. *King* v. *Randall*, 14 Com. B. Rep. N.S. 721.

*(c) Particular Covenants and Conditions.*

A composition deed under the statute 24 & 25 Vict. c. 134. s. 192, and fulfilling its requirements, made between the debtor of the one part, and the creditors whose names are subscribed of the other part, by which each of the said creditors covenanting for his own acts only, covenants with the debtor at all times to indemnify him from and against every bill of exchange, promissory note and other negotiable instrument on which the debtor may have incurred any liability, or which may have been indorsed or put into circulation by any or either of the said creditors, is not binding on a creditor who has not assented to or executed the deed, since such a covenant is wholly unreasonable, and the deed containing it is not such a deed as is contemplated by the statute. *Woods* v. *Foote* (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 199; 1 Hurls. & C. 841.

A deed, by which a debtor assigned all his estate to trustees for the benefit of creditors, and otherwise satisfying the conditions of the 192nd section of the Bankruptcy Act, 1861, contained a clause, "that all creditors to whom bills or other negotiable instruments might have been given by the debtor for debts due to such creditors, should indemnify the debtor and his estate against all claims or demands by other persons than themselves in respect of such bills or instruments, and all losses, damages and costs by reason or in respect thereof; and should if any such bills had been indorsed or transferred to any other persons take the same up and retire the same before or when they should become due, and so as to prevent any claim or demand in respect thereof being made upon the debtor or his estate":—Held, that this was an unreasonable clause, and not binding upon a non-assenting creditor, and therefore that the deed was void and of no effect as a deed under the 192nd section. *Balden* v. *Pell*, 33 Law J. Rep. (N.S.) Q.B. 200; 5 Best & S. 213.

*Quære*—Whether it was objectionable that the powers of the trustee should be continued to his executors and administrators? Ibid.

A deed of assignment of a debtor's property to a trustee for the benefit of creditors, which was registered under the Bankruptcy Act, 1861, contained a clause empowering the trustees to require the amount of any debt to be verified by declaration, or in such other manner as to such trustee should seem expedient, and in the event of any creditor refusing or failing so to verify his debt, such creditor was to lose all benefit under the deed. It also contained a covenant by the creditors not to sue the debtor, and if any creditor should do so that then the debtor should be discharged from all debts and demands of the creditor by whom he should be so sued, and that

the deed might be pleaded in bar as a release for that purpose; and it further contained a proviso empowering the trustee to pay in full those creditors whose debts were under 10*l.*, or to make such arrangement with them as might be deemed expedient:—Held, that the above clause and covenant were each unreasonable, and that the proviso provided for an unequal distribution of the property amongst all the creditors, and that these vitiated the whole deed as against a non-executing creditor. *Leigh* v. *Pendlebury*, 33 Law J. Rep. (N.S.) C.P. 172; 15 Com. B. Rep. N.S. 815.

By a composition deed between a debtor of the first part, his surety of the second part, and the several persons, creditors, whose names and seals were set and affixed to the schedule, and all other the creditors of the debtor, of the third part,—reciting that the creditors, parties to the deed of the third part, did approve of the debtor's proposal to pay his creditors a composition of 7*s.* 6*d.* in the pound, by two instalments, secured by the surety, and that bills of exchange drawn by the surety upon and accepted by the debtor had been delivered to the creditors,—it was witnessed that the creditors, parties thereto of the third part, covenanted with the debtor that unless and until default should be made in meeting the said bills the said creditors would not sue or molest the debtor; and further, that if any of them, the said creditors, should break or contravene the said covenant, then the debtor and his estate and effects should be thenceforth absolutely released and discharged from all and singular the debts, claims and demands of the creditor, and the deed should operate as a defeasance pleadable in bar, or might be otherwise set up as a defence, to any action theretofore or thereafter brought by such creditor:—Held, that the last-mentioned covenant vitiated the deed; and that, therefore, although the deed was executed and registered in conformity with the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), it was no answer to an action by a non-executing creditor for the amount of his debt. *Dell* v. *King*, 33 Law J. Rep. (N.S.) Exch. 47; 2 Hurls. & C. 84.

A clause in a deed of assignment, registered under the Bankruptcy Act, 1861, by which the trustee is empowered to require any creditor of the debtor to verify the nature and amount of his debt, with full particulars, by statutory declaration proved before the Commissioners of Bankruptcy, "or otherwise as the trustee may think fit," is unreasonable, and a deed with such a clause is not binding on a non-assenting creditor. *Coles* v. *Turner*, 34 Law J. Rep. (N.S.) C.P. 198; 18 Com. B. Rep. N.S. 736.

By a composition deed made between an insolvent, the defendants as sureties, the plaintiff as trustee, and the body of creditors, the defendants covenanted to pay to the plaintiff certain instalments; and it was provide dthat, as between them and the creditors, the defendants should be deemed principal debtors, also that on non-payment of the instalments, adjudication of bankruptcy against the insolvent, or any different arrangement by him with his creditors, the release, the deed, and all its clauses and provisions should be at an end and void. After payment of the first instalment the insolvent was adjudicated bankrupt on his own petition. In an action by the plaintiff against the defendants for the second instalment,—Held, that "void" meant "voidable" at election, and that the defendants were liable. *Hughes* v. *Palmer*, 34 Law J. Rep. (N.S.) C.P. 279; 19 Com. B. Rep. N.S. 393.

By a composition deed between a debtor of the one part, and the several creditors who signed the deed respectively of the other part, after reciting that the debtor was unable to pay his debts in full, the latter covenanted with the several persons, parties thereto of the second part, to pay to all his present creditors a composition of 5*s.* in the pound on their respective debts:—Held, that the deed was not valid, since the non-assenting creditors were not in an equally advantageous position with the executing creditors, for the deed gave to each individual creditor who had executed the deed the right of action for the composition on his individual debt, while a non-assenting creditor had no power of suing either personally or by means of any one as trustee on his behalf. *Benham* v. *Broadhurst* (Ex. Ch.), 34 Law J. Rep. (N.S.) Exch. 61; 3 Hurls. & C. 472.

A deed of composition was made between certain persons, whose names and seals were subscribed and affixed in the schedule thereunder written, being creditors in their own right solely, or in co-partnership with others, of the debtor, of the first part; the debtor of the second part; and two sureties for securing the composition of the third part; and in which the parties of the second and third parts covenanted with the parties of the first part, and with all the other creditors of the debtor, to pay them a composition of 10*s.* in the pound on their respective debts:—Held, that as the non-assenting creditors were not parties to the deed, but only covenantees, they could not sue for the composition, and had not an equal advantage with the assenting and executing creditors, and that, therefore, the deed was not valid. *The Chesterfield and Midland Silkstone Colliery Co. (Lim.)* v. *Hawkins*, 34 Law J. Rep. (N.S.) Exch. 121; 3 Hurls. & C. 667.

By a composition deed purporting to be made under the Bankruptcy Act, 1861, section 192, it was covenanted that "no creditor who shall have executed or otherwise assented to these presents shall negotiate any bills of exchange, or other negotiable instrument on which the debtor is liable, without having first indorsed thereon a memorandum of the execution of or other accession to these presents by such creditor." A second covenant was in these terms:—"And in consideration of the premises, it is hereby declared and agreed (but each of the creditors who shall have executed or otherwise acceded to or be bound by these presents, agreeing and declaring for himself and his partners, and his and their respective heirs, executors and administrators, and so far as relates to his and their respective acts and defaults), that if the said trustees shall, within the time aforesaid, certify under their hands to the effect hereinbefore mentioned, the creditors of the debtor who shall have executed or acceded to or be bound by these presents shall not, nor shall any of them, nor shall their respective heirs, executors or administrators, or partners or assignees, at any time (except in respect of the covenant or agreements herein contained, or any of them, or in respect of the aforesaid promissory notes, or except so far as may be necessary in order to enforce any mortgage, lien or security, or any rights or remedies against any persons other than the debtor) commence or prose-

cute any action or suit at law or in equity, or other proceeding, or obtain any act or adjudication of bankruptcy against the debtor or his heirs, executors or administrators, or make or sue out any attachment or requisition of or upon him or them, or his or their property, credits or effects, for or on account of all or any part of the debts now due from the debtor to the said creditors who shall have executed or otherwise acceded to or be bound by these presents, or any of such creditors, or for or on account of all or any claim of such creditors provable under these presents, and that this present agreement may be pleaded to any action brought contrary to this agreement as if the same were an actual release":—Held, by the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer (33 Law J. Rep. (N.S.) Exch. 273; 3 Hurls. & C. 361), that the first covenant was valid, as it applied to and bound those creditors only who assented to it by executing or assenting to the deed, and did not bind non-assenting creditors. Held, further, that the second covenant was a reasonable and proper covenant. *Hidson* v. *Barclay* (Ex. Ch.), 34 Law J. Rep. (N.S.) Exch. 217; 3 Hurls. & C. 361.

A deed of composition, which purported to be made between the debtor and the several persons, creditors whose names and seals were subscribed and affixed thereto, contained the following covenant:—"And each of them the said creditors parties hereto doth hereby for himself, his executors, &c., covenant with the debtor, his executors, &c., to retire and deliver up to him and them, cancelled and discharged, all bills of exchange or promissory notes given to the said creditors or any or either of them before the date hereof for any debt due to him or them from the said debtor, or for which he is liable, and to hold him and them harmless against all costs, charges, damages, and expenses to which they or he may be put in consequence of or in default of the non-retirement of the same":—Held, not a valid deed within the 192nd section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. *Inglebach* v. *Nichols*, 14 Com. B. Rep. N.S. 85.

A stipulation in a composition deed under the 192nd section of the Bankruptcy Act, 1861, that it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of the debtor to verify the nature and amount of such debt or claim, with full particulars shewing the consideration thereof, by statutory declaration before the Commissioners of Bankruptcy, or otherwise, as the said trustee or trustees may think fit,—is unreasonable, and renders the deed inoperative as against a non-assenting creditor. *The Brompton Waterworks Co.* v. *Jennings*, 19 Com. B. Rep. N.S. 149.

### (*d*) *Registration of.*

To an action, by the indorsee, against the acceptor of five bills of exchange, the defendant pleaded, *inter alia*, a release by deed; and in support of the plea tendered as evidence an indenture made between G W (the defendant) of the one part, and certain other creditors of the said G W of the other part; and which (after reciting that the said parties thereto of the second part, being or representing at the least three-fourths in value of the creditors of the said G W, had agreed to take the sum of 6*s*. in the pound in full satisfaction and discharge of all their respective debts), witnessed that they, the said parties, in pursuance of the said agreement, and in consideration of the said sum which the said G W covenanted to pay by two instalments of 3*s*. each, on the 3rd of May and the 7th of July then next ensuing the date of the said deed, did each of them acquit, release and discharge the said G W from all liability with respect to their respective debts, and accepted the said sum of 6*s*. for every pound in full discharge of their respective debts and claims. The deed was executed by the defendant G W, the plaintiff and thirteen other creditors; but it did not appear whether they were in fact a majority in number, or all the creditors, or three-fourths in value. The deed was not registered under sections 192-194. of 24 & 25 Vict. c. 134:—Held (1), that the deed being unregistered was not admissible in evidence; (2), that the deed was intended to be a deed binding on the whole of the defendant's creditors under section 192, and, as such, required registration under section 194; (3), that section 194. applies to all deeds whatsoever, which are, or profess to be, or are obviously on the face of them intended to be, deeds of arrangement between a debtor and the whole body of his creditors; (4), that the scope of the act, 24 & 25 Vict. c. 134, is to subject all deeds of arrangement between a debtor and his creditors to the operation (to some extent at least) of the Bankrupt Laws, leaving it open to the parties, by express provision in their deeds, to qualify and restrain the application of such laws. *Hodgson* v. *Wightman*, 32 Law J. Rep. (N.S.) Exch. 147; 1 Hurls. & C. 810.

The power given to the Court of Bankruptcy for enlarging the time for registration, under the 194th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134),—which enacts, that every deed of assignment, &c., shall within twenty-eight days after the execution thereof by the debtor, or within such further time as the Court shall allow, be registered in the Court of Bankruptcy, and in default thereof shall not be received in evidence,—may be exercised after the twenty-eight days have elapsed, and after a prior application for extension of time has been refused; and a deed registered within the time so enlarged is admissible in evidence. *Wishart* v. *Fowler*, 33 Law J. Rep. (N.S.) Q.B. 125; 4 Best & S. 674.

A debtor resident abroad executed a power of attorney authorizing a person in this country to execute a deed of composition with his creditors. The execution of the power of attorney by the debtor and of the composition deed by the attorney was attested by solicitors:—Held, that the terms of the 3rd rule of the 192nd section of the Bankruptcy Act, 1861, had been sufficiently complied with, and that the deed ought to be registered. *In re Bell*, 2 De Gex, J. & S. 672.

### (*e*) *Effect of.*

#### (1) *Rights and Liabilities of the Parties.*

The 197th section of the Bankruptcy Act, 1861, gives to the trustees and creditors under a trust deed, duly registered, the same powers, rights and privileges as are possessed by assignees and creditors under a fiat:—Held, therefore, that such a trustee is entitled as a matter of course to summon as a witness any person whom he suspects to have property of the bankrupt in his possession, or supposes

to be indebted to the bankrupt. *Ex parte Alexander, in re Thinn and Flett*, 32 Law J. Rep. (N.S.) Bankr. 55; 1 De Gex, J. & S. 311.

The powers given by this section are, however, to be exercised with judicial discretion, and not merely in a ministerial way. Ibid.

After the execution and registration of a statutory composition deed, all creditors, whether assenting or not, are placed in the same position as creditors who have proved under a bankruptcy, and they are entitled to examine the debtor, though the object of the examination may be to invalidate the deed. But, *semble*, where a creditor holds the debtor in prison or seeks to withdraw property, or to withhold property that is claimed, from the influence of the trust deed, he ought not to be allowed to examine the debtor without submitting himself to the jurisdiction of the Court. *Ex parte Brooks, in re Brooks*, 33 Law J. Rep. (N.S.) Bankr. 41.

Where a debtor had no assets and executed a statutory composition deed for the mere purpose of defeating a creditor who had recovered judgment against him, the Court, acting under the 198th section of the Bankruptcy Act, 1861, gave leave to the creditor to issue execution on his judgment notwithstanding the deed. *Ex parte Morrison, in re Clunn*, 33 Law J. Rep. (N.S.) Bankr. 47.

A debtor who has executed a trust-deed for the benefit of his creditors is not, in the absence of express stipulation, entitled to receive the allowances directed to be made to bankrupts by the Bankrupt Law Consolidation Act, 1849, in the event of their estates realizing certain dividends. *Ex parte Gibbins, in re Gibbins*, 34 Law J. Rep. (N.S.) Bankr. 39.

An assignment by an executor of the testator's effects for the benefit of creditors, is valid as between the assignee and a judgment creditor. *The Wolverhampton and Staffordshire Banking Co.* v. *Marston, executrix*, 30 Law J. Rep. (N.S.) Exch. 402; 7 Hurls. & N. 148.

*Quære*—Whether such an assignment amounts to a *devastavit*? Ibid.

In reckoning the proportion of assenting creditors required, by section 192. of the Bankruptcy Act, 1861, to a composition deed under that section, debts due to secured as well as to unsecured creditors must be taken into account.—So held, in accordance with the decision of the Lords Justices in *Ex parte Godden, in re Shettle. Turquand* v. *Moss*, 33 Law J. Rep. (N.S.) C.P. 355; 17 Com. B. Rep. N.S. 15, 24: affirmed in Ex. Ch. by *Whittaker* v. *Lowe*, 35 Law J. Rep. (N.S.) Exch. 46.

S & Co., in business as iron-masters, being in embarrassed circumstances, assigned to trustees all their stock, &c., the deed containing powers for the trustees to carry on the business, under the name of a company, until the debts of the firm were paid. The deed was made for the benefit of creditors and with their assent, and contained clauses authorizing the creditors to accept the resignation of the trustees, to appoint new trustees and to alter the trusts, or direct the works to be discontinued. All the trustees were creditors of S & Co. The trustees who acted did carry on the business, and in the course of it their agents accepted bills in this form: "Per pro. S. Iron Co.":—Held, reversing the judgment of the Court of Common Pleas, that the creditors through these acts of the trustees were not liable as partners in the company upon such bills given to those who supplied the company with goods. *Cox* v. *Hickman* (House of Lords), 30 Law J. Rep. (N.S.) C.P. 125; 8 H. L. Cas. 268.

K, being indebted to M, to the defendant, and to other creditors, executed a bill of sale which recited the debt to M, and that he had applied to him for goods, which M had agreed to supply upon having the payment for the same secured in manner thereinafter mentioned. The bill of sale then assigned to M the whole of the household furniture, stock-in-trade, goods and effects upon the premises occupied by K, with a provision that if K should, upon demand in writing, fail to pay the amount already due and that which was then advanced, it should be lawful for M to take possession of and to sell the effects comprised in the deed. No advances of money were made, nor were any goods supplied at the time of the execution of the bill of sale. Three days afterwards the defendant called upon K, and, after some conversation about the bill of sale, prevailed on K to give him some of the goods out of the shop. Another creditor afterwards petitioned for an adjudication of bankruptcy against K, when M (who had seized the goods assigned to him by the bill of sale, and sold them) agreed to give up his claim under the security, and the creditors agreed, in order to avoid expense, that the bankruptcy should be annulled, K agreeing to execute a deed of assignment of all his property according to the provisions of the 24 & 25 Vict. c. 134. s. 192, in trust for the benefit of his creditors:—Held, that the execution of the bill of sale was an act of bankruptcy, and that the defendant had notice of it when he received the goods; and, secondly, that, having regard to the special circumstances that the trust-deed had been executed to avoid the cost of a bankruptcy, preserving to the creditors the same rights which they would have had under a bankruptcy, that it contained an assignment of all the debtor's property, and that as the debt of the petitioning creditor was in existence at the time of the giving up the bill of sale, the trustees were entitled to the same rights as if they had been assignees of a bankrupt, and to recover from the defendant in an action of trover the value of the goods of which he had possessed himself. *Topping* v. *Keysell*, 33 Law J. Rep. (N.S.) C.P. 225; 16 Com. B. Rep. N.S. 258.

(2) *In Answer to Actions by non-assenting Creditors.*

To a declaration, delivered the 9th of August, 1861, the defendant pleaded that, by a deed since the commencement of the action, and since the Bankruptcy Act, 1861, between the defendant, his sureties, and his creditors, reciting a meeting and resolution of creditors to accept a composition of 12*s.* 6*d.* in the pound by certain instalments guaranteed by third persons, the several persons creditors parties to the deed, granted to the defendant absolute liberty and licence to conduct and manage his business and affairs for the period of fifteen months, determinable as thereinafter mentioned, and that they would not, during the said period, sue, arrest, prosecute, impede, or molest the defendant, or seize, or intermeddle with his goods, &c., for or in respect of the debts then due to them, and that in case any of the creditors should act contrary to the agreement, the defendant should be thenceforth and for ever acquitted and discharged from the debts due to the

person acting contrary to the agreement, and all actions to be had or taken, for or in respect of the same, and that the agreement might be pleaded in release and in bar to all such debts, actions, &c., as effectually as if a release had been given under the hand and seal of the person who should act contrary to the agreement, and that in case the composition of 12*s.* 6*d.* should be paid by the instalments agreed upon, the deed should operate, and might be pleaded as a release; proviso, that the release and restraint on the creditors should be void in case of default or breach of agreement by the defendant. Averment, that the defendant and the other parties to the deed executed it on the 12th of October 1861, and that a majority in number, representing three-fourths in value of all the creditors whose debts amounted to 10*l.*, did, before the execution thereof by the defendant, in writing assent to and approve of the said deed, and averring the due attestation and registration of the deed in bankruptcy:—Held, on demurrer, that the plea was bad;—*semble*, because the action was brought before the date of the deed and before the Bankruptcy Act, 1861, and no step had been taken by the plaintiffs after the deed which could operate as a breach of the stipulations contained in it so as to make the deed pleadable as a release. *Oppenheimer* v. *Grieves*, 31 Law J. Rep. (N.S.) Exch. 375; 7 Hurls. & N. 533.

To a declaration upon a bill of exchange, the defendant pleaded a composition deed executed by himself and three-fourths in value of his creditors whose debts amounted to 10*l.* and upwards. By the deed, set out in the plea, the defendant agreed to set apart half his income until a composition of 5*s.* in the pound should be paid to all the creditors respectively. The creditors who executed the deed agreed thereby to accept "these presents in full discharge and satisfaction of their respective debts, claims and demands," against the defendant; and they, by the deed, released the defendant from all their debts and claims against him, and agreed that the deed might "operate as a defeasance pleadable in bar to or be otherwise set up as a defence to any action," &c. The deed also contained a proviso that it should not operate to prevent any of the creditors from claiming or realizing any security held by them, or from suing any person, other than the said debtor, liable for payment of such security, nor in any way prejudice or affect the rights or remedies of any such creditors, except as against the said debtor (the defendant). The plea then alleged performance of the several requirements of section 192. of the Bankruptcy Act, 1861:—Held, that the plea disclosed a good defence to the action. *Keyes* v. *Elkins*, 34 Law J. Rep. (N.S.) Q.B. 25; 5 Best & S. 240.

The plaintiff accepted a bill of exchange for the accommodation of the defendant. While the bill was running the defendant executed a deed of arrangement under the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. The plaintiff having afterwards taken up and paid the bill, brought an action against the defendant to recover the amount:—Held, that the deed was no answer to the action. *Mare* v. *Underhill*, 4 Best & S. 566.

A deed, under section 192, and in the form given in Schedule D. of 24 & 25 Vict. c. 134, by which the debtor assigned all his estate and effects to trustees for the benefit of creditors, if it contain no release, cannot be pleaded in bar to an action by a creditor. *Jones* v. *Morris*, 34 Law J. Rep. (N.S.) Q.B. 90; 6 Best & S. 198.

A composition deed, made between the defendant, a debtor, of the first part, certain trustees of the second part, and the creditors whose names were thereunto subscribed in the schedule of the third part, contained a clause, whereby the parties of the third part covenanted with the defendant that they would not sue, &c. him, and that if they did, the defendant should be discharged from all actions, suits, debts and demands of those by whom he was so sued, &c., and the deed be pleaded in bar:—Held, that if, on the true construction of the deed, this clause applied to non-assenting creditors, it was unreasonable, and that if it did not, there was no release by non-assenting creditors; and that in either view it was not pleadable in bar of an action by a non-assenting creditor. *Lyne* v. *Wyatt*, 34 Law J. Rep. (N.S.) C.P. 179; 18 Com. B. Rep. N.S. 593.

The mere agreement to accept a composition, under section 230. of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), without the payment or tender of the amount, does not release the bankrupt from liability. *Hazard* v. *Mare*, 30 Law J. Rep. (N.S.) Exch. 97; 6 Hurls. & N. 434.

To an action for goods sold, the defendant pleaded his bankruptcy, on his own petition, under the 12 & 13 Vict. c. 106, and the offer, under section 230, by him and one R of a composition of 2*s.* 6*d.* in the pound, to be paid in fourteen days after the second sitting appointed under that section, and the agreement, by nine-tenths of his creditors, to accept such composition, and the subsequent dismissal of the petition, and order to annul the bankruptcy; and that the offer of composition was made in consideration of the defendant having agreed to convey all the estate to R, and that the same was accordingly conveyed to him, with an averment that the defendant and R paid the composition to the other creditors, and had always been ready to pay the plaintiff; and payment into court of the sum:—Held, that the plea was no answer to the action. Ibid.

To a declaration for a debt due on a foreign contract entered into with the plaintiff abroad, a plea of a composition deed made and registered under the Bankruptcy Act, 1861, whilst the plaintiff resided abroad, by which the defendant covenanted to pay a certain composition in the pound to his creditors on a day since passed, must shew that the defendant paid or tendered such composition to the plaintiff, notwithstanding the plaintiff was abroad when it became payable. *Fessard* v. *Mugnier*, 34 Law J. Rep. (N.S.) C.P. 126; 18 Com. B. Rep. N.S. 286.

The want of an averment in such plea of payment or tender of the composition was held to be not cured by an averment that the defendant was always ready and willing to pay to the plaintiff the said composition according to the provisions of the deed, and that all conditions having been performed and all things having happened necessary in that behalf, the plaintiff became bound by the deed, as if he had executed the same. Ibid.

To a declaration by indorsee against drawer and indorser of a bill of exchange, the defendant pleaded a plea setting out a composition deed, whereby a

majority in number and three-fourths in value of his creditors, in consideration of the payment of the composition agreed upon before the 10th of April then next, agreed to accept a composition of 2s. 6d. in the pound in discharge of their respective debts, so far as they were able to do so without the consent or permission of, and without prejudice to the rights of third parties or sureties, but no further. The plea also alleged compliance with the requisitions of the 192nd section of the Bankruptcy Act, 1861, and a tender to the plaintiff of the composition in respect of his debt:—Held, on demurrer, that this deed, although containing no actual release in terms, was good under the Bankruptcy Act, 1861, so as to bind the plaintiff, as if he had executed it; and that the plea alleging a tender of the composition shewed a good defence to the action. *Garrod* v. *Simpson*, 34 Law J. Rep. (N.S.) Exch. 70; 3 Hurls. & C. 395.

A trust deed for the benefit of creditors, executed in the form given in Schedule D. of the 24 & 25 Vict. c. 134, cannot, without the addition of a clause of release, be pleaded by the bankrupt in bar to an action against him by a creditor. *Eyre* v. *Archer*, 33 Law J. Rep. (N.S.) C.P. 296; 16 Com. B. Rep. N.S. 638.

A deed of arrangement under the Bankruptcy Act, 1861, not on its face purporting to release the debts, cannot be pleaded in bar to an action. *The Ipstones Park Iron Ore Co. (Lim.)* v. *Pattinson*, 33 Law J. Rep. (N.S.) Exch. 193; 2 Hurls. & C. 829.

To an action on a promissory note, the defendant pleaded that by a deed between the defendant of the one part and S P, on behalf of and with the assent of the undersigned creditors of the defendant, of the other part, the defendant conveyed all his estate and effects to S P absolutely, to be applied and administered for the benefit of the creditors of the defendant, in like manner as if he had been duly adjudged bankrupt, and the creditors assenting thereto being satisfied that his estate would not realize more than 5s. in the pound, agreed to accept that sum in discharge of their respective debts, to be paid within twelve months from the date of the deed:—Held, that the plea was no answer to the action, and that the defendant could only avail himself of the deed by an application to the Court of Bankruptcy, or, after judgment, to a Court of law to stay execution. Ibid.

*Semble*—The deed was a valid deed of arrangement under the Bankruptcy Act, and, the requisites of the act having been complied with, was binding on non-executing creditors. Ibid.

A deed of composition by a debtor with his creditors under section 192. of the Bankruptcy Act, 1861, containing a release of the debtor by each of the creditors from *all* debts due from him to them respectively, cannot be pleaded in bar by a joint debtor to an action by a non-assenting creditor; for it extends to joint debts so as to release a joint debtor, it is bad, and not binding on non-assenting creditors. *Andrew* v. *Macklin*, 34 Law J. Rep. (N.S.) Q.B. 89; 6 Best & S. 201.

By a deed of composition registered under the Bankruptcy Act, 1861, the creditors agreed to accept payment of their debts by certain instalments, and they covenanted, "while the said instalments were duly and regularly paid by the debtor, not to sue the said debtor or enforce any judgment or other proceeding against him or his estate":—Held, that the deed could not, in the absence of any express stipulation to that effect, be pleaded as a bar to an action. *Ray* v. *Jones*, 34 Law J. Rep. (N.S.) C.P. 306; 19 Com. B. Rep. N.S. 416.

A plea of a composition deed within the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, made between the defendant and his creditors, relating to his debts and liabilities, and his release therefrom, is pleadable in bar to an action by a non-assenting creditor. Such a plea need not set out the deed. *Whitehead* v. *Porter*, 5 Best & S. 193.

A deed was executed by a debtor for the benefit of his creditors under the Bankruptcy Act, 1861. The deed did not contain a clause of release:—Held (affirming the judgment of the Court of Exchequer, 34 Law J. Rep. (N.S.) Exch. 60; 3 Hurls. & C. 508), that such a deed cannot be pleaded in bar to an action. *Clarke* v. *Williams* (Ex. Ch.), 34 Law J. Rep. (N.S.) Exch. 188; 3 Hurls. & C. 1001.

(3) *As a Protection to the Debtor from Process.*

A deed of composition and assignment between a debtor and his creditors, in order to be valid under the 192nd section of the Bankruptcy Act, 1861, must be for the benefit of all creditors, and must not exclude such creditors as shall not execute it within a certain time; and the certificate of registration is no protection under section 198, unless the deed itself be valid. *Dewhurst* v. *Kershaw*, 32 Law J. Rep. (N.S.) Exch. 146; 1 Hurls. & C. 726.

A debtor, arrested on a *ca. sa.*, after executing a good deed of arrangement under section 192. of the Bankruptcy Act, 1861, is, according to section 198, entitled to his discharge from custody on the deed being duly registered. *Baerselman* v. *Langlands*, 34 Law J. Rep. (N.S.) Exch. 3; 3 Hurls. & C. 433.

The certificate of the Registrar of the Court of Bankruptcy that a composition deed has been filed and registered is not available to the debtor for the purpose of protecting him from arrest, unless the deed of composition is a valid one; and a certificate founded on an invalid deed may be treated as void, without taking proceedings to set it aside. *Ilderton* v. *Jewell*, 32 Law J. Rep. (N.S.) C.P. 256; 14 Com. B. Rep. N.S. 665.

*Quære*, per *Williams*, *J.*, and *Willes*, *J.* whether, even if the certificate were founded on a valid deed of composition, the defendant in an action on a recognizance of bail could avail himself thereof. Ibid.

If a valid deed of composition be executed and registered as required by the Bankruptcy Act, a writ of *fi. fa.* issued by a non-assenting creditor after notice of the deed will be set aside. *Stone* v. *Jellicoe*, 34 Law J. Rep. (N.S.) Exch. 11; 3 Hurls. & C. 263.

A defendant, who did not plead a composition deed, under the Bankruptcy Act, 1861, when he had the opportunity, will not be allowed afterwards to avail himself of it for the purpose of defeating execution. *Whitmore* v. *Wakerley*, 34 Law J. Rep. (N.S.) Exch. 83; 3 Hurls. & C. 538.

(F) FRAUDULENT PREFERENCE.

Where a bankrupt trader compounded with his general creditors for 4s. in the pound, but gave as security to one creditor his I O U for the whole debt, in order to induce him to concur in annulling the bankruptcy, and afterwards, in consideration of

a loan, exchanged the I O U for bills which he accepted, the Court, at the instance of the trader, declared the bills to be invalid, but without costs. *Mare* v. *Warner*, 3 Giff. 100; *Mare* v. *Erle*, Ibid. 108.

W B, on the 3rd of December, 1862, in pursuance of a resolution passed on the 25th of November, 1862, at a meeting of his creditors, executed an assignment of the whole of his property to the plaintiffs, as trustees, to pay and discharge rateably all the debts due and owing from W B to his creditors (being such persons as would have been entitled to rank as creditors in bankruptcy if the said W B had been adjudged bankrupt upon a petition for that purpose filed on the 25th of November, 1862):—Held, that the deed was not void and fraudulent as against creditors within 13 Eliz. c. 5. *Evans* v. *Jones*, 34 Law J. Rep. (N.S.) Exch. 25; 3 Hurls. & C. 423.

(G) JURISDICTION OF THE COURT OF BANKRUPTCY.

A trust deed in the form given in Schedule D. of the Bankruptcy Act, 1861, and registered, &c. according to section 192, though not assented to by the prescribed majority of creditors, is (by virtue of the 194th and 197th sections) subject to the jurisdiction of the Court of Bankruptcy. *Symons* v. *George*, 33 Law J. Rep. (N.S.) Exch. 231; 3 Hurls. & C. 68.

Section 198. of the Bankruptcy Act, 1861, provides that, after notice of the filing and registration of a deed of composition, process shall not issue against the person or property of the bankrupt "without leave of the Court":—Held, that the Court of Bankruptcy is the Court here referred to. *Skelton* v. *Symonds*, 34 Law J. Rep. (N.S.) C.P. 151; 18 Com. B. Rep. N.S. 418.

After action commenced and before judgment a deed of inspectorship, executed by the defendant, was duly filed and registered, and a certificate thereof obtained; judgment was signed and the defendant's goods taken under a *fi. fa.* On an interpleader summons the sheriff was ordered to withdraw on the payment into court by the inspectors of a certain sum of money. The plaintiffs obtained a rule to shew cause why part of this money should not be paid to them in satisfaction of their judgment, on the ground that the deed ought to have been pleaded:—Held, that without leave of the Court of Bankruptcy they could not make their execution available, and that the inspectors were entitled to the money. *Whitmore* v. *Wakerley* distinguished. *Hartley* v. *Mare*, 34 Law J. Rep. (N.S.) C.P. 187; 19 Com. B. Rep. N.S. 85.

## DECEIT.

[See FRAUD AND MISREPRESENTATION.]

## DEED.

[See DEBTOR AND CREDITOR.]



### (A) EXECUTION.

#### (a) *When void.*

F signed the memorandum and articles of association of a company. After signature but before registration a sheet of articles was taken out and a new sheet substituted for it without his privity, but with the approbation of the persons when managing the company. There was a conflict of evidence as to whether the contents of the substituted sheet were identical with those of the old one, and whether there was not a material alteration:—Held, that the articles were not binding upon F, that the articles and memorandum must be taken as together constituting one instrument, and that F was not a contributory. *In re the United Kingdom Ship-owning Co., Felgate's case*, 2 De Gex, J. & S. 456.

Per *Turner, L.J.*—If the substitution of a sheet in a deed after execution does not *ipso facto*, without reference to the question whether there is any variation in the contents, make the deed void (as to which *quære*), at all events, it makes the deed void, unless it is most clearly proved that the contents of the old and substituted sheet are identical, or at least that there is no material difference between them. Ibid.

A mortgagor executed a mortgage-deed to A B, the solicitor who prepared it. On the following morning A B filled in the date, the names of the tenants, and the date of the proviso for redemption:—Held, that this did not render the deed void. *Adsetts* v. *Hives*, 33 Beav. 52.

#### (b) *Delivery.*

##### (1) *What amounts to a Delivery.*

In an action on a covenant which had been entered into by certain creditors of C (of which the defendant was one) with the plaintiffs, who were trustees for such creditors, there was an issue taken on a plea of *non est factum*. At the trial, there was evidence that the deed had been signed for the defendant by his son; and that on its being afterwards shewn to the defendant, he was asked if the son had authority to execute it for him, when he stated his son had authority, and that he adopted it. It was also shewn that the defendant had subsequently confirmed the proceedings which had been taken by the plaintiffs as trustees under the deed:—Held, that there was evidence of a delivery of the deed by the defendant, sufficient to sustain a verdict for the plaintiffs, notwithstanding the absence of proof of the son having been authorized to execute the deed by an instrument under seal. *Tupper* v. *Foulkes*, 30 Law J. Rep. (N.S.) C.P. 214; 9 Com. B. Rep. N.S. 797.

##### (2) *Complete Delivery; Escrow.*

A deed (which by arrangement was to be executed

in duplicate, one to be prepared by each party and to be interchanged between them), was executed by the grantee, but not attested, and was by him sent to the solicitor of the grantors to procure their execution; and they accordingly signed, sealed and delivered it:—Held, that this was a complete delivery, whereby the estate passed; and that the above arrangement did not render the deed an *escrow* until the duplicates were interchanged. *Kidner* v. *Keith*, 15 Com. B. Rep. N.S. 35.

### (B) VALIDITY OF.

#### (*a*) *Incorrect Statement of Consideration.*

A deed which incorrectly recites the consideration of a contract on which a conveyance was executed, does not thereby warrant a suit to set aside the contract, but only to reform the conveyance. *Harrison* v. *Guest*, 8 H.L. Cas. 481.

Where no fiduciary relation exists between two parties dealing for the sale and purchase of an estate, mere inadequacy of consideration or irregularity in the statement of it in the deed of conveyance is not sufficient to impeach the contract. Ibid.

A was the possessor of a small property in land. B, a neighbouring landowner, had formerly offered to purchase the property, but his offer had been refused. A grew old, and became ill: he proposed some arrangement; and the land was conveyed to B. The deed of conveyance truly recited an advance of money to pay off a mortgage on the land, and then it recited other money considerations. Instead of these money considerations, the real agreement was that B should allow A to live in a certain cottage, occupied by one of B's tenants, providing him there a bedroom and sitting-room and attendance, and supplying him with food from B's table. This deed was prepared by B's solicitor: it was sworn in evidence that A had refused to have another solicitor called in, and that the statements of the latter class of money considerations in the deed were only made as a security to A in case the board and lodging, &c. should not be properly provided. In a suit by persons whom many years before he had made his devisees to set aside this deed of conveyance,—Held, that there being no actual fraud proved (though it was charged), the irregularities in the statement contained in the deed were not sufficient to make a Court of equity set aside the transaction. Ibid.

Observations on the framing of deeds in such cases. Ibid.

#### (*b*) *Family Arrangement.*

Two sisters joined their two brothers in executing a deed to secure during their respective lives an annuity of 200*l.* a year from each for S, another brother, his wife and children, in the same manner and under restrictions similar to those contained in their father's will respecting a legacy given to S, his wife and children. The annuities were regularly paid, and S died upwards of fourteen years after the date of the deed. Upon a bill filed by the two sisters, alleging a recent discovery that the annuities were to be continued to the wife and children, and that the intention was that they should be payable only during the respective lives of each donor and S, and asking that the deed might be altered,—Held, by the Master of the Rolls, and affirmed by the Lords Justices, on appeal, that in the absence of fraud and undue influence, and notwithstanding the absence of advice from a separate solicitor, the future operation of the deed could not be restrained after it had been made known to the donors, and acted upon for a long period of years, when the mistake insisted upon was supported only by the evidence of the parties interested in setting the deed aside. *Bentley* v. *Mackay*, 31 Law J. Rep. (N.S.) Chanc. 697; 31 Beav. 143.

A mutual agreement by several to grant an annuity to a third party may be a consideration sufficient to support the grant. Ibid.

#### (*c*) *Voluntary and Fraudulent Conveyance.*

The statute of 13 Eliz. c. 5. extends to future as well as existing debts, and a deed, having for its object to defraud future creditors, is void under that statute. *Barling* v. *Bishopp*, 29 Beav. 417.

After notice of trial in an action of trespass, the defendant executed a voluntary conveyance of real estate to his daughter. The verdict went against him, and he afterwards took the benefit of the Insolvent Debtors Act:—Held, that the conveyance was void under the 13 Eliz. c. 5, it being intended to defeat the plaintiff in the action. Ibid.

A debtor, during his last illness, assigned two policies of assurance on his life, for 500*l.* and 300*l.*, to a creditor, in consideration of a debt of 174*l.* 3*s.* 6*d.* He died within a month afterwards, intestate. The policies were paid to the assignee. Upon a bill by the administrator of the intestate for the administration of the estate,—Held, that policies of assurance were securities for money, within the 1 & 2 Vict. c. 110. s. 12; that the assignment was voluntary and void under the 13 Eliz. c. 5; and that the deed could only stand as a security for the debt due to the party who obtained the assignment. *Stokoe* v. *Cowan*, 30 Law J. Rep. (N.S.) Chanc. 882; 29 Beav. 637.

### (C) CONSTRUCTION AND OPERATION OF.

#### (*a*) *What Property passes.*

When a close of land adjoins a highway the presumption of law is, that half of such highway, *usque ad medium filum*, passes with the conveyance of the close; and such presumption is not rebutted by the fact that the close is separated from the highway by a fence, and is defined in the conveyance by admeasurement and reference to a plan which did not include such highway. *Berridge* v. *Ward*, 30 Law J. Rep. (N.S.) C.P. 218; 10 Com. B. Rep. N.S. 400.

Leaseholds which were not specified in a deed, held not to pass by the general words all other "property and effects." *Hopkinson* v. *Lusk*, 34 Beav. 215.

By a deed executed by a trustee of a banking company on his retiring, he assigned three specified policies held for securing debts due to the bank and the debts themselves. He also assigned leaseholds mortgaged to him for securing a debt due to the bank, "and all other moneys, securities, property and effects" vested in him and four others as trustees for the company:—Held, the leaseholds Y, belonging to the bank absolutely, and vested in the

retiring trustee and the same other four trustees, but which were not referred to in the deed, did not pass under the above general words. Ibid.

(*b*) *Merger of Simple Contract Debt.*

The plaintiffs lent M 650*l.* on the security of a mortgage of certain property, with a covenant by M to repay the 650*l.*, with interest at 5*l.* per cent., on the 22nd of June, 1864; and as the mortgage was not a sufficient security for more than 500*l.*, the loan was made on the further security of the promissory note of M and two sureties for 150*l.*, payable on demand, with interest at 4*l.* 10*s.* per cent. The promissory note, which it was agreed between the plaintiffs and M should be a collateral security to the mortgage-deed, was made and given to the plaintiffs on the 7th of December, 1863, when 150*l.*, part of the loan, was advanced to M; but the mortgage-deed was not executed until the 22nd of December, 1863. The deed contained no reference to the note, and the sureties who signed the note were not parties to the deed:—Held, that the debt secured by the note did not merge in the deed, and that, though the remedy on the covenant could not be enforced before the 22nd of June, 1864, time was not given to M so as to discharge the liability of the sureties on the note. *Boaler* v. *Mayor*, 34 Law J. Rep. (N.S.) C.P. 230; 19 Com. B. Rep. N.S. 76.

(D) Reforming for Mistake.

A deed can only be rectified on the ground of mistake when the mistake is common to all parties. *Bentley* v. *Mackay*, 31 Law J. Rep. (N.S.) Chanc. 697; 31 Beav. 143.

## DEFAMATION.

[See Libel—Slander.]

## DEFENCE ACT.

Applications relating to moneys paid into court under the Defence Acts must be made by summons at chambers. *In re Defence Act*, 1842, *and Ordnance Board Transfer Act*, 1855, *and Maynard's Trusts*, 30 Law J. Rep. (N.S.) Chanc. 344.

Under the Defence Act, 1860, certain lands were taken absolutely by the Secretary of State for War, and other lands were required to be kept free from buildings. The amount of compensation for both classes of land was agreed upon; and the plaintiffs, by their bill, claimed interest at 5*l.* per cent. on the amount paid as compensation for the lands required to be kept free from buildings from the date of the agreement to the time of payment:—Held, on demurrer, that the compensation paid for lands required to be kept clear of buildings was only a payment for damage, and did not carry interest. *The Earl of Suffolk* v. *Lewis*, 32 Law J. Rep. (N.S.) Chanc. 232; 1 Hem. & M. 369.

Upon a petition to obtain out of court the purchase-money for lands taken under the Defence Act, 1860 (23 & 24 Vict. c. 112), it is not necessary to serve the Secretary of State who paid it in. A fund, paid into court for the purchase, under the Defence Act, of lands, which were subject to contingent charges, was ordered to be paid out to the trustees, they having powers to sell the lands and to give discharges for the purchase-money. *Ex parte Morshead, in re Defence Act*, 33 Beav. 254.

## DEMANDING MONEY WITH MENACES.

[See Threats.]

## DEPOSITIONS.

[See Evidence.]

## DESCENT.

Where under a devise the whole fee is not exhausted, the reversion results to the testator as part of his old estate, and the heir takes it by descent and not by purchase. Therefore, under the law of inheritance as it existed prior to the 3 & 4 Will. 4. c. 106, if the heir has died intestate without being seised of such resulting interest, the descent must be traced from the ancestor. *Buchanan* v. *Harrison*, 30 Law J. Rep. (N.S.) Chanc. 74; 1 Jo. & H. 662.

The Court will not allow any legal interest existing in the heir to prevent the devolution of the equitable interest in the course in which it would pass if the legal interest were separate. Therefore, where the heir was seised of the legal estate as trustee under his ancestor's will, and the ultimate trusts in the fee failed for remoteness, it was held, that his legal estate did not so unite with his beneficial interest as to constitute a seisin of the latter. Ibid.

There may, however, be a *possessio fratris* of an equitable as well as of a legal estate, and any dealing by the heir with his beneficial interest in the reversion will be sufficient to constitute a seisin, so that on his death intestate a sister of the whole blood will be entitled, to the exclusion of a brother of the half-blood. Ibid.

## DETINUE.

(A) When maintainable.
- (*a*) *For Title-Deeds.*
- (*b*) *For Letters.*
- (*c*) *For Grant of Arms by Heralds' College.*

(B) Action claiming Writ of Injunction.

(A) When maintainable.

(*a*) *For Title-Deeds.*

Declaration for detaining title-deeds of the plaintiff's property, whereby he was prevented from selling or mortgaging it. Plea, that the deeds were entrusted to the defendant by one G, since deceased; that the plaintiff claims the right to the deeds as devisee under G's will, and never had any other interest in them; that the deeds were lost by the defendant before G's death, and the defendant never had possession of them since the death:—Held, by *Wightman, J.*, that the plea was bad: inasmuch as the plaintiff was entitled to maintain detinue for the

deeds, and, as on the pleadings they must be taken to be in existence and ought to be in the defendant's possession, it was no answer to say that they had been lost without shewing that it was not by the defendant's default; by *Blackburn, J.*, that the plea was good, as it must be taken that the defendant never had any control over the deeds after the plaintiff acquired any property in them. *Goodman* v. *Boycott*, 31 Law J. Rep. (N.S.) Q.B. 69; 2 Best & S. 1.

He who has the present legal estate for life can maintain an action to recover the title-deeds against one who is a contingent remainderman in fee. *Allwood* v. *Heywood*, 32 Law J. Rep. (N.S.) Exch. 153; 1 Hurls. & C. 745.

On the death of a tenant for life, who had granted a lease under a power in a will, the reversioners were held entitled to recover the title-deeds from an assignee of the lease, with whom they had been deposited as security for money advanced to the tenant for life and the lessee. *Easton* v. *London*, 33 Law J. Rep. (N.S.) Exch. 34.

*(b) For Letters.*

The receiver of letters has such a property in the paper on which they are written that he may maintain an action of detinue against the sender, if by any means the letters get back into the possession of the latter. *Oliver* v. *Oliver*, 31 Law J. Rep. (N.S.) C.P. 4; 11 Com. B. Rep. N.S. 139.

*(c) For Grant of Arms by Heralds' College.*

A obtained from the Heralds' College a grant of arms, to be borne by him and his descendants and the descendants of his brother. He died without issue, leaving two nephews, the sons of his brother:—Held, that the nephews had not such an exclusive interest in the exemplification or instrument issued to A by the College as to entitle them to maintain an action of detinue against his widow, who retained possession of it, and to whom all the household effects were bequeathed. *Stubs* v. *Stubs*, 31 Law J. Rep. (N.S.) Exch. 510; 1 Hurls. & C. 257.

One of the nephews and another person were appointed joint executors of A's will:—Held, by *Bramwell, B.*, that even assuming the executors could claim the document by action, the provisions of the Common Law Procedure Act, 1860, section 19, by which judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, did not apply to this case, where the two nephews were the plaintiffs, so as to enable the nephew, executor, to recover. Ibid.

(B) Action claiming Writ of Injunction.

The plaintiff, a photographic artist, lent to T, the publisher of an illustrated newspaper, certain photographic portraits to be engraved and published in T's newspaper. T having executed an assignment for the benefit of creditors, the newspaper and plant were sold by auction, and some of the original negatives and photographic portraits lent to him by the plaintiff were, among the other effects on the premises, sold by public auction and bought by the defendant, who made reduced copies, which he published and sold without the permission of the plaintiff. The plaintiff declared in trespass for taking the portraits, claiming damages from the defendant for making and selling reduced and other copies of the same, and also in detinue for the portraits and negatives, and claimed a writ of injunction to restrain the defendant from continuing to make and sell such reduced and other copies. The plaintiff had a verdict for 40*s.* on the first count, and for 25*l.* on the second count:—Held, that the plaintiff was entitled to retain the verdict on both counts, and to the writ of injunction as claimed. *Mayall* v. *Higbey*, 31 Law J. Rep. (N.S.) Exch. 329; 1 Hurls. & C. 148.

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## DEVISE.

[See Legacy—Way—Will.]



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### (A) Construction of, in general.

*(a) General Limitations of Estates.*

A testator gave, devised and bequeathed all his real and personal estate to a trustee upon trust for

A B and his assigns, so that he should be entitled to the rents and profits thereof for life, and after his decease upon trust for the heir or heiress-at-law of A B, his or her heir and assigns for ever:—Held, that A B was only entitled to an estate for life, with a limitation in fee simple by way of purchase to the person who at his death should answer the description of his heir or heiress-at-law. *Greaves* v. *Simpson*, 33 Law J. Rep. (N.S.) Chanc. 641.

Held, adhering to *Eddels* v. *Johnson* (27 Law J. Rep. (N.S.) Chanc. 302; 1 Giff. 22), and dissenting from *Dady* v. *Hartridge* (1 Dr. & S. 236) and *Rotheram* v. *Rotheram* (26 Beav. 465), that every devise of lands, whether in particular or general terms, is equally, where contained in a will governed by the Wills Act (1 Vict. c. 26), as where contained in a will governed by the old law, specific; and therefore, that, under the new law as well as the old, realty included in a general or residuary devise is not liable to the payment of the testator's debts in priority to realty included in a specific devise, but the two classes of estate are liable *pari passu* to the payment of such debts. *Clark* v. *Clark*, 34 Law J. Rep. (N.S.) Chanc. 477.

A gift by will dated in 1838 to J M "of the house she lives in, and grass for a cow in G field," part of another estate, passes an estate in fee in the house, but it will not create a permanent interest in the land of the other estate. *Reay* v. *Rawlinson*, 30 Law J. Rep. (N.S.) Chanc. 330; 29 Beav. 88.

Upon a gift, after the failure of a previous devise "of all my sister A's family, with a gift to J R of the D estate, and the rest to be sold and divided equally,"—Held, that J R, one of A's family, took the D estate in fee; but that it did not deprive him of his right to participate with the other members of the family in the proceeds to arise from the sale of the other estates. Ibid.

A testatrix devised to trustees all her real estates at Anglesey, and all other real estates which she might have at her decease, or had power to dispose of by will, upon certain trusts therein mentioned. The will contained powers for the trustees to lease and sell the estates, and to pay off incumbrances. There were then four legacies given, amounting to 400*l*., which were charged upon her real estates, in discharge of her personal property, thereby or by any codicil thereto, specifically bequeathed; and there followed a bequest of plate, furniture, and other effects, discharged from payment of debts, funeral or testamentary expenses, which she charged upon her real estates, in case her other property should be insufficient. By a codicil dated on the same day as the will, the testatrix devised two other real estates to certain persons named therein, without the intervention of trustees. The personal estate was insufficient for payment of debts, and a bill was filed to administer the estate, and to have a declaration as to the liabilities of the real estate to payment of debts and legacies:—Held, that since the Wills Act, a residuary devise of real estate is not specific; that the estate devised by the will, and the two estates devised by the codicil, were specifically devised, and must contribute rateably to the payment of both the debts and legacies, and each of the mortgaged estates must bear its own burden. *Barnewell* v. *Iremonger*, 30 Law J. Rep. (N.S.) Chanc. 13; 1 Dr. & S. 242.

An issue was directed to try whether a particular devise formed part of the will of a testator; but upon appeal this order was discharged, and liberty was given to the heir-at-law to bring an ejectment. *Taylor* v. *Brown*; *Arnold* v. *Brown*, 31 Law J. Rep. (N.S.) Chanc. 453.

By his will a testator gave his real and personal estate to trustees, on trusts for his sister. By a codicil he gave a legacy to his eldest nephew, whom he called his "heir-at-law," and he directed that the codicil should not give to his trustees, for the benefit of his sister, any after-acquired freeholds or copyholds; but that the same as to freeholds should descend to his heir-at-law, and as to customary estates to his customary heir. At the testator's death his sister was his heiress-at-law and customary heir:—Held, that she was not excluded from taking by descent the after-acquired copyholds. *Gould* v. *Gould*, 32 Beav. 391.

A testator made a codicil to his will in these words:—"I acknowledge T N, my second cousin, to be my next-of-kin and heir-at-law to all my real and personal property situate in the parish of M":—Held, a good devise to T N of property in the parish of M. *Parker* v. *Nickson*, 32 Law J. Rep. (N.S.) Chanc. 397; 1 De Gex, J. & S. 177.

A codicil contained the following expression:—"T N, my second cousin, is my next-of-kin and heir-at-law, as my brother J is dead and has left no issue." Held, that it could not be inferred from this that the testator was ignorant of the state of the family of another brother, who had left issue. Ibid.

Where a will contained a devise of hereditaments "in the county of Hants," described as "my Tedworth Estate," and it was proved that the testatrix had an estate at Tedworth extending into two counties, Hants and Wilts, but which had been dealt with without regard to the county division, and the will contained various indications derived from the limitations of the estate and the value of the Hants and Wilts portions of it tending to shew that the testatrix must have intended to deal with the whole estate:—Held, that, although no one of these circumstances alone would have controlled the words of the devise, their cumulative force was sufficient to justify the rejection of the words in the "county of Hants" as *falsa demonstratio*. Ibid.

Devise of real and leasehold estates together to A for life and after his decease to the male issue of the body of A in equal shares and proportions, the leaseholds being the bulk of the property:—Held, that A took an estate tail in the freeholds and an estate for life only in the leaseholds. *Jackson* v. *Calvert*, 1 Jo. & H. 235.

In construing a will of real estate the Court will look at the nature and circumstances of the property, and at the value of the subjects of the various devises; and if the whole will, read by the light of such circumstances, discloses an intention inconsistent with restrictive words in the description of the subject of the devise, those restrictive words may, as matter of construction, be rejected as *falsa demonstratio*. *Stanley* v. *Stanley*, 2 Jo. & H. 491.

Evidence of the intention of a testator or of mistake in the preparation of his will, is not admissible, and an issue will not be directed on this ground to try whether particular restrictive words were or were not part of the will. Ibid.

Leaseholds were, by deed, conveyed to trustees

in trust for the settlor for life, and after her decease, in trust to assign them to T, his executors, &c., absolutely. But if T should die without leaving any child living at the time of his decease, then in trust to assign to P, &c.:—Held, on the context, that the death referred to was not confined to a death in the life of the tenant for life, and that T did not, upon the death of the settlor, become absolutely entitled to the leaseholds. *Milner* v. *Milner*, 33 Beav. 276.

(*b*) *Condition.*

W O devised an estate to his son H O in fee simple, and declared that it was his "earnest hope," and he "particularly requested" that his son should keep the devised estate, and all such real estate as he was or might become entitled to under certain settlements, "or otherwise howsoever," and not to sell, alien, or dispose of the same, except by way of exchange, or for reinvesting the value in the purchase of other estates; and in case H O should die without leaving issue male of his body him surviving, the testator expressed his anxious desire that he should so settle and devise the estates so devised to him, and also the estates to which he was or might become so entitled as aforesaid, in such manner and to such persons that the same might continue in the name of O:—Held, that H O took an estate in fee simple in the devised estate unfettered by any condition. *Hood* v. *Oglander*, 34 Law J. Rep. (N.S.) Chanc. 528; 34 Beav. 513.

A testator by his will gave the whole of his real and personal property to his sister for life, and by a codicil, made on the same day, he expressed his desire that his sister should do what she pleased with the remaining property, excepting a tenement called W M and 1,400*l.* stock, of which his sister should only receive the rent and interest for life, and afterwards to her eldest son on his taking the name of Millard; but should he refuse to take that name, or should his sister depart this life without a son, then the said tenement and stock should go over to his cousin T P on his taking the name of Millard, and so on to his heirs, each taking the said name, none of them being allowed to inherit the property who should not take or possess the name of Millard. The sister survived, and her eldest son received at baptism, together with other names, that of "Millard":—Held, first, that the testator's sister took an estate for life with remainder in fee to the son who should first come into *esse*, to vest immediately on his birth; secondly, that the condition as to taking the name of Millard was a condition subsequent; and, thirdly, assuming the condition not to be invalid for remoteness, that the name being given in baptism was sufficient compliance therewith. *Bennett* v. *Bennett*, 34 Law J. Rep. (N.S.) Chanc. 37; 2 Dr. & S. 266.

Devise of real estate to A for life, and after her decease, to B and C and D and E (an infant), "provided she lives to attain the age of twenty-one":—Held, that this was a condition subsequent, and that the tenant for life having died during the minority of E, E was entitled to her share of the rents until she attained twenty-one. *Simmonds* v. *Cox*, 29 Beav. 455.

Property was by will limited to the defendant, on condition of his settling some Scotch estates within a limited time on trusts, the validity and effect of which were doubtful. The defendant settled the estates within the time in general terms, on the persons on whose behalf the condition was imposed:—Held, that this was a sufficient compliance with the condition. *Scarlett* v. *Lord Abinger*, 34 Beav. 338.

(*c*) *Period of Vesting.*

A testator devised real estate to his wife for life, directing that on her death it should be shared, share and share alike, amongst twelve persons *nominatim*, "or the survivors of them." All the twelve survived the testator, but only six survived the tenant for life:—Held, reversing the decision of *Wood, V.C.*, that there was no such settled rule of construction applicable to gifts of real estate respecting the period to which the survivorship should be referred, as prevented the Court from ascertaining that period simply by the intention of the testator, as gathered from the words of the particular devise when construed in their natural and ordinary sense; and that the testator had sufficiently expressed an intention to have these words as used by him construed with reference to the death, not of himself, but of the tenant for life, and that the six devisees who survived the tenant for life were alone entitled. *In re Gregson's Trusts*, 34 Law J. Rep. (N.S.) Chanc. 41; 2 De Gex, J. & S. 428.

Per *Turner, L.J.*—Words of survivorship ought not to be construed as referring to the event of the devisee dying in the testator's lifetime, if there be any other period to which they can reasonably be referred. Ibid.

*Semble*—The rule of construction as laid down in *Cripps* v. *Wolcott* (4 Madd. 11) applies as well to real as to personal estate. Ibid.

*Stringer* v. *Phillips* (1 Eq. Ca. Abr. 292) and *Doe* v. *Prigg* (8 B. & C. 231; 6 Law J. Rep. K.B. 296) questioned. Ibid.

A testator devised freeholds and leaseholds to trustees, upon trust for his wife for life; remainder for E A and S G for their lives; and if either should die without leaving issue, upon trust for the survivor for life; but if either should die leaving issue, then one moiety to the children of E A and one moiety to the children of S G, "and to their respective heirs, executors and assigns, as tenants in common, the said children to become beneficially interested on the death of their respective parents":—Held (affirming the decision of the Master of the Rolls), that the children of E A and S G acquired vested interests respectively on their births, and not upon the death of their respective parents. *M'Lachlan* v. *Taitt*, 30 Law J. Rep. (N.S.) Chanc. 276.

A testator gave his residuary real and personal estate to his daughter for life, and afterwards he directed his trustees to "pay, transfer and divide" his residuary estate between his children, and (by substitution) the issue of such as should have died in his lifetime leaving issue living at his decease. He subsequently authorized his trustees in their discretion, if they should think fit, to pay the male issue their shares at any time between attaining twenty-one and thirty, with power of maintenance and advancement in the meanwhile, but he directed that the shares of female issue should be "vested" at twenty-one:—Held, that the shares of the issue vested on the death of the daughter. *Barnet* v. *Barnet*, 29 Beav. 239.

A testator, who was entitled to a reversion expectant on the death of A and B without issue living at their death, devised it in trust to sell and divide the produce between his six daughters or such of them as should be then living, and the children of such of them as should be dead, the children taking their parents' share. But, if only one daughter survived A and B, she was to take the whole, and the heir-at-law was to take if no daughter or child of a daughter should be living at the death of A and B:—Held, that the shares of the children of the daughters vested not at their mother's death, but at the death of the survivor of A and B. *Lewis* v. *Templer*, 33 Beav. 625.

(*d*) *Executory Trust.*

A testator devised his residuary real estate to his son G H D, and directed him to settle the F estate, which was included in the devise, to the use of G H D for life, with remainder to his first and other sons successively in tail male, or tail general, or in tail male with remainder in tail general, or otherwise in tail as he should think proper, with remainder to H T D for life, with remainders over, and an ultimate limitation to the survivor of G H D and H T D, his heirs and assigns. And the testator directed that such settlement should contain such powers of jointuring, of charging with portions for younger children, of sale and exchange, &c., as G H D should direct, and should also contain all other usual and proper provisions for giving effect to his intentions as therein expressed, and all such other powers and provisions as counsel should advise. There was a large quantity of timber on the F estate: Held, that in settling the property the estates for life ought not to be limited without impeachment of waste, but that powers must be given to the trustees to cut timber in a due course of management for the benefit of all parties interested. *Davenport* v. *Davenport*, 33 Law J. Rep. (N.S.) Chanc. 33; 1 Hem. & M. 775.

(*e*) *Contingent Remainders.*

A testator devised freeholds, as to one-fifth to J H for life, with remainder to all and every his children who should attain twenty-one, with remainder over if there should be no child who should attain twenty-one; and bequeathed leaseholds to trustees "in trust for such person or persons as should from time to time be entitled to the freeholds." J H died leaving one child only, W J O H, then under twenty-one, but who subsequently attained that age:—Held, upon a bill filed by W J O H, against the trustees, claiming both the corpus and the intermediate rents (which had been accumulated by the trustees during his minority) of one-fifth of the leaseholds: first, that assuming the limitation of the freeholds to be a contingent remainder, so that it failed at A's death, still this failure, by reason only of a feudal rule, would not prevent the Court from ascertaining by reference to the gift of the freeholds, as if it had been good by way of executory devise, what persons were intended to take thereunder, and consequently that W J O H was, in any event, entitled to the corpus of one-fifth of the leaseholds; secondly, that having regard to the peculiar terms of the referential gift, the question whether W J O H took the intermediate rents of the leaseholds, depended upon whether he would take the intermediate rents of the freeholds—in other words, upon the question whether the remainder in the freeholds was vested or contingent; thirdly, following *Festing* v. *Allen* (12 Mee. & W. 279; 13 Law J. Rep. (N.S.) Exch. 74), and dissenting from *Browne* v. *Browne* (3 Sm. & Giff. 568; 26 Law J. Rep. (N.S.) Chanc. 635), that the remainder to the children of A who should attain twenty-one was a contingent and not a vested remainder, and therefore that the intermediate income of the one-fifth of the leaseholds fell into the residuary personal estate. *Holmes* v. *Prescott*, 33 Law J. Rep. (N.S.) Chanc. 264.

The rules laid down in *Hodgson* v. *Lord Bective* (1 Hem. & M. 376; 32 Law J. Rep. (N.S.) Chanc. 489), respecting the destination of the income of property contingently devised and bequeathed, adhered to. Ibid.

A testator, in 1827, devised land to trustees, their heirs and assigns, upon trust to stand seised of the land during the life of W, and until the testator's debts and legacies should be satisfied, upon trust to let the land, and to apply the rents in discharge of the debts and legacies until the same should be fully paid, and thenceforth to pay the rents to W for life; and after the death of W, and the payment of the debts and legacies and the expenses of the trust, the testator devised the land to the heirs of the body of W, with remainder to his own right heirs. The trustees, after paying the debts and legacies, conveyed the legal estate to W for his life, and W suffered a recovery to the use of himself in fee. *Collier* v. *M'Bean*, 34 Law J. Rep. (N.S.) Chanc. 555; 34 Beav. 426. (See as to this case, 35 Law J. Rep. (N.S.) Chanc. 144.)

In a suit for specific performance by W against a purchaser from him,—Held, that the trustees took under the will an estate determinable on the death of W and payment of the debts and legacies; that the estate limited to the heirs of the body of W was a legal estate; that the conveyance by the trustees to W did not enable him to defeat the contingent estate limited to the heirs of his body; and that if such conveyance had had that effect, the Court of Chancery would have relieved against it as a breach of trust. Ibid.

(*f*) *Implied Devise.*

A testator by will devised estates to three persons upon trusts, and appointed them executors of his will. By a codicil he directed that one of the three (by name) should not be a trustee and executor, but that the other two and another (by name) should be the executors of his will:—Held, that the estates were, by implication, devised to the three named in the codicil. *In re Turner*, 30 Law J. Rep. (N.S.) Chanc. 144.

(*g*) *Implication of Cross-Remainders.*

A testator devised real estate to J S for life, with remainder to his children as tenants in common in tail, and in case any one or more of the children should die without issue, then the share or shares of him, her or them so dying should go to the eldest surviving son for the time being of J S in tail, and in case of no such son, then to the other or others of the children of J S as tenants in common in tail; and in case all such children should die without

issue, then over. There were six children of J S, three of whom died without issue in the lifetime of their eldest brother A. Then A died, leaving him surviving B, a brother, and C, a sister, the latter of whom contended that the words "share or shares" were not sufficient to carry over to B the three-sixths which A took by accruer; and that as to these shares, cross-remainders must be implied to B and C, as tenants in common:—Held, that as the will shewed an intention to accumulate the shares of such of the tenants in common as died without issue upon the eldest surviving son for the time being, it would be an unreasonable construction first to restrict the word "shares" to original shares only, and then to imply cross-remainders as to the accrued shares, and that under the remainder to the eldest surviving son for the time being the shares which accrued to A (as well as his original share) vested in B as tenant in tail general. *Dutton* v. *Crowdy*, 33 Law J. Rep. (N.S.) Chanc. 241; 33 Beav. 272.

(*h*) *Wife's Estate.*

If husband and wife have issue, and the wife take by devise an estate in fee in certain lands, and so the husband become tenant by the curtesy initiate, a term for years which the husband previously had in the same lands will not, during the wife's life, merge either in his estate as such tenant by the curtesy, or in the estate which he has in the lands in right of his wife. *Jones* v. *Davies* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 116; 7 Hurls. & N. 507.

(*i*) *After-acquired Property.*

In 1840 a testator devised as follows: "I give and devise to my wife, all my part, share, estate, or interest of and in the dwelling-house or tenement, and likewise the several closes or parcels of land hereinafter mentioned (describing them). And I also give and bequeath all my goods and chattels, dwelling-house or tenement heretofore mentioned, unto my said wife, for her use and interest during the term of her natural life; and after her decease, I give and devise all my property, real and personal, unto my heir or heirs to be equally divided among them and as joint heirs of this my above-mentioned property." Several years afterwards the testator became possessed of two other closes and two cottages, and died in 1850:—Held, that the after-acquired property passed under the will, and the testator's wife took a life interest in it. *Jepson* v. *Rey*, 3 Hurls. & N. 873.

(*k*) *Meaning of particular Words.*

(1) "*And premises.*"

A testator devised a messuage "and premises" situate No. 4, Turnham Green Terrace, held of the Prebend Manor:—Held, that a small piece of garden severed from the house No. 4 by a road, but held under the same manor and usually occupied therewith, passed by the devise. *Hibon* v. *Hibon*, 32 Law J. Rep. (N.S.) Chanc. 374.

A testator devised his estates to trustees upon trusts for payment of certain debts and annuities. As to the S estate, the trustees (after a special purpose after mentioned) were to pay the rents to his eldest son for life, afterwards to his eldest grandson for life, and after his decease for the first and other sons of such grandson, with remainders over. Another estate was similarly disposed of for a second son and his issue. The testator gave pictures, plate, &c. as heir-looms with the S estate. The special trust was that the surplus rents of the real estate should be applied in aid of the personal estate until all the testator's debts, liabilities, mortgages and legacies should be paid. The testator gave power to the trustees to repair his mansion-houses and insure them and their contents against fire, and to make improvements, and declared that they might, if they should think proper, permit the person entitled for life or any greater estate in the S property, to occupy the "mansion-house, gardens and premises," without paying any rent or compensation for the same, and without such person being obliged at his expense to put the same in repair, or being at any other expense than paying the rates and taxes. The eldest son presented a petition praying that he might be declared entitled to the use of the park, and to have the gardens kept up by the trustees:—Held, that by the word "premises" the testator must have intended that his eldest son should enjoy more than mere gardens and curtilage; and that having regard to the context of the will and the surrounding circumstances, he was entitled (the trustees not objecting) to occupy the park and also an orchard; and that the trustees were bound to keep up the gardens according as they might deem to be necessary. *Lethbridge* v. *Lethbridge*, 30 Law J. Rep. (N.S.) Chanc. 388; 3 De Gex, F. & J. 523.

A testator, by his will, after giving annuities, directed that the surplus of the rents, profits and interest of his real and personal estate should be applied by his trustees in the reduction of mortgage and other charges upon his estates. Subject thereto, he devised his S estate to trustees for his sons for life, and empowered his trustees to permit the person entitled for life or any greater estate in the S property to occupy the mansion, gardens and "premises" rent free. The Home Farm had no farm-house, and the farm-buildings and farm were occupied by the testator at the time of his death:—Held, that the word "premises" meant premises in immediate connexion with the mansion, and did not include the Home Farm. *Lethbridge* v. *Lethbridge*, 31 Law J. Rep. (N.S.) Chanc. 737; 3 De Gex, F. & J. 523.

(2) "*Appurtenances.*"

A testator, possessing a farm in the parish of G, and a small piece of land in the adjoining parish of A, which had always been occupied and let at an entire rent with the farm in G, devised all his lands and hereditaments, "situate, lying and being within the parish of G, with the appurtenances," to G for life with remainder to the child or children of G in tail; and he empowered P and J, the trustees of his will, during the minority of a tenant in tail entitled in possession, to take possession of the property on behalf of the minor, and to grant leases; and he devised the residue of his real estate to P and J, during the life of M, in trust for M, with remainders over. The testator died in 1842, and thereupon G took possession of the lands in G and A. In 1850 G died, leaving an only daughter, an infant, and P and J took possession of the land in G and A, and in 1861 they granted a lease of the whole farm in pursuance of the power. In 1863 the daughter of G came of age and took possession of the whole

farm. In 1864 M filed a bill to establish his right to the land in A:—Held, that the land in A did not pass by the specific devise, but formed part of the residuary estate, and that M's right was not barred by the Statute of Limitations, inasmuch as the possession of P and J from 1850 to 1863 must be attributed to their character of devisees in trust of the residuary estate, and was therefore not adverse to that of M. *Lister* v. *Pickford*, 34 Law J. Rep. (N.S.) Chanc. 582; 34 Beav. 576.

A testator devised "all that messuage wherein D now resides, with the appurtenances thereto belonging and therewith occupied":—Held, that the devise passed a piece of land purchased by the testator after the date of his will, which adjoined the house and was occupied therewith as a garden by D at the time of the testator's death. *In re the Otley and Ilkley Joint Line Committee*, 34 Law J. Rep. (N.S.) Chanc. 596; 34 Beav. 525.

(3) "*As now occupied by me.*"

A testatrix, at the date of her will, being owner of two adjoining houses, &c., occupied one herself, in the garden of which was a pump; the other was occupied by T A as her tenant from year to year; and he, with the knowledge of the testatrix, was accustomed to go into the garden and fetch water from the pump for the use of his house, there being no other water supply:—Held, that the right to the use of the pump did not pass by a devise of "the house as now in the occupation of T A." *Polden* v. *Bastard*, 32 Law J. Rep. (N.S.) Q.B. 372; 4 Best & S. 258.

(4) "*Children.*"

Though the word "children" in its primary sense is to be read as a word of purchase, and to be confined to issue in the first degree, yet the interpretation of the word is subordinate to the intention to be collected from the rest of the will, and it may be converted into a word of limitation, and interpreted "heirs of the body." *Byng* v. *Byng* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 470; 10 H. L. Cas. 171.

A testatrix devised as follows: "I give in trust to my executors for my niece, M A B, and her children all my Q H estates in E, provided she takes the name of Cranmer and arms, and her children, with my mansion-house, furniture, plate, books, linen, &c., Archbishop Cranmer's portrait" (and other chattels), "as heir-looms with my estate":—Held (affirming the decision of the Lords Justices and of *Wood, V.C.*), that the word "children" must be read as a word of limitation, and that M A B took an estate tail. Ibid.

(5) "*Either one.*"

A testator gave to his wife a house during her life, and at her death to go to his two children; the rent to be equally divided between the two, and at their deaths to go to their children. But in case that either one of them should die without children, that share to go to the other; and that the house should not be sold, but be kept amongst them as long as it lasted. Both of the children of the testator died without children:—Held, that each of them took a moiety absolutely. *Drennan* v. *Andrew*, 30 Law J. Rep. (N.S.) Chanc. 384.

(6) "*Heirs.*"

The word "heirs" in a devise to first and other sons construed "heirs of the body" in order to give effect to the general intention, that the sons should take successively and in priority of birth. *Hennessy* v. *Bray*, 33 Beav. 96.

Devise to A B for life, and afterwards to his first and other sons successively, according to the priority of their respective births, and their respective heirs (omitting "of their bodies"), to the intent that the elder should be preferred to the younger, and for default of such son or sons, to the daughters as tenants in common in fee:—Held, that the sons of A B took successively as tenants in tail general. Ibid.

Devise, after a tenancy for life, of borough English lands for sale, and to divide the moneys among all the testator's sons and daughters who might then be living, and to the heir and heirs of those who might be deceased, share and share alike:—Held, that under the gift to the heirs, the common law and not the heirs in borough English took. *Polley* v. *Polley* (No. 2), 31 Beav. 363.

Two houses, one of leasehold and the other of gavelkind tenure, were given by will (after the exhaustion of prior limitations) to the right heirs of the testator:—Held, that the heir-at-law was entitled to both. *Sladen* v. *Sladen*, 31 Law J. Rep. (N.S.) Chanc. 775; 2 Jo. & H. 369.

(7) "*Issue.*"

Devise to A for life, and after her decease to her lawful issue then living, and the children of such of them as should be then dead, in equal shares, the children of such issue to take their parents' share:—Held, that the word "issue" was to be construed "children," and that the children of A and the children of A's children who pre-deceased her took for life only. *Fairfield* v. *Bushell*, 32 Beav. 158.

(8) "*Leaving issue of her body.*"

A testator gave and devised an estate to trustees for and during the life of his niece M, upon trust to permit and suffer M to take the rents and profits of the same during her life: "And from and immediately after the decease of my said niece I give and devise the said messuages, &c. aforesaid unto the issue of the body of her my said niece, as well male as female, to be equally divided amongst or between them at their respective ages of twenty-one years or days of marriage, which shall first happen, share and share alike, and to the heirs and assigns of such issue respectively, and if any of such issue should be under the age of twenty-one years, at the decease of my said niece as aforesaid, &c.; I direct that an equal share of the rents and profits of the said hereditaments and premises may be appropriated towards the education and maintenance of such issue as shall not have attained the age of twenty-one years at the decease of my said niece as aforesaid; and if my said niece shall depart this life leaving only one child of her body, then I give and devise all, &c., unto such only child, &c., as soon as he or she shall attain the age of twenty-one years aforesaid; but in case my said niece shall depart this life without leaving any issue of her body at the time of her decease as aforesaid, or in case all such issue

shall depart this life under the age of twenty-one years and unmarried as aforesaid, then I give and devise the said, &c., to the children of my brother, &c." M married and had one daughter, who attained the age of twenty-one years, but died in the lifetime of M unmarried:—Held, that even if an estate in fee in remainder did vest in the daughter of M (which the Court doubted), such an estate would be divested upon her death in the lifetime of M. *Young* v. *Turner*, 30 Law J. Rep. (N.S.) Q.B. 268; 1 Best & S. 550.

(9) "*Now occupied by me.*"

A testator, by his will made in 1854, devised to his wife "all that my messuage of dwelling-house, with the buildings and lands belonging thereto, now occupied by me, situate at W, containing about twenty acres, together with the close of land called H, now occupied by W, as tenant thereof, to the use of my said wife, her heirs and assigns for ever"; and devised the residue of his real estate to trustees. In 1847 a railway separated part of a field from a farm belonging to the testator, occupied by a tenant, and at the date of the will the testator occupied a portion of the separated part as potato ground, the remainder of that part, called T, being still occupied by the tenant as part of his farm; but the testator, before his death, took T into his own occupation, and occupied it to his death in 1856, with the house and land admitted to form part of the devise to the wife. A closer approximation to the quantity of "twenty acres" was obtained by excluding T:—Held, that T did not pass under the devise to the wife, the words "now occupied by me" being matter of description of the property devised, and was not to be construed as speaking from the death, within the Wills Act, 7 Will. 4. & 1 Vict. c. 26. s. 24. *Hutchinson* v. *Barrow*, 30 Law J. Rep. (N.S.) Exch. 280; 6 Hurls. & N. 583.

(10) "*Or.*"

Devise to A for life when he attains thirty-one, and after his death to his eldest son in fee. In case A should not live to that age "or" not have any son, then in trust for B for life on attaining thirty-one, and after his death to his eldest son in fee, and in case of failure, to the eldest son of the testator's daughter in fee. A attained thirty-one and died without having had issue, and B also died without having issue:—Held, that "or" could not be read "and," and that the eldest son of the daughter took the estate. *Cooke* v. *Mirehouse*, 34 Beav. 27.

A testator after leaving certain legacies devised as follows: "As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to J J and D H, equal between them, but in case my daughter shall have lawful issue, then I leave the whole of my property real and personal to her and her heirs":—Held, by a majority of the Court (*Wightman, J.* and *Byles, J. dissentientibus*) that J J and D H would take under the will only in the event of the daughter dying under age and having no children; and that they took nothing as the daughter lived to be twenty-one, though she never had any child. *Johnson* v. *Simcox*, 31 Law J. Rep. (N.S.) Exch. 38; 7 Hurls. & N. 344.

(11) "*Rents, issues and profits.*"

A testator, who was entitled to various rectories in E S, devised his manors, advowsons, messuages and hereditaments in E S to trustees upon trust to make certain payments out of the rents, issues and profits, and subject thereto to accumulate the "residuary or surplus rents, issues and profits" of the same property for twenty-one years on specified trusts. A claim by the heir-at-law to the proceeds of sale of a next presentation to one of the testator's rectories, on the ground that the next presentations were not disposed of under the trust of "rents, issues and profits," was disallowed by the Lords Justices on the construction of the whole will. And *semble*—per *Turner, L.J.*, that the words "rents, issues and profits" were of themselves sufficient to include the proceeds of sale of the next presentation. *Cust* v. *Middleton*, 34 Law J. Rep. (N.S.) Chanc. 185.

(12) "*Such as shall survive.*"

E M T devised real estate to her three nephews, A, B and C, for their respective lives, share and share alike, with remainder, as to the share of each nephew, to his first and other sons in tail male, with remainder to his daughters as tenants in common in tail, and in case of the death of any or either of the nephews without lawful issue, male or female, then to such of her said nephews as should survive, and to their and his issue in the manner thereinbefore mentioned, and in case of the death of all the said nephews and their issue, then to the right heirs of the testatrix. A died leaving a son, then B died without issue, then C died leaving a son:—Held (overruling a decision of one of the Vice Chancellors), that the words of the will, "such as shall survive" of the nephews, must be construed as meaning "the others or other" of them, and consequently that A's son was entitled to one moiety of B's share. *In re Tharp's Estate*, 33 Law J. Rep. (N.S.) Chanc. 59; 1 De Gex, J. & S. 453.

(*l*) *Who entitled as Devisees.*

Devise to A for life, with remainder to B in fee, but if B should die leaving issue, then to his children. B survived A, and died leaving children:—Held, that the gift to his children did not take effect. *Slaney* v. *Slaney*, 33 Beav. 631.

Devise to trustees of freehold premises, on trust to pay the rents to P for life, and after her decease, on further trust for such person or persons, being a child or children of P, as she should by will appoint, and in case P should die without leaving children her surviving, or in default of appointment, or so far as such may not extend, on trust for M in fee. P died leaving children, but without appointing:—Held, M entitled. *Goldring* v. *Inwood*, 3 Giff. 139.

Devise and bequest to A, and after her decease leaving any child or children her surviving who should attain twenty-one, to pay her share to her eldest child, his executors, administrators and assigns, with a gift over in default of such child:—Held, that A's eldest child, who died in A's life, did not take, but that the second child, who survived her mother, was entitled. *Stevens* v. *Pyle*, 30 Beav. 284.

A testator devised a real estate to trustees in fee, in trust for all the children of his two sisters then born, or thereafter to be born, who should have

attained or should afterwards attain twenty-one, in equal shares; and he directed that, as the same should respectively become vested, the trustees should convey the same accordingly:—Held, that the children born after the testator's death took a share. *Eddowes* v. *Eddowes*, 30 Beav. 603.

A testator devised his freeholds in trust to pay two-fifths of the rents to A for life, with remainder to his children; and to pay three-tenths to B for life, with remainder to his children; and to pay the remaining three-tenths to C for life, with remainder to her children. By a codicil, he left A an equal share only of the property with B and C, instead of the increased share:—Held, that the property was divisible into thirds, one of which belonged to each of the legatees for life, with remainder to his children. *Quentery* v. *Quentery*, 33 Beav. 369.

(*m*) *Effect of Recital in Codicil.*

Held, that a devise for life contained in a will could not be enlarged by a recital in a codicil that such devise was in tail. *In re Arnold's Estate*, 33 Beav. 163.

(B) What Property passes.

(*a*) *In general.*

Where a testatrix gave "all those her freehold messuages or tenements, hereditaments and premises called West Cliff, with the appurtenances thereto belonging, situate at West Cowes, and now used as lodging-houses," and in a codicil referred to the same property as "her estate called West Cliff, at West Cowes,"—Held sufficient to pass not only the lodging-houses but other houses, of which some were unfurnished, and also certain plots of ground, together with the site of a private road and of a church then building, and the advowson, all known as the West Cliff Estate. *Cunningham* v. *Butler*, 3 Giff. 37.

A testator in 1841 devised all the freehold property "of which I am seised or entitled in fee simple" in strict settlement. He afterwards devised all the copyholds "I am or at the time of my death shall be possessed of," upon trusts corresponding with those of his freeholds. The testator died in 1861:—Held, that freeholds acquired after the date of the will passed by the devise. *Lord Lilford* v. *Keck* (No. 2), 30 Beav. 300.

Devise of all the freehold, real and leasehold estates in the counties of Lincoln and Cambridge (except such as I have hereinbefore disposed of), "and all the leasehold lands" at S, in the "county of Dorset, and elsewhere, which I can dispose of by this my will":—Held, that it passed freeholds in Norfolk and elsewhere wherever situate. *Pinney* v. *Marriott*, 32 Beav. 643.

A gift by will, dated before the Wills Act, 1 Vict. c. 26, came into operation, of "all and every my freehold, copyhold and leasehold messuages, lands, tenements and hereditaments, and all and every my stocks, funds, moneys, mortgages, annuities, securities for money, debts, goods, chattels, and generally all other my real and personal estates and effects whatsoever and wheresoever, and of what nature, kind or quality soever the same may be, whereof, wherein, or whereto I, or any person or persons in trust for me, am, is, are, or shall or may be seised, possessed, interested, or entitled in possession, reversion, remainder or expectancy, or otherwise howsoever," was held to refer to real estates purchased by the testator between the date of his will and his death, and the will being invalid to pass such subsequently-acquired estates, the heir-at-law was put to his election between them and his interest under the will. *Hance* v. *Truwhitt*, 31 Law J. Rep. (N.S.) Chanc. 289; 2 Jo. & H. 216.

(*b*) *Mortgage and Trust Estates.*

A devise by a testator of all his real and personal estate to his nephews and nieces, who were a numerous and unascertained class,—Held, not to pass estates vested in the testator in trust or on mortgage, but that such estate descended to his heir-at-law. *In re the Trustee Act; in re Finney's Estate*, 3 Giff. 465.

(*c*) *Parcel or no Parcel.*

M S executed a devise in these terms: "I give my mansion-house at Tedworth in the county of Hants, and all my manors, farms, lands, tenements and hereditaments in the county of Hants, devised to me by my late husband (subject to the annuities charged thereon by his will, and subject to a further annuity charged thereon by me), and all other hereditaments in the said county of Hants of or to which I shall be seised or entitled, or over which I shall have a disposing power at the time of my death (all which hereditaments in the county of Hants are hereinafter described or referred to as my Tedworth estate), to &c." By the devise of the husband of M S (referred to in the will) the annuities mentioned by his wife were charged upon "all his lands at or near Tedworth." In ejectment by the heir-at-law against the person claiming under this devise, it was found by the jury that there was one property comprising land in the counties both of Wilts and Hants, known as the Tedworth Estate, and enjoyed as one property by the husband of M S and by M S herself at the time of her death; that there was no artificial or physical boundary between the portions of the estate in Wilts and Hants, and that the manor-house passing under the devise was largely disproportioned to the Hants property (including certain additions made to it by the will). Evidence was also given to shew that there was but one manor in the county of Hants, although there were several in the county of Wilts. The will contained no residuary devise, though there was a residuary bequest:—Held, that the description limiting the lands devised to the county of Hants must operate as a true limitation, and could not be rejected as a false demonstration, and that lands in Wilts were excluded from the devise. That there was therefore an intestacy as to this last-named property, and the heir-at-law was entitled to recover it in ejectment from the devisee. *Webber* v. *Stanley*, 33 Law J. Rep. (N.S.) C.P. 217; 16 Com. B. Rep. N.S. 698.

(C) Particular Limitations.

(*a*) *Trust or Beneficial.*

A testator devised and bequeathed his property as follows: "I give and bequeath all my property, real and personal, of whatever nature or kind, wheresoever to be found, in possession, reversion or expectancy, to which I am legally or equitably entitled, unto my dear wife, C E, absolutely, and to be by her

willed to any or either of my children in any manner suitable to her wishes, to hold to her for ever, and I appoint her executrix of this my will, hereby revoking all other wills":—Held, that the wife took the property absolutely; but that a trust was engrafted on it for the benefit of the testator's children, who might survive her, with a power for her to appoint it among them by will, as she might think fit. *Evans* v. *Evans*, 33 Law J. Rep. (N.S.) Chanc. 662.

The widow of the testator made a will, by which she devised part of his real estate to a son of his, in liquidation of a debt due to him from the testator; and she afterwards made an agreement with that son and another, agreeing that the latter should have the property on the terms of his paying the debt due to the former, and also stipulating for certain benefits for herself:—Held, that neither the will of the widow nor the agreement was an exercise of the power in the testator's will. Ibid.

(*b* *Joint Tenancy* or *Tenancy in Common*.

J O, by his will, gave all his real estate, charged with an annuity and bequests, to his three sons, J O, W O, and C O, "as tenants in common" in fee. J O, the son, gave his property to his two brothers, "absolutely for their uses, under the directions of the will of my late father." C O devised all his estates to J E W. When J O, the son, made his will, all the moneys charged on the estates by the will of J O had not been paid:—Held, on a special case submitted to the Court, in which W O was plaintiff and J E W was defendant, that the will of J O, the son, created a joint tenancy in the property to his father thereby devised, and that the plaintiff took the whole of his share. *Oliver* v. *White*, 31 Law J. Rep. (N.S.) Chanc. 689.

A devise of real estate to trustees to pay the rents and profits to C for life, during widowhood, and after her decease or second marriage to pay the rents and profits to all and every the child and children of his late sister, until the youngest of them should have attained twenty-one, and when and so soon as the youngest should have attained twenty-one, then on trust to sell the real estate and to divide the moneys equally between and among the said children, share and share alike:—Held, that all the children were tenants in common until the youngest attained twenty-one. *In re Grove's Trusts*, 3 Giff. 575.

A devise to two persons, in terms importing a joint tenancy, is not changed into a tenancy in common by a subsequent gift over of the "estate" of one of them upon a certain contingency. *Edwardes* v. *Jones*, 33 Beav. 348.

A testator devised his real estate to his wife and his son D, and he then proceeded thus: "If my son D shall happen to die without issue living, my will is that all his estate is to be divided between all my children in equal shares;" and "if my wife will intermarry she is to enjoy none of my property":—Held, first, that the wife and D took as joint tenants; secondly, the wife having died in the life of the testator, and D having survived the testator and died a bachelor, that the whole estate was divisible between the testator's children, and that D's representatives took his share of it. Ibid.

(*c*) *Fee Simple*.

A testator devised freeholds to trustees to pay the rent to his five children "or their heirs":—Held, that the children took a fee. *Adshead* v. *Willetts*, 29 Beav. 358.

A testator devised his real and personal estate to trustees and their heirs, upon trust to sell, if expedient, and invest in consols, and permit his wife, *durante viduitate*, to receive the rents and dividends, and from and after her decease or second marriage to divide "the residue of his estate and effects" between his children (without words of inheritance):—Held, that (subject to the wife's interest) the children took the real estate absolutely. *Tatham* v. *Vernon*, 29 Beav. 604.

A testator devised his Upton Park estate to his five daughters and his grandson, as tenants in common, for their respective lives, with remainders over. By a codicil he devised to his son A and his heirs "the like share he had given to his five daughters in the Upton Park property in every respect whatever":—Held, that A took one-seventh in fee. *Bedborough* v. *Bedborough* (No. 1), 34 Beav. 284.

A testator gave his real estate to trustees to permit his wife to receive the rents for life, with remainder for the separate use of his daughter, and after her decease for the sole use and benefit of all and every the children and issue of his daughter which she might happen to leave her surviving, to take as tenants in common, and their respective heirs and assigns for ever; and if but one such child, then upon trust for such only child, his or her heirs or assigns for ever. But if his daughter should happen to die without leaving such issue, or leaving such, all of them should die during their minority and without leaving lawful issue, then upon trust for such persons as his daughter should by deed or will appoint. And the testator bequeathed his personal estate in terms nearly identical with the devise of the real estate, except that in the gift over the language was "in case there shall be no child or issue of my said daughter." The daughter survived the widow and died, having had six children, two of whom only survived her; one child was unmarried, and the other had a son born before the death of the daughter:—Held, that all the children or issue of the daughter living at her death took *per capita* as tenants in common in fee simple as to the real estate and absolutely as to the personalty, the property being devisable equally in thirds between the two children and the grandchild. *Cancellor* v. *Cancellor*, 32 Law J. Rep. (N.S.) Chanc. 17; 2 Dr. & S. 194.

(*d*) *Defeasible Fee Simple*.

A testator devised an estate to his daughter for life, and after her decease to her son or sons, daughter or daughters, to him, her, or them, or his, her, or their heirs for ever; but, should his daughter die without having such heir or heirs, then the estate to be sold within three months after her death and the produce divided amongst other persons. The daughter died without having had any issue:—Held, that the gift over was valid and took effect. *Polley* v. *Polley*, 29 Beav. 134.

(*e*) *Estate Tail*.

C by his will gave his estate to his grandson T C for life, with remainder to "the first son of the body of the said T C severally and successively in tail

male" of the name of C; and for want of such lawful issue of that name, either by his said grandson T C or his son J C, then amongst his "daughters and their children" in fee:—Held, that estates tail were given to the first and other sons of T C, and that the gift over to the daughters and their children was a gift to a class, and that a child of a daughter who died before the date of the will was not within the gift. *Parker* v. *Tootal*, 34 Law J. Rep. (N.S.) Exch. 198; 11 H.L. Cas. 143.

*Semble*—That estates tail by implication were given to T C and J C after the estates tail of the sons of T C. Ibid.

A devise of real estate to be divided equally between my two sons, who shall enjoy the interest thereof, and then to go to their respective families according to seniority:—Held, that the two sons took as tenants in common in tail general. *Lucas* v. *Goldsmid*, 30 Law J. Rep. (N.S.) Chanc. 935; 29 Beav. 657.

Devise to A for life remainder to the heirs of the body of A and his, her, and their heirs and assigns for ever, as tenants in common:—Held, an estate tail in A. *Mills* v. *Seward*, 1 Jo. & H. 733.

Devise to A for life, and from and after her decease, unto the heirs of her body, they to take the freehold and inheritance thereof as tenants in common, and in default of such heirs of the body of A unto the testatrix's own right heirs:—Held, that A took an estate tail. *Anderson* v. *Anderson*, 30 Beav. 209.

*(f) Estate for Life.*

The testator (by will made in 1809) after giving all "his lands, tenements, chattels, and premises whatsoever" to his wife during her life, gave and bequeathed at her death certain messuages "to his son W M, he paying to certain legatees the sum of 50*l.* each, out of the aforesaid premises." By another devise he "gave to his son J M certain other messuages at the decease of his wife." The residuary clause was as follows: "All the rest and residue of my estate of whatever nature, kind and quality soever the same may be and not herein disposed of, after payment of my debts, &c., first I give to my grandson the sum of 5*l.*, lastly I give and bequeath unto my four daughters equal share and share alike of the said residue and remainder and *to be paid* to them one year after the death of my wife:—Held, according to *Right* d. *Compton* v. *Compton*, that the devise to J M was not enlarged to a devise in fee by implication from the prior devise to W M (which was accompanied with a charge), and that J M took an estate for life only. *Morris* v. *Lloyd*, 33 Law J. Rep. (N.S.) Exch. 202; 3 Hurls. & C. 141.

Held, also, that the reversion in fee passed by the residuary devise, the words "*to be paid, &c.*" being satisfied by being applicable to some part, if not to the whole, of the residue. Ibid.

E P, by her will, dated in 1789, devised to A and B and their heirs, certain real estate, to hold to them, their heirs and assigns, to the use of S L (her grandson) for life, with remainder to the use of A and B and their heirs during the life of S L to preserve contingent remainders, with remainder to the use of the children of S L, but if he should die without leaving such issue to the use of C D L (another grandson) for life, with remainder to the use of A and B and their heirs during the life of C D L to preserve contingent remainders, with remainder to the use of the children of C D L, but if he should die without leaving such issue to the use of her granddaughters, their heirs and assigns for ever, as tenants in common and not as joint tenants. The testatrix died in 1791, leaving her two grandsons, bachelors, surviving. Subsequently they both married, and died, both leaving children:—Held, that the children of S L took estates for life only; that no interests were effectually given to C D L or his children or to the granddaughters of the testatrix, and that, subject to the life estates to S L and his children, the inheritance devolved as under an intestacy to the heir-at-law of the testatrix. *In re Pollard's Trusts*, 32 Law J. Rep. (N.S.) Chanc. 657.

The circumstance that the whole fee simple is (under a will made before 1838) devised to trustees, cannot be relied upon as a ground for enlarging a subsequent gift under the will to *cestuis que trust* in a case where the will contains an ulterior though contingent gift to other *cestuis que trust* of the whole beneficial fee. Ibid.

A testator who died in 1804 devised real estate to his daughter for life, with remainder to her sons successively in tail, with remainder to her daughters as tenants in common (without words of limitation), and in default of such issue to his son in fee:—Held that, contrary to the decision in *Doe* v. *Taylor* (10, Q.B. Rep. 718), the daughters took for life only. *In re Arnold's Estate*, 33 Beav. 163.

"Devise of my moiety of closes at L":—Held insufficient, prior to the last Wills Act, to pass the fee. Ibid.

*(g) Vested or Contingent Estates.*

Henry T devised real estate to K and others during the life of the testator's son Henry, in trust for him; and after his decease the testator devised the property to the heirs of the body of Henry, and in default of such issue to the testator's nephew Henry, for life, and after his decease to the testator's own right heirs of the name of Henry T, if any such there should then be, for ever:—Held, that the devise to the testator's right heirs of the name of Henry was a contingent remainder to the testator's heir-at-law if named Henry T, and that the testator's heir-at-law at the death of the second life estate not being named Henry, the contingent remainder failed, and the testator's heir-at-law was entitled to the property in preference to a Henry T who, although in the line of descent from the testator, was not his heir-at-law. *Thorpe* v. *Thorpe*, 32 Law J. Rep. (N.S.) Exch. 79; 1 Hurls. & C. 326.

Devise, after the death of the tenant for life, in trust to sell, and "pay and divide" the produce amongst all his children, to be paid as and when they respectively attained twenty-one, and in the mean time the interest to be applied in their maintenance, with a gift over in case the tenant for life died without leaving any child:—Held, that the interests of children vested at their births. *Shrimpton* v. *Shrimpton*, 31 Beav. 425.

In a gift over on the death of A before the estate became vested in him, the word "vested" held to mean vested in interest, and not vested in possession. *In re Arnold's Estate*, 33 Beav. 163.

(*h*) *Clause of Forfeiture.*

A testator devised certain estates to trustees upon trust to pay the rents, &c. to A and B, his wife, for their lives, and after their decease to settle and assure the said estates to the use of all and every the son and sons of A and B successively, for their respective lives, with immediate remainders after the decease of each and every such son to the use of his first and other sons successively in tail male, with remainders over, with an ultimate remainder to his own right heirs. The will contained a proviso that if the said A and B or any of their children who might be entitled to the estates should reside in foreign parts for more than six months while in enjoyment of the rents and profits of the estates, or if any son or remoter issue of the said A and B should fail (as therein mentioned) to profess the Protestant religion, "then the devises in favour of the said A and B and their sons and remoter issue should cease and be absolutely void, so far as concerned the rights and interests of the party making default, but not further or otherwise." A tenant in tail male having come into possession, and both resided abroad and failed to profess the Protestant religion,—Held, first, that upon the true construction of the proviso the testator had not shewn an intention that the whole estate tail should determine, but that only the individual interest of the tenant in tail should cease, and yet the estate tail with all the remainders limited thereon continue for the benefit of those to whom the testator intended the property to devolve after the death of the tenant in tail; and, secondly, that this intention of the testator was one which could not legally be effected, and, consequently, that the proviso was inoperative. As to the operation of the proviso upon the ulterior remainders, assuming it to have amounted to a declaration that the whole estate tail should determine—*quære*. *Seymour* v. *Vernon*, 33 Law J. Rep. (N.S.) Chanc. 690.

(*i*) *Shifting Clause.*

A shifting clause will be construed strictly. *Walmesley* v. *Gerard*, 30 Law J. Rep. (N.S.) 435; 29 Beav. 311.

Where a large estate was devised to J G who had acquired a smaller estate from his father by descent, and not in the manner specified, upon which it was to be conveyed to shifting uses in favour of his brothers and their issue,—Held, that J G, on taking the larger estate, might also retain the smaller without forfeiting his claim to the larger estate, though the smaller was specifically referred to in the will. Ibid.

If a person to whom an estate is devised executes deeds, under an impression that a shifting clause in the will required him to convey a smaller estate to specific uses, effect will be given to them, though the terms of the shifting clause do not apply to the estate conveyed, and though the grantor might have retained the smaller estate without forfeiting the larger; but it will not be assumed that he intended to part with more than he supposed himself compellable to convey. The ultimate use, therefore, on failure of the limitations referred to in the shifting clause, will result to the grantor and his heirs, and not to the devisor of the larger estate and his heirs. Ibid.

If deeds are executed in general terms, they will be considered to include all the limitations, powers and provisos to which the shifting clause makes the estate liable. Ibid.

Shifting limitations in favour of nephews will not be implied in favour of nieces, if no mention is made of nieces in the shifting clause. Ibid.

If members of a family take the benefit of a shifting clause, those taking the larger estates cease immediately to have any estate, right or interest in the smaller estates; and any deeds which the former possessory owner may execute with reference to the smaller estates cannot affect the uses in or the devolution of the smaller estates. Ibid.

Limitations and conditions affecting estates transferred by a shifting clause follow each estate as it shifts. Ibid.

A B, who was tenant for life, with remainder to his issue in tail, forfeited his estate before he had any issue:—Held, upon the intention apparent on an executory instrument, that the next remainderman became entitled to the rents. *D'Eyncourt* v. *Gregory*, 34 Beav. 36.

A will directed a settlement to be made of the G estate, which should contain a shifting clause, providing that if any person taking the G estate should not re-settle the De Ligne estate (acquired through another title) to like uses, the G estate should go to such uses as if the limitation in his favour had not been inserted. It also directed the insertion of a name and arms shifting clause in a very different form. A B, a tenant for life, with remainder to his children in tail, refused to re-settle the De Ligne estate, and he had no issue:—Held, thereupon, that the next remainderman was entitled to the rents of the G estate until A B died or had issue. Ibid.

Construction of a shifting clause. *Lord Kenlis* v. *Earl of Bective*, 34 Beav. 587.

A testator directed two estates to be purchased (A and B). The estate A was to be settled on the sons of his daughter (except Lord K the eldest) and their issue, and in default on K for life, with remainder to his first and other sons in tail, with remainder to his issue in tail general, with remainders over to daughters of the daughter. Estate B was to be settled on Lord K for life, with remainder to his first and other sons in tail, and afterwards to the same uses as the estate A. There was a shifting clause determining the estate of Lord K and his first and other sons in estate B, in case he or his issue male became entitled to estate A. K having become entitled to estate A, it was held that his first life estate alone in estate B had ceased, but that his second life estate therein, expectant on the failure of younger sons of the daughters, was still subsisting. Ibid.

(D) CHARGES.

A testator, by his will, dated in June 1855, directed that "all his debts should be paid by his executors out of his estate":—Held, reversing the decision of *Stuart, V.C.*, that such direction did not exonerate a mortgaged estate, devised by the will, from the payment of the mortgage debt. *Woolstencroft* v. *Woolstencroft*, 30 Law J. Rep. (N.S.) Chanc. 22.

Devisees of a real estate, which had been mortgaged by the testator, held entitled to have the mortgage paid out of the other real and the personal

estate devised for payment of debts, notwithstanding Locke King's Act (17 & 18 Vict. c. 113). *Newman* v. *Wilson*, 31 Beav. 33.

A B mortgaged freeholds and leaseholds together, and died intestate in 1857:—Held (as between the heir and administrator), that the freeholds and leaseholds must bear the burden rateably. *Evans* v. *Wyatt*, 31 Beav. 217.

A direction to pay debts out of personal estate is not a sufficient expression of intention within the 17 & 18 Vict. c. 113, to exonerate a real estate from a mortgage to which it had been made liable. *Rowson* v. *Harrison*, 31 Law J. Rep. (N.S.) Chanc. 818; 31 Beav. 207.

A bequest of personalty "subject to the payment thereout of all the testator's just debts" is a sufficient indication of intention to make the personal estate the primary fund for the payment of mortgage debts, under the 17 & 18 Vict. c. 113. *Mellish* v. *Vallins*, 31 Law J. Rep. (N.S.) Chanc. 592; 2 Jo. & H. 194.

A testatrix devised two farms to trustees, to sell and apply the money for specific purposes. These farms were subject to a mortgage for 1,600*l*. The residue of her real and personal estate she devised to her two sons, and directed that the mortgages, debts and incumbrances charged thereon should be borne by the premises specifically affected. She then directed that all her debts, funeral and testamentary expenses should be paid out of her residuary real and personal estate, and she charged the same thereon accordingly. Upon a bill by the parties interested in the purchase-moneys to arise from the two farms,—Held, that the general direction to pay all debts included mortgage debts, and that the two farms were devised free from the mortgage thereon. *Allen* v. *Allen*, 31 Law J. Rep. (N.S.) Chanc. 442; 30 Beav. 395.

A testator, by will dated in 1859, directed that his executors should, by and out of the moneys to arise from the sale, calling in and conversion into money of his personal estate and effects, pay his debts:—Held, that such direction exonerated a mortgaged estate, devised by the testator to one of the executors, from the payment of the mortgage debt, the testator's personal estate being sufficient for the payment of all his debts, including the mortgage debt. *Smith* v. *Smith*, 31 Law J. Rep. (N.S.) Chanc. 91; 3 Giff. 263.

A bequest, contained in a will dated in 1857, of all a testator's personal estate "subject to the payment of his debts," renders such personal estate primarily liable for the payment of a sum of money, with which the testator had charged it by way of mortgage; notwithstanding the statute 17 & 18 Vict. c. 113. (commonly called "Locke King's Act,") which makes the mortgaged lands primarily liable to bear mortgage debts; the direction to pay debts out of a particular fund amounting to a sufficient indication of a "contrary or other intention" within the meaning of the act. *Eno* v. *Tatam*, 32 Law J. Rep. (N.S.) Chanc. 311; 4 Giff. 181.

Dictum of *Lord Campbell* in *Woolstencroft* v. *Woolstencroft* (2 De Gex, F. & J. 350; 30 Law J. Rep. (N.S.) Chanc. 22) explained by *Turner, L.J.* Ibid.

A will executed before the 1st of January 1855, is a will already made within the meaning of the 17 & 18 Vict. c. 113, notwithstanding it does not come into operation by the death of the testator till after that day. Nor will a mere republication by codicil, giving no new operation to the material dispositions in the will, deprive it of the character of a will already made. Therefore, where a testator, by his will dated before the 1st of January, 1855, devised real estate (which was then subject to certain mortgages) to T P in fee, and after that day made a codicil which did not affect or refer to the devise, it was held that the devisee was entitled to have the devised estate exonerated out of the personalty. *Rolfe* v. *Perry*, 32 Law J. Rep. (N.S.) Chanc. 471.

A testator gave his residuary personal estate to trustees, upon trust to sell and convert the same into money, and thereout, in the first place, pay all his "just debts, funeral and testamentary expenses," and, after full payment and satisfaction thereof, to hold the residue upon certain trusts therein mentioned:—Held, reversing a decision of the Master of the Rolls, that this was a sufficient expression of "a contrary or other intention" under Locke King's Act, to make the personal estate primarily liable for the testator's mortgage debts. *Moore* v. *Moore*, 32 Law J. Rep. (N.S.) Chanc. 605; 1 De Gex, J. & S. 602.

The 17 & 18 Vict. c. 113. (Locke King's Act) does not apply to leaseholds. *Solomon* v. *Solomon*, 33 Law J. Rep. (N.S.) Chanc. 473.

A testator devised his real estate to trustees, upon trust, in the first place, out of the rents, issues and profits, to pay life annuities, "and, subject to the trusts aforesaid," to pay the residue of the rents, issues and profits to his four grandsons for life, and, as any of them died, he devised his one-fourth of the real estates to their children in tail:—Held, that the annuities were not charged on the corpus of the estate. *Sheppard* v. *Sheppard*, 32 Beav. 194.

The only remaining assets of a testator consisted of a devised real estate, which was liable to his bond for securing an annuity. Before the annuity had fallen in arrear, the annuitant instituted a suit for administration, and for an injunction and receiver. The Court merely declared the plaintiff's annuity a charge on the real estate, but ordered the plaintiff to pay the defendant's costs of suit. *Norman* v. *Johnson*, 29 Beav. 77.

Life annuities bequeathed by will, to be issuing and payable out of leaseholds and personalty, with power to recover them when in arrear by distress or sale, in like manner as rack-rents are recovered by law:—Held, to be charged on the income and not on the corpus. *Addecott* v. *Addecott*, 29 Beav. 460.

Land devised, subject to a charge which is undisposed of, goes to the devisee free from the charge. *Heptinstall* v. *Gott*, 31 Law J. Rep. (N.S.) Chanc. 776; 2 Jo. & H. 449.

A testator devised his own estates in trust to pay the mortgages on his estate, "as well settled and unsettled." Part of the settled estates consisted of leaseholds, in which the testator had a life interest only, but after the date of the will, the fee of it was conveyed to him, he having purchased the reversion. Immediately after this he and his eldest son mortgaged it for the purchase-money, with a power of sale, and the equity of redemption was limited to them jointly, and the surplus produce of the sale

was reserved to them according to their respective rights and interests therein:—Held, that this mortgage was payable out of the testator's own estate under the trusts of the will. *Lord Hastings* v. *Astley*, 30 Beav. 260.

(E) VOID DEVISE.

(*a*) *Trust for Accumulation.*

A testator, by will dated before 1838, devised real estates to trustees and their heirs, upon trust to accumulate the rents and profits for a longer period than that permitted by the Thellusson Act, and divide them among certain persons. The will contained a clause disposing of "all the rest, residue, and remainder" of the testator's estate and effects to other persons:—Held, that although the direction to accumulate, so far as it exceeded the limit prescribed by the Thellusson Act, was void *ab initio*, yet, having regard to the construction put upon residuary devises under the old law, the testator had shewn an intention not to give the void accumulations to the residuary devisee, and that the heir-at-law was entitled thereto. *Smith* v. *Lomas*, 33 Law J. Rep. (N.S.) Chanc. 578.

(*b*) *Remoteness.*

A testator devised an estate to his son for life, and, after his decease, to and amongst all and every the child or children of his said son, for and during the term of his, her, or their lives, in equal shares if more than one; and after the decease of any or either of such child or children, he further gave and devised the share of him, her or them so dying of and in the said estate unto his, her or their child or children, if more than one, lawfully to be begotten, and to his, her or their heirs for ever, as tenants in common:—Held, that the devise was good as to the children of such children of the son as were living at the death of the testator; since the gift to them must take effect, if at all, within the limits allowed by law; and the share of each child and its children was ascertainable within the legal period; and the gift of each share was in effect a separate and independent gift, and unaffected by any remoteness of limitation existing in respect to the other shares. *Knapping* v. *Tomlinson*, 34 Law J. Rep. (N.S.) Chanc. 2.

*Cattlin* v. *Brown* (11 Hare, 372) followed. Ibid.

*Arnold* v. *Congreve* (1 Russ. & M. 209) treated as overruled. Ibid.

A testator bequeathed five leasehold houses, having about fifty-four years to run, to his daughter for life, with remainder to her children. And after the expiration of any of the leases, he directed his trustees to convey to his daughter and her children one or more of his five freehold houses of equal annual value, or as near as could be to the expired leasehold:—Held, that the devise was neither invalid for remoteness or uncertainty. *Wood* v. *Drew*, 33 Beav. 610.

A testator, who died in 1811, was entitled to the reversion of an estate expectant on the death of his son, without issue living at his death. By his will, after reciting that he was entitled to a reversion on the death of his son without issue generally, he devised it to trustees to sell upon the death of his son without issue generally, and divide the produce:—Held, that the trust was not void for remoteness. *Lewis* v. *Templer*, 33 Beav. 625.

(*c*) *Secret Trust for Charity.*

A devise of land to A B, upon the face of the will for his own benefit, but really upon a secret trust assented to by him for a charity, vests the legal estate in A B subject only to a resulting trust for the testator's real representative. Therefore, where a testator devised his residuary real estate to trustees upon a secret agreed trust for a charity, and his heir-at-law was not known,—Held, as between the Crown and persons claiming under the surviving trustee, that the legal estate was well devised, and that the former could therefore establish no claim by escheat. *Sweeting* v. *Sweeting*, 33 Law J. Rep. (N.S.) Chanc. 211.

In the case mentioned the Court considered itself bound by the 25 & 26 Vict. c. 42. to decide the question as to the legal effect of the devise, and accordingly made a declaration as to the legal right, dismissed the Attorney General from the suit, and directed inquiries as to the heir. Ibid.

(F) REVOCATION.

A specific devise is revoked by a subsequent contract to sell at the option of the purchaser, though the option be not exercised until after the testator's death. *Weeding* v. *Weeding*, 30 Law J. Rep. (N.S.) Chanc. 680; 1 Jo. & H. 424.

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## DISENTAILING ASSURANCE.

[See FINE AND RECOVERY.]

An estate stood limited subject to a life estate to five persons as tenants in common in tail, with cross-remainders between them in tail. One of these five persons, a married woman, concurred with her husband in a deed mortgaging her fifth share and all other the share and interest to which she might become entitled by the death of any of the other tenants in tail without issue, and the deed contained a covenant to levy a fine of the property expressed to be conveyed by the deed. A fine was levied purporting to extend only to the fifth share. Afterwards one of the other tenants in tail died without issue, and without having barred his estate tail:—Held, that there was an error in the fine which was caused by 3 & 4 Will. 4. c. 74. s. 7, and that the fine was effectual as to one-fourth, and not as to one-fifth only. *Life Assoc. of Scotland* v. *Siddal*, 3 De Gex, F. & J. 58.

An assurance executed for disentailing copyholds, to have any operation under the 3 & 4 Will. 4. c. 74, must be entered on the rolls of the manor within six calendar months after the execution thereof, by analogy to the time when required for the enrolment in the Court of Chancery of similar assurances affecting freeholds. *Honywood* v. *Forster*, 30 Law J. Rep. (N.S.) Chanc. 930; 30 Beav. 1.

An equitable tenant in tail of copyholds executed a disentailing deed, intending to bar his entail in divers copyhold estates. By his will he gave an annuity to the tenant in tail in remainder, and supposing the deed to have barred the entail, he devised both the freehold and copyhold estates, which lay intermingled, and could not be distinguished, to other persons. It was afterwards ascertained that the deed was informal, and that it did not bar the

entail. Upon a bill by the tenant in tail in remainder,—Held, that the apparent intention of the testator was to dispose of the copyholds away from the tenant in tail in remainder, and that he must elect which he would take, the copyholds or the annuity. Ibid.

A disentailing assurance under the Act for the Abolition of Fines and Recoveries of an equitable estate in copyholds must be entered upon the rolls of the manor court within six months after its execution. *Gibbons* v. *Snape*, 33 Law J. Rep. (N.S.) Chanc. 103; 1 De Gex, J. & S. 621; 32 Beav. 130.

An account of the rents was directed at the suit of the issue in tail for six years previous to the filing of the bill. Ibid.

The entail of lands to be purchased with rents hereafter to become due to trustees may be barred under the statute 3 & 4 Will. 4. c. 74. s. 71. *Fordham* v. *Fordham*, 34 Beav. 59.

## DISORDERLY HOUSE.

[See MUSIC AND DANCING—REFRESHMENT HOUSE.]

If a weekly tenant of a house use it as a brothel, and the landlord receive no additional rent by reason of the immoral occupation, the latter cannot be convicted of keeping a brothel merely because, having notice of the nature of the occupation, he does not give the tenant notice to quit. *R.* v. *Barrett*, 32 Law J. Rep. (N.S.) M.C. 36; 1 L. & C. 263.

The prisoner, being the owner of a house, let out the different apartments in it separately to young women, who, to his knowledge and with his consent, used them for the purposes of prostitution. They were merely weekly tenants. The prisoner, when he let the rooms, knew of the purposes to which they would apply them, and fully assented thereto, but he received no share of the earnings of the women. He did not live in the house, and he only went there to collect his weekly rents. He had no other control over the tenants than arose from his power as landlord to determine the tenancies:—Held, that he could not be indicted for keeping a disorderly house. *R.* v. *Stannard*, 33 Law J. Rep. (N.S.) M.C. 61; 1 L. & C. 349.

## DISTRINGAS UPON STOCK.

A writ of *distringas* was obtained to restrain the transfer of a particular sum of stock, upon the usual affidavit that the applicant was interested in the money. The writ was then served upon the Bank of England, with a notice not to permit the transfer of a totally different sum of money standing in a different name, this proceeding being rendered possible by the peculiar practice of the Bank. Writ discharged, with costs. *In re Cross*, 31 Law J. Rep. (N.S.) Chanc. 255; 1 Dr. & S. 580.

## DISTRESS.



### (A) WHAT MAY BE DISTRAINED.

A, the owner of certain lace-machines, paid 12*s.* a week to B for permission to place the machines in a room in B's factory, and for free ingress and egress to the room for himself and workmen for the purpose of working and inspecting the machines. B supplied the necessary steam-power for working the machines, payment for which was included in the above sum:—Held, that there was no demise to A of any part of the room, and that the weekly payments could not be distrained for as rent. *Handcock* v. *Austin*, 32 Law J. Rep. (N.S.) C.P. 252; 14 Com. B. Rep. N.S. 634.

Goods in the possession of a pawnbroker as security for money advanced cannot be distrained for rent; and in an action by the pawnbroker to recover goods distrained under such circumstances, the pawnbroker is entitled to recover the full value of the goods. *Swire* v. *Leach*, 34 Law J. Rep. (N.S.) C.P. 150; 18 Com. B. Rep. N.S. 479.

Rails and other chattels by the terms of the contract, when placed on the land, became the absolute property of the company, the contractor having no property therein, except the right of using them on the land for the purpose of the works, and on completion of the line, a condition precedent, the plant was to be given to the contractor as part consideration, or if used by the company to be paid for:—Held, not liable to be taken in execution for the company's debts. *Beeston* v. *Marriott*, 4 Giff. 436.

### (B) WHEN WRONGFUL.

An entry for the purpose of making a distress through a window fastened by a hasp is unlawful. *Handcock* v. *Austin*, 32 Law J. Rep. (N.S.) C.P. 252; 14 Com. B. Rep. N.S. 634.

There is no illegality in distraining for rent by climbing over a fence, and so gaining access to the house by an open door. *Eldridge* v. *Stacey*, 15 Com. B. Rep. N.S. 458.

The broker having been forcibly expelled, regained possession by force after an interval of three weeks:—Held, that he was justified in so doing; and that it was a question for the jury whether by staying out so long he had abandoned the distress. Ibid.

### (C) IRREGULAR SALE.

Goods belonging to the defendant having been distrained for rent on a third person's premises, they were duly appraised, and the landlord, instead of actually selling, took them at the condemned price in satisfaction of the rent and costs, and then handed them as a gift to the plaintiff, upon which the defendant took possession of them:—Held, that there was no sale so as to divest the defendant of the property in the goods, and he had therefore a right to take them. *King* v. *England*, 33 Law J. Rep. (N.S.) Q.B. 145; 4 Best & S. 782.

### (D) TENDER OF AMENDS.

Detinue will not lie for goods impounded damage feasant where tender of amends has been made after the impounding. *Singleton* v. *Williamson*, 31 Law J. Rep. (N.S.) Exch. 287; 7 Hurls. & N. 747.

### (E) ABUSE OF, BY WORKING.

If a distrainor abuses a distress by working it, the

owner may interfere and prevent it, and no action can be maintained against him for pound breach or rescue. *Smith* v. *Wright*, 30 Law J. Rep. (N.S.) Exch. 313; 6 Hurls. & N. 821.

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## DIVORCE AND MATRIMONIAL CAUSES.

[The Divorce and Matrimonial Act (20 & 21 Vict. c. 85) amended by 27 & 28 Vict. c. 44.—The Act, 23 & 24 Vict. c. 144, for Amending the Procedure and Powers of the Court of Divorce and Matrimonial Causes, made perpetual by 25 & 26 Vict. c. 81.]

(A) JURISDICTION.
(B) LEGITIMACY (DECLARATION ACT).
(C) JACTITATION OF MARRIAGE.
(D) NULLITY OF MARRIAGE.
  (*a*) *Defect in the Contract.*
    (1) *Fraudulent Misnomer.*
    (2) *Marriage after Decree of Divorce and before Time for Appeal had elapsed.*
  (*b*) *Defect in the Parties.*
    (1) *Affinity.*
    (2) *Impotence.*
      (i) *Generally.*
      (ii) *Permanent or curable.*
      (iii) *Triennial Cohabitation.*
      (iv) *Inspection.*
  (*c*) *Lapse of Time.*
  (*d*) *Confrontation.*
(E) DISSOLUTION OF MARRIAGE.
  (*a*) *When the Suit is maintainable.*
    (1) *Adultery coupled with Cruelty* [See (H) Cruelty].
    (2) *Adultery coupled with Desertion* [See (I) Desertion].
  (*b*) *When not maintainable.*
    (1) *Agreement made in former Suit.*
    (2) *Discretionary Bar.*
  (*c*) *Effect of.*
(F) JUDICIAL SEPARATION.
  (*a*) *When the Suit is maintainable* [See (H) Cruelty, and (I) Desertion].
    (1) *Decree pending Cross-Suit for Dissolution.*
    (2) *On Petition for Dissolution.*
  (*b*) *When not maintainable* [See (K) Condonation].
    (1) *Impediment to Marital Intercourse arising after Marriage.*
    (2) *Lapse of Time.*
  (*c*) *Compromise of Suit.*
(G) RESTITUTION OF CONJUGAL RIGHTS.
  (*a*) *Absolute Bar.*
  (*b*) *Discretionary Bar.*
  (*c*) *Proof of the Marriage.*
  (*d*) *Practice* [See *post*, (T) Practice (*h*) Petition; and (*g*) Motions, Orders, and Decrees].
(H) CRUELTY.
  (*a*) *Generally what amounts to Cruelty.*
  (*b*) *Sufficiency of one Act of Cruelty.*
  (*c*) *By the Wife.*
  (*d*) *By Insane Person.*
  (*e*) *Condonation.*
(I) DESERTION.
  (*a*) *Generally what amounts to.*
  (*b*) *Wilful Separation.*
  (*c*) *Effect of Offer to return to Cohabitation.*
  (*d*) *Protection Order.*
(K) CONDONATION.
(L) CONNIVANCE AND COLLUSION.
  (*a*) *Connivance.*
  (*b*) *Collusion.*
(M) PARTIES TO SUITS.
  (*a*) *Committee of Lunatic.*
  (*b*) *Curator ad Litem.*
  (*c*) *Intervener.*
    (1) *Queen's Proctor.*
    (2) *Other Persons.*
  (*d*) *Co-respondent.*
    (*a*) *Generally who to be made.*
    (*b*) *Dispensing with and dismissing.*
    (*c*) *Death of.*
(N) PLEADING.
  (*a*) *Certainty, Particularity, Relevancy, and Impertinence.*
  (*b*) *Plea to the Jurisdiction.*
  (*c*) *Plea by Co-respondent of Discretionary Bar.*
  (*d*) *Claim of Damages.*
  (*e*) *Petition by Father of Minor.*
  (*f*) *Effect of Pleading over.*
  (*g*) *Reforming Pleadings* [See (O) Amendment.
  (*h*) *Striking out Plea.*
(O) AMENDMENT.
  (*a*) *Of Petition.*
  (*b*) *Of Answer.*
  (*c*) *Of Appearance.*
(P) EVIDENCE.
  (*a*) *In general.*
  (*b*) *Of the Parties* [See (Q) Witness].
  (*c*) *Admissions on the Pleadings.*
  (*d*) *Depositions.*
  (*e*) *Proceedings in other Suits: Estoppel.*
  (*f*) *Privileged Communications.*
  (*g*) *Proof of Marriage.*
    (1) *In British Colonies.*
    (2) *In Foreign Countries.*
  (*h*) *In Aggravation of Damages.*
(Q) WITNESS.
  (*a*) *Competency.*
  (*b*) *Commission to examine.*
  (*c*) *Examination of.*
    (1) *Notice of.*
    (2) *Before Trial.*
    (3) *At the Trial.*
  (*d*) *Cross-examination.*
  (*e*) *Evidence to contradict.*
(R) ALIMONY.
  (*a*) *Pendente Lite.*
    (1) *Right to.*
    (2) *When and how long payable.*
    (3) *Amount of, and how ascertained.*
    (4) *To whom payable.*
  (*b*) *Permanent Alimony.*
    (1) *When and on what Principles awarded.*
    (2) *Amount awarded.*
    (3) *Deductions.*
    (4) *Examination as to.*
    (5) *To whom payable.*
    (6) *Other Matters.*

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## (A) JURISDICTION.

[See PROHIBITION, *Foster* v. *Foster*.]

The Court has jurisdiction to dissolve a marriage solemnized between foreigners in a foreign country, on the ground of the adultery of the wife committed abroad, if the husband at the time the adultery is committed, and at the time the petition is presented, is *bona fide* and permanently resident in England; although, for the purpose of succession, he may not have acquired an English domicil. *Brodie* v. *Brodie*, 30 Law J. Rep. (N.S.) Prob. M. & A. 185; 2 Swab. & T. 259.

A Scotch divorce is inoperative on the marriage of a domiciled Englishman. *Tollemache* v. *Tollemache*, 30 Law J. Rep. (N.S.) Prob. M. & A. 113.

A a domiciled Englishman married in 1837, at Gretna Green, B a Scotchwoman, and afterwards cohabited with her, without abandoning his English domicil. In 1841 B committed adultery in Scotland with C. In the same year, on the ground of that adultery, A obtained a divorce in the Court of Session in Scotland. C then married B, and died in 1855, having by her had issue. In 1854, A having been advised by counsel that the Scotch divorce was inoperative in England, he presented a petition to the House of Lords for a bill to declare his marriage void from the date of the Scotch divorce. This petition was rejected, and on the passing of the Divorce Act, A instituted a suit for dissolution of marriage on the ground of the adultery in 1841:—Held, 1, that the Scotch sentence of divorce being inoperative, the Court had jurisdiction to dissolve the marriage. 2, That A under the circumstances had not been guilty of unreasonable delay in presenting his petition, within the meaning of section 31. of the 20 & 21 Vict. c. 85. Ibid.

A, an Irishman by birth, resided at the Cape of Good Hope from 1842 till 1862. During the earlier part of this period he served in an English regiment stationed at the Cape, during the latter in the Cape Mounted Rifles. In 1850 he married B at the Cape,

and in 1852 this marriage was dissolved by a sentence of the Colonial Court on the ground of B's adultery. In 1852 he married C in the lifetime of B, and in 1863 he died intestate. An application by C for administration to A as his widow was opposed on the ground that A was a domiciled Englishman at the date of his first marriage, and therefore that the sentence of divorce pronounced by the Colonial Court was inoperative:—Held, that as upon the evidence there was no proof that A was a domiciled Englishman, or that his domicil was not at the Cape, the sentence of divorce must be treated as valid. *Argent* v. *Argent*, 34 Law J. Rep. (N.S.) Prob. M. & A. 133; 4 Swab. & T. 52.

*Quære*—Whether if A had been a domiciled Englishman the divorce would have been invalid in England. Ibid.

The Court of Divorce and Matrimonial Causes has, under section 3. of 20 & 21 Vict. c. 85, jurisdiction to vary a decree of the Ecclesiastical Courts, allotting permanent alimony. *Harmar* v. *Harmar*, 32 Law J. Rep. (N.S.) Prob. M. & A. 118.

Where a husband was domiciled in Ireland, and had only a temporary abode in England at the date of filing the petition, and the wife appeared and submitted to the jurisdiction of the Court, the full Court dissolved their marriage, which had been celebrated in Ireland, on the ground of adultery committed by the wife in England and on the Continent. *Callwell* v. *Callwell*, 3 Swab. & T. 259.

The Court is not at liberty to recognize an agreement made between the counsel of the petitioner and co-respondent in respect of the amount of damages to be paid, but is bound by the assessment of the jury. Ibid.

A respondent in a suit for dissolution of marriage having entered an absolute appearance, cannot afterwards plead to the jurisdiction of the Court, nor can she raise such objection by act on petition. *Forster* v. *Forster*, 3 Swab. & T. 144.

If a respondent intends to plead to the jurisdiction of the Court, she should appear under protest.—*Semble*, however, that at the hearing she may, notwithstanding, object to the jurisdiction. Ibid.

(B) Legitimacy (Declaration Act).

In a petition under the Legitimacy Declaration Act, the citation of parties, between whom and the petitioner there already exists a judgment of a Court of competent jurisdiction upon the subject now in suit, does not afford ground for a plea of *res judicata*. The Attorney General is by the act a necessary respondent; the Court is bound therefore to decide the personal question of status as between the Crown and the petitioner. The intention of the 10th section is not to prevent the Court pronouncing a decree which may militate against former judgments, but to protect former judgments against its operation. *Shedden* v. *Her Majesty's Attorney General*, 30 Law J. Rep. (N.S.) Prob. M. & A. 217; 2 Swab. & T. 170.

Evidence by a witness of reputation of marriage is admissible so long as it appears to be of a general reputation; so soon as it appears, however, upon cross-examination or otherwise, that the witness is speaking from information given to him by some individual, even of the existence of a general reputation, such evidence is merely hearsay, and, as such, inadmissible. Ibid.

The admissibility of declarations by members of the family terminates with the commencement of the controversy, and the termination of this admissibility is not affected by any knowledge or ignorance on the part of the declarant of the existence of that controversy; nor is it affected by its being shewn that such proceedings were fraudulently commenced with a view to exclude the possibility of any such declaration. Ibid.

The giving in evidence by the one side, without objection raised by the other, a copy-letter from a letter-book, does not waive the right of the party so giving it from objecting to the other side putting in a letter between the same parties from the same book. Ibid.

The commencement of the controversy, and not of the institution from which it springs, is the commencement of the *lis mota*, and terminates the admissibility of family declarations. A declaration made expressly with a view to a probable future contest is admissible *quantum valeat*. Not so, however, when made in a prior cause on the same subject-matter. A prior cause carried on between the same parties will not be a *lis* so as to exclude declarations, unless the very point subsequently in dispute upon which it is sought to bring such declaration to bar was then in litigation. Ibid.

(C) Jactitation of Marriage.

A suit of jactitation of marriage can only be instituted by one of the parties to the pretended marriage. *In re Campbell* v. *Corley, ex parte Campbell*, 31 Law J. Rep. (N.S.) Prob. M. & A. 60.

(D) Nullity of Marriage.

(*a*) *Defect in the Contract.*

[See *post*, (*b*) (1) *Wing* v. *Taylor*.]

(1) *Fraudulent Misnomer.*

A marriage by banns, where the publication of banns was in the name of "John" instead of "Bower," the christian name of the man, both parties being at the time of the solemnization of the marriage aware of such misdescription, was pronounced null. *Midgley* v. *Wood*, 30 Law J. Rep. (N.S.) Prob. M. & A. 57.

The woman having consented to such publication on the faith of the statement of the man that the marriage would not thereby be invalidated, the Court condemned him in the costs of the suit of nullity instituted by her. Ibid.

*Quære*—Whether, when the ground of a suit of nullity is such that either party might have instituted it, the respondent may plead matter tending to sustain the suit, and cross-examine the petitioner's witnesses, and adduce affirmative evidence in support of this plea. Ibid.

*Quære* also—Whether in such a suit a respondent, who by his answer admits the allegations of the petitioner, may, on the petition being dismissed at the hearing, institute a fresh suit on the same ground. Ibid.

*Semble*—That it is collusion for both parties to a suit, instituted on grounds which would entitle the petitioner only to sue, to concur in getting up evidence in support of the petition, though the evidence be true. Ibid.

*Quære*—Whether it would be so if either party

might have instituted a suit on the same grounds. Ibid.

A partial departure from the true name of one of the parties to a marriage, in a licence obtained in the altered name by the other party, for the purpose of concealing the intended marriage, is no cause of nullity, if the altered name may represent the person, and if such licence was obtained for, and by the direction of, that person. *Bevan* v. *M'Mahon*, 30 Law J. Rep. (N.S.) Prob. M. & A. 61; 2 Swab. & T. 230.

*Aliter* in the case of a marriage by banns after a publication in such an altered name under similar circumstances. Ibid.

A marriage was solemnized by virtue of a licence, in which the name of the woman was stated to be "Margaret Bevan," her baptismal name, and that by which she was commonly called, being "Margaret Lea Bevan." The licence was obtained in the altered name by the man, who, knowingly, and by the direction of the woman, suppressed the name "Lea," in order that the surrogate might not know who the woman was, and that the intended marriage might be kept secret from her friends:—Held, in a suit of nullity of marriage instituted by the woman on the ground of misnomer in the licence, that as the name "Margaret Bevan" might represent her, and the licence was obtained for her, and by her direction, the marriage was not void as having been solemnized without licence. Ibid.

(2) *Marriage after Decree of Divorce and before Time for Appeal had elapsed.*

After a decree of dissolution of marriage on the ground of the adultery of the wife had been pronounced, but before the time allowed for appealing against the decree had elapsed, the wife married again:—Held, that such marriage was void. *Chichester* v. *Mure*, 32 Law J. Rep. (N.S.) Prob. M. & A. 146; 3 Swab. & T. 223.

On the 1st of June, 1860, a final decree of dissolution of marriage was pronounced; parliament was prorogued on the 28th of August, 1860, and on the 20th of November, 1860, when parliament was not sitting, the respondent married again:—Held, that the marriage was void. *Rogers* v. *Halmshaw*, 33 Law J. Rep. (N.S.) Prob. M. & A. 141; 3 Swab & T. 141.

(*b*) *Defect in the Parties.*

(1) *Affinity.*

By the law of England affinity is not created by sexual intercourse without marriage. *Wing* v. *Taylor*, 30 Law J. Rep. (N.S.) Prob. M. & A. 258; 2 Swab. & T. 278.

The illicit intercourse of the man with his wife's mother prior to the marriage does not render the marriage void, as being within the prohibited degrees of affinity. Ibid.

*Prima facie* the vestry is part of the church. A petition for sentence of nullity, on the ground that a marriage was solemnized in the vestry which does not aver that the vestry formed no part of the church, is insufficient. Ibid.

The 4 Geo. 4. c. 76. s. 28, which requires that two witnesses should be present at a marriage, and should sign the register, is merely directory; and the non-compliance with its directions is no ground for annulling the marriage. Ibid.

(2) *Impotence.*

(i) *Generally.*

In a suit of nullity of marriage by a woman on the ground of impotence, the Court not being satisfied with the evidence at the hearing suspended its decree; but afterwards, on motion, pronounced the marriage null upon affidavits that, since the hearing, the parties had renewed cohabitation for some weeks, and that the marriage had not been consummated. *M*—— v. *H*——, 34 Law J. Rep. (N.S.) Prob. M. & A. 12; 3 Swab. & T. 592.

After a cohabitation of fourteen years a woman presented a petition for a decree of nullity of marriage on the ground of the man's impotence. The report of the inspectors and the medical evidence shewed that the woman was *virgo intacta et apta viro*, and that there was no apparent defect or malformation in the man. The Court was satisfied that the marriage had never been completely consummated, but was not satisfied that the non-consummation arose from the incapacity of the man, and it therefore dismissed the petition. *X*—— v. *Y*——, 34 Law J. Rep. (N.S.) Prob. M. & A. 81.

Any evidence is admissible in a suit for nullity which tends to throw light on the case set up by the petitioner or the respondent; evidence is therefore admissible as to disputes between the petitioner and the respondent during their cohabitation, although the only issues raised by the pleadings are the respondent's impotence and the consummation of the marriage. Ibid.

The woman cohabited with her husband from their marriage, in November, 1848, till July, 1862; she then occupied a separate bed for two or three weeks, and left his house in August, 1862, after disputes about other matters, and did not return to it. In May, 1864, she filed her petition for nullity, by reason of his impotence; he traversed this, and alleged consummation. The report of the inspectors pronounced her to be a virgin and apt, and stated that the man had no apparent imperfection. At the hearing the petitioner and respondent both gave evidence, and medical men, besides the inspectors, gave evidence on both sides. In the result the Court held, that the petitioner had failed to prove that the marriage had remained unconsummated by reason of the impotence of the man, and dismissed him from the suit. *L*—— v. *H*——, 4 Swab. & T. 115.

(ii) *Permanent or curable.*

A congenital malformation, rendering consummation impossible, though curable by a surgical operation, is a ground of nullity, if such operation would be attended with great danger to life. Such a malformation may be considered incurable. *W*—— v. *H*——, 30 Law J. Rep. (N.S.) Prob. M. & A. 73; 2 Swab. & T. 240.

It is not a condition precedent to the right of the petitioner to a decree, under such circumstances, that he should call upon the respondent to submit to an operation. Ibid.

Evidence is admissible in such a case to explain or vary the report of the inspectors. Ibid.

The circumstance that at the time of the marriage

the petitioner, the man, was aged fifty-four, and the respondent forty-nine, is no bar to such a suit. Ibid.

*Quære*—Whether there is any limit of age at which the right to a decree of nullity on such a ground ceases. Ibid.

Incapacity to consummate a marriage is no ground for a decree of nullity, unless the incapacity be permanent. If there is a possibility that its cause may be cured, the Court will not pronounce a sentence of nullity, although such cure may be highly improbable. *Stagg* v. *Edgecombe*, 32 Law J. Rep. (N.S.) Prob. M. & A. 153.

*Quære*—Whether in a case in which there is incurable impotence a decree of nullity will be pronounced where there has been only cohabitation for three months. *Semble*—That in a suit by the woman for nullity of marriage on the ground of impotence, there must be a report by sworn medical inspectors as to the state of the woman. *Semble*, also, that when the Court rejects a petition for a decree of nullity, it will not decree a monition that the petitioner do return to cohabitation, unless such process is prayed by the respondent. Ibid.

S, a woman, married E on the 22nd of July, and lived with him till the 23rd of September. She petitioned for a decree of nullity by reason of his inability to consummate the marriage. He did not appear. The report of medical inspectors negatived any apparent and incurable defect on his part, but ascribed the non-consummation to incapacity caused by a long-continued habit of self-abuse, which (as further explained by their *viva voce* evidence) they considered might possibly, but not probably, be cured; the question being one of moral restraint. There was no report of inspectors as to the condition of the woman, and their *viva voce* evidence was equivocal as to proof of non-consummation from examination of her person. The Court refused to make the decree. *S*—— v. *E*——, 3 Swab. & T. 240.

*Semble*—The Court would not, at all events, make such a decree without a report from sworn medical inspectors as to the condition of the woman. Ibid.

(iii) *Triennial Cohabitation.*

In a suit of nullity of marriage on the ground of the impotence of the husband, if the marriage has not been consummated, and there is no visible defect in either party, impotence will not be presumed merely from ineffectual cohabitation, unless such cohabitation has lasted for three years. Cohabitation for two years and ten months is not sufficient. *M*—— v. *H*——, 33 Law J. Rep. (N.S.) Prob. M. & A. 159; 3 Swab. & T. 517.

The presumption of impotence arising from ineffectual cohabitation may be rebutted by proof that the non-consummation of the marriage is due to another cause. Ibid.

A woman petitioned for a decree of nullity on the ground of the man's impotency, after a cohabitation of seventeen months. The respondent did not appear, and refused to submit to inspection. The medical inspectors certified with respect to the petitioner, that there were no certain signs of virginity, and that the physical appearances were consistent with the marriage having been consummated or not. The Court being satisfied by the petitioner's evidence that the marriage had never been consummated, that the non-consummation was owing to the impotency of the respondent, and that the physical appearances of the petitioner were to be accounted for otherwise than by consummation, granted a decree of nullity. *D*—— v. *F*——, 34 Law J. Rep. (N.S.) Prob. M. & A. 66; *nom. F*——, *falsely called D*—— v. *D*——, 4 Swab. & T. 86.

The rule as to triennial cohabitation only applies when the impotency is left to be presumed from continual non-consummation, and not when it is plainly proved *aliunde*. Ibid.

(iv) *Inspection.*

In a suit of nullity of marriage on the ground of malformation, the petitioner on moving for the appointment of inspectors should also move for an order that the respondent submit to inspection. *Semble*—When the respondent appears the Court will allow each of the parties to nominate one of the inspectors, and when he does not appear it will allow the petitioner, in default of the respondent nominating one, to select both. *S*—— v. *E*——, 31 Law J. Rep. (N.S.) Prob. M. & A. 164.

Where in answer to a suit by a husband for restitution of conjugal rights, the wife pleads the impotence of the husband, the Court will, upon the application of the respondent, appoint medical inspectors to examine her. It is convenient that the same medical inspectors should examine both parties. *C*—— v. *C*——, 32 Law J. Rep. (N.S.) Prob. M. & A. 31.

In a suit of nullity of marriage on the ground of physical incapacity, each party has a right to nominate two medical inspectors to examine him or her. It is not necessary that both parties should be examined by the same inspectors. In a suit of nullity by a woman, the Court, with the consent of the respondent, allowed the petitioner's evidence to be given on affidavit. *B*—— v. *C*——, 32 Law J. Rep. (N.S.) Prob. M. & A. 135.

[And see *post*, (F) Trial, (*a*) (5).]

(*c*) *Lapse of Time.*

A married B in 1834. In October, 1838, she left him, alleging that he was impotent, and that he himself had in many conversations admitted the fact. In November, 1838, and from that time till 1854, she had tried to effect a reconciliation, maintaining herself all this time by her own means. Suits were then instituted against her husband for her debts; he then made her an allowance, which he continued till October, 1858, when he proposed to reduce it on account of his altered circumstances. In November, 1858, this suit was instituted:—Held, that though delay was not an absolute bar to such a suit, it was a reason for requiring the strictest evidence of the complaint; and the Lords, agreeing with the Court below that such evidence had not been given, affirmed the decree of that Court by which the suit had been dismissed. *H*—— v. *C*—— (House of Lords), 31 Law J. Rep. (N.S.) Prob. M. & A. 103.

Where a husband, who was the petitioner in a suit for nullity on the ground of his wife's malformation, had not instituted the suit until upwards of eleven years after the marriage, the Court required him to give an explanation of the delay before making a decree. *E*—— v. *T*——, 33 Law J. Rep. (N.S.) Prob. M. & A. 37; 3 Swab. & T. 312.

Lapse of time, coupled with an indirect motive for bringing the suit, is an absolute bar to a suit for a decree of nullity of marriage on the ground of impotence. *M*—— v. *B*——, 33 Law J. Rep. (N.S.) Prob. M. & A. 203; 3 Swab. & T. 550.

(*d*) *Confrontation.*

Decree of confrontation granted in a suit for nullity of marriage. *Enticknap* v. *Rice*, 34 Law J. Rep. (N.S.) Prob. M. & A. 110; 4 Swab. & T. 136.

(E) Dissolution of Marriage.

(*a*) *When the Suit is maintainable.*

(1) *Adultery coupled with Cruelty* [See (H) Cruelty].

(2) *Adultery coupled with Desertion* [See (I) Desertion].

(*b*) *When not maintainable.*

(1) *Agreement made in former Suit.*

Petition for dissolution of marriage dismissed on the ground that it was presented in violation of an agreement made in a former suit by which the petitioner had surrendered any right to relief in respect of misconduct alleged to have been committed prior to the institution of that suit. *Rowley* v. *Rowley*, 34 Law J. Rep. (N.S.) Prob. M. & A. 97; 4 Swab. & T. 187.

(2) *Discretionary Bar.*

Where the petitioner has been guilty of adultery or cruelty, &c. the Court may, in the exercise of the discretionary power vested in it by the 31st section of 20 & 21 Vict. c. 85, refuse to decree a dissolution of the marriage, although such adultery, cruelty, &c. may have been condoned. *Goode* v. *Goode*, 30 Law J. Rep. (N.S.) Prob. M. & A. 105; 2 Swab. & T. 253.

In a suit for dissolution of marriage, on the ground of the wife's adultery, the respondent did not appear. The co-respondent denied the adultery, and that issue was found by a jury in favour of the petitioner. The evidence upon which the verdict was founded being unsatisfactory, the Judge Ordinary declined to make a decree upon it against the respondent. *Dolby* v. *Dolby*, 30 Law J. Rep. (N.S.) Prob. M. & A. 110; 2 Swab. & T. 228.

A ward in Chancery who had no means of his own, at the age of sixteen, married clandestinely a prostitute of about the age of thirty-five. By an order of the Master of the Rolls made a month after the marriage, it was ordered that the husband should be delivered into the custody of his guardian, with liberty for the guardian to send him abroad, and that the wife should be restrained from holding any communication with him. In pursuance of this order, he was sent abroad against his will. The wife being left without means of support, she applied to her husband's guardian for money, but it was refused. For some months after the marriage she conducted herself properly, and then relapsed into her former course of life. In a suit by the husband for dissolution of marriage,—Held, that as the separation was, on the husband's part, involuntary, and he had no means wherewith to contribute to his wife's support, he had not wilfully separated himself from her nor been guilty of such neglect or misconduct as had conduced to the adultery so as to give the Court a discretionary power, under section 31. of 20 & 21 Vict. c. 85, to refuse to dissolve the marriage. *Beavan* v. *Beavan*, 32 Law J. Rep. (N.S.) Prob. M. & A. 36.

Where in a suit by a husband the adultery of the wife is proved, the Court will not under the discretionary power vested in it by section 31. of 20 & 21 Vict. c. 85, refuse to decree a divorce, unless some act of misconduct specified in that section is established. It will not act on mere suspicion. *Davies* v. *Davies*, 32 Law J. Rep. (N.S.) Prob. M. & A. 111; 3 Swab. & T. 221.

A husband, in 1842, married a fellow-servant, and continued with her in the same service until 1846, when, in order to improve his position, he left, and took another situation. His wife remained in the same place, and there formed an adulterous connexion with a fellow-servant. It did not appear that the petitioner, from the time he left his wife, had ever visited or communicated with her:—Held, that the petitioner was entitled to a divorce. Ibid.

In a suit by a wife for dissolution of marriage, adultery and cruelty were proved, but there was no evidence of any misconduct subsequent to the year 1844. From that time until shortly before the year 1863, when the petition was filed, the wife was without means of instituting a suit in the Ecclesiastical Court or in this Court:—Held, that she had not been guilty of unreasonable delay. *Harrison* v. *Harrison*, 33 Law J. Rep. (N.S.) Prob. M. & A. 44; 3 Swab. & T. 362.

In 1861 a decre *nisi* was made by the Divorce Court in favour of the appellant, who had previously obtained a decree for a divorce *a mensa et thoro* in the Ecclesiastical Court. Subsequently to the decree *nisi* the Queen's Proctor intervened, alleging collusion, and that the husband had been living in adultery since the divorce *a mensa et thoro*. The charge of collusion was, however, abandoned, but the adultery was proved, and the Court reversed the decree *nisi*, dismissed the petition, and condemned the appellant in the costs of the Queen's Proctor:—Held, on appeal, that the Judge of the Divorce Court had, under the circumstances, a discretion, under the 31st section of the 20 & 21 Vict. c. 85, to refuse a divorce, and that such discretion had been properly exercised. *Lautour* v. *Her Majesty's Proctor* (House of Lords), 33 Law J. Rep. (N.S.) Prob. M. & A. 89; 10 H.L. Cas. 685.

A petition for dissolution of marriage by reason of the adultery of the wife, dismissed on the ground that the petitioner, before the adultery, had wilfully separated himself from the respondent without reasonable excuse. *Jeffreys* v. *Jeffreys*, 33 Law J. Rep. (N.S.) Prob. M. & A. 84; 3 Swab. & T. 493.

At the hearing of a suit, by a husband, for dissolution of marriage, the petitioner, after his case had been proved, tendered himself for examination, under the 43rd section of 20 & 21 Vict. c. 85, and confessed that on one occasion, during a temporary separation from the respondent, he had been guilty of an act of adultery. The Court refused a decree. *Clarke* v. *Clarke*, 34 Law J. Rep. (N.S.) Prob. M. & A. 94.

A husband, believing that his wife, who had eloped from him, and was living in adultery, was dead, married another woman and committed adultery

with her. The Court, in the exercise of the discretion vested in it by the 31st section of the 20 & 21 Vict. c. 85, granted the husband a divorce notwithstanding his adultery. *Joseph* v. *Joseph*, 34 Law J. Rep. (N.S.) Prob. M. & A. 96.

A young man who had just taken his degree at Cambridge married a prostitute and never afterwards cohabited with her. He had no means of providing a home for her, or of contributing to her support, and the day after the marriage he separated from her and went to live with his father, who, on being informed of the marriage some months afterwards, caused a deed of separation to be executed, by which an allowance of 1*l.* a week was secured to her. This allowance was paid by the husband's father. After the execution of the deed the wife was guilty of adultery. In a suit by the husband for dissolution of marriage,—Held, that the separation, if wilful, was not without reasonable excuse, and that the petitioner was entitled to a decree. *Proctor* v. *Proctor*, 34 Law J. Rep. (N.S.) Prob. M. & A. 99; 4 Swab. & T. 140.

(c) *Effect of.*

After a divorce *a vinculo matrimonii*, a man is not liable to be sued, jointly with his former wife, for a tort committed by her during the coverture. *Capel* v. *Powell*, 34 Law J. Rep. (N.S.) C.P. 168; 17 Com. B. Rep. N.S. 743.

## (F) JUDICIAL SEPARATION.

(a) *When the Suit is maintainable* [See (H) Cruelty, and (I) Desertion].

(1) *Decree pending Cross-Suit for Dissolution.*

A wife, who has obtained a verdict in a suit for judicial separation, in which she is the petitioner, is entitled to a decree of judicial separation, notwithstanding the pendency of a cross-suit by the husband for dissolution. *Bancroft* v. *Bancroft*, 34 Law J. Rep. (N.S.) Prob. M. & A. 70; 4 Swab. & T. 84.

(2) *On Petition for Dissolution.*

The Court will, on the application of a petitioner, grant a decree of judicial separation instead of a decree of dissolution, although the petition prays for dissolution, and evidence has been given upon which a decree of dissolution could be founded. *Dent* v. *Dent*, 34 Law J. Rep. (N.S.) Prob. M. & A. 118; 4 Swab. & T. 105.

(b) *When not maintainable* [See (K) Condonation].

(1) *Impediment to Marital Intercourse arising after Marriage.*

An impediment to marital intercourse supervening after marriage in consequence of the disease of the wife cannot be pleaded in bar to a suit by her for judicial separation on the ground of adultery. *M*—— v. *M*——, 31 Law J. Rep. (N.S.) Prob. M. & A. 168.

(2) *Lapse of Time.*

Delay in instituting a suit for judicial separation, on the ground of cruelty, is not a bar to the suit; but it is a material fact for the consideration of the Court, as tending to shew that there was no serious apprehension of further violence. *Smallwood* v. *Smallwood*, 31 Law J. Rep. (N.S.) Prob. M. & A. 3; 2 Swab. & T. 397.

In a suit for judicial separation, brought by the wife, on the ground of cruelty,—Held, on appeal, affirming the decision of the Judge Ordinary, that lapse of time, though not an absolute bar, yet taken in connexion with other circumstances, *e. g.* a deed of separation, may shew that the application was not made, *bona fide*, for the protection of the wife, but for some collateral purpose; and that if the Court was satisfied of this, the petition ought to be dismissed. *Matthews* v. *Matthews*, 3 Swab. & T. 161.

(c) *Compromise of Suit.*

Upon a petition for judicial separation by the wife, on the ground of cruelty, an arrangement was come to by counsel for both parties, before the jury was sworn, that the record should be withdrawn, the suit not moved, and a referee appointed to settle the terms of a separation by deed, with full powers over the question of income. The referee refused to go into the charge of cruelty, as contended for by the petitioner, for the purpose of aggravation of alimony. Upon motion by the petitioner upon the ground that the agreement was silent as to costs, and that it had been intended by the petitioner to place the referee in the position of the Court to hear and decide upon the whole case, the Judge Ordinary refused to allow the record to be re-entered. *Hooper* v. *Hooper*, 30 Law J. Rep. (N.S.) Prob. M. & A. 49.

Though the Court cannot recognize an agreement to live apart, it will hold parties bound by an agreement upon which a suit for separation was compromised. Ibid.

Upon appeal to the full Court,—Held, that the wife, as a party to the suit, may bind herself by such an arrangement, and that it is equivalent to a judgment in the suit; that the referee had no need to consider the question of cruelty, as the amount of permanent alimony is not varied by the amount of marital delinquency; that, in allotting it, regard may properly be had to the status of both parties, but that it can never be increased for the purpose of mulcting the guilty party. Ibid.

## (G) RESTITUTION OF CONJUGAL RIGHTS.

[See (D) (b) (iv) *Inspection.*]

(a) *Absolute Bar.*

A plea in bar to a suit for restitution of conjugal rights is bad, unless it set forth matter sufficient to entitle the respondent to a decree of judicial separation. A plea that the respondent had reasonable suspicion that the petitioner had committed adultery, is bad. *Burroughs* v. *Burroughs*, 30 Law J. Rep, (N.S.) Prob. M. & A. 186; 2 Swab. & T. 303.

An agreement to live separate is no bar to a suit for restitution of conjugal rights. *Spering* v. *Spering*, 32 Law J. Rep. (N.S.) Prob. M. & A. 116; 3 Swab. & T. 211.

(b) *Discretionary Bar.*

The Court has no discretionary power to refuse a decree in a suit for restitution of conjugal rights on the ground that the suit was instituted by the petitioner, not in order that he might regain the society of his wife, but for some collateral object. *Scott* v. *Scott*, 34 Law J. Rep. (N.S.) Prob. M. & A. 23.

The petitioner in a suit for restitution of conjugal rights is entitled to a decree unless he is proved to have committed a matrimonial offence which would be ground for a judicial separation. Ibid.

Unless the respondent to a petition for restitution of conjugal rights can establish a legal defence to the petition, the petitioner will be entitled to a decree, and the Court has no discretion to inquire into the sincerity of the petitioner in bringing the suit. *Scott* v. *Scott*, 4 Swab. & T. 113.

(*c*) *Proof of the Marriage.*

A decree will not be granted in an undefended suit for restitution of conjugal rights, upon mere proof of the marriage. Evidence of the other facts of the case must be given. Where, at the time of pronouncing a decree of restitution of conjugal rights, the respondent was abroad, the Court directed that the decree should be served on the respondent's return to England, and that it should require him to certify within a fortnight after such service that he had obeyed it. *Pearson* v. *Pearson*, 33 Law J. Rep. (N.S.) Prob. M. & A. 156.

In a suit for restitution of conjugal rights the Court has no jurisdiction to make a decree until the marriage has been formally proved, although the respondent may have filed an answer not taking issue on the marriage. *Scott* v. *Scott*, 34 Law J. Rep. (N.S.) Prob. M. & A. 23.

(*d*) *Practice* [Dismissing Petition. See (T) Practice. (2) and (3) Withdrawing and Dismissing Petitions. Enforcing Decree. See (T) Practice (*g*), Motions, Orders, and Decrees].

## (H) CRUELTY.

[See *Squires* v. *Squires*, *post*, (P). And see *post*, N) (a).]

(*a*) *Generally what amounts to Cruelty.*

Spitting in the wife's face, combined with other acts of violence, held to constitute cruelty. A test of injuries such as spitting in the face is the sense in which they are received. If not resented at the time, less weight will be attached to the charge when brought forward. *Waddell* v. *Waddell*, 31 Law J. Rep. (N.S.) Prob. M. & A. 123 ; 2 Swab. & T. 584.

A husband assaulted his wife in the public street without inflicting personal injury, but by his conduct and filthy language led a passer-by to take her for a common prostitute and insult her :—Held, that he had been guilty of cruelty. *Milner* v. *Milner*, 31 Law J. Rep. (N.S.) Prob. M. & A. 159.

Cruelty is no answer to a suit for judicial separation on the ground of adultery. *Tuthill* v. *Tuthill*, 31 Law J. Rep. (N.S.) Prob. M. & A. 214.

*Quære*—Whether a respondent, in a suit for judicial separation on the ground of adultery, is at liberty to introduce a charge of cruelty into the answer, and to pray for a judicial separation, and to give evidence in support of that charge in the event of the petitioner's failure to establish the charge of adultery ? Ibid.

A wife in consequence of her husband's cruelty left his house. She afterwards came back, but refused to return to his bed except upon condition that he would restore her to her position in the household as his wife, with which he refused to comply. In consequence of his ill-treatment, she again left and never returned. After the final separation, in consideration of the wife's agreement to apply part of her settled income for the benefit of the children of the marriage, the husband promised to allow them to visit her from time to time. This promise he failed to perform, and in consequence of the breach of his agreement, and not from fear of personal violence, the wife six years after the separation instituted a suit for judicial separation ; and it was held by the full Court, affirming the decision of the Judge Ordinary, that the wife was entitled to a decree of judicial separation. *Cooke* v. *Cooke*, 32 Law J. Rep. (N.S.) Prob. M. & A. 154 ; 3 Swab. & T. 246.

Weight given by the Court to the wife's evidence of unnatural connexion had, or attempted to be had, with her by the husband, and to evidence tending to prove the existence of gonorrhœa, and of its wilful communication by husband to wife. *N*—— v. *N*——, 3 Swab. & T. 234.

Cruelty established by proof of habitually insulting conduct and violent temper, leading to frequent quarrels and occasionally to slight acts of violence, and inducing mental and bodily suffering. *Knight* v. *Knight*, 34 Law J. Rep. (N.S.) Prob. M. & A. 112; 4 Swab. & T. 103.

A husband's constant intoxication and open profligacy, coupled with some slight acts of violence towards his wife, and an attempt to cut her throat, held to constitute a case of cruelty. *Power* v. *Power*, 34 Law J. Rep. (N.S.) Prob. M. & A. 137 ; 4 Swab. & T. 173.

A husband treated his wife with neglect and indifference, ceased to have matrimonial intercourse with her, and carried on an adulterous intercourse with a servant in the same house where he and his wife were residing. The Court held that, in the absence of any threats or acts of positive violence, his conduct did not amount to legal cruelty. *Cousen* v. *Cousen*, 34 Law J. Rep. (N.S.) Prob. M. & A. 139 ; 4 Swab. & T. 164.

A plea that the petitioner without reasonable cause withdrew from the bed of the respondent, and refused to render conjugal rights, standing alone and without any allegation of other misconduct, is no bar to a suit for judicial separation on the grounds of adultery and cruelty, and will therefore be struck out. *Rowe* v. *Rowe*, 34 Law J. Rep. (N.S.) Prob. M. & A. 111 ; 4 Swab. & T. 162.

Where the evidence of actual violence used by the husband towards the wife is not sufficient of itself to warrant a decree on the ground of cruelty, the Court will take into consideration his general conduct towards her, and, if this is of a character tending to degrade the wife and subjecting her to a course of annoyance and indignity injurious to her health, will feel itself at liberty to pronounce the cruelty proved. *Swatman* v. *Swatman*, 4 Swab. & T. 135.

(*b*) *Sufficiency of one Act of Cruelty.*

One gross act of cruelty is ground for a decree of judicial separation if there be reasonable apprehension of further acts of the same kind. *Reeves* v. *Reeves*, 32 Law J. Rep. (N.S.) Prob. M. & A. 178 ; 3 Swab. & T. 139.

A decree of judicial separation, on the ground of cruelty, will not be granted unless the Court is satis-

fied that further cohabitation is unsafe. A single act of personal violence committed under excitement, and not producing any considerable injury to the person, will not warrant the Court in concluding that further cohabitation is unsafe. *Smallwood* v. *Smallwood*, 31 Law J. Rep. (N.S.) Prob. M. & A. 3; 2 Swab. & T. 397.

Petition by a wife for judicial separation, on the ground of cruelty, dismissed, when the sole evidence of cruelty was, that in an altercation, arising out of the unfounded jealousy of the husband, he had seized his wife by the throat and had thrown her on the ground, and it did not appear that any marks on the throat, or injury to the health of the wife, had resulted from the violence. Ibid.

(*c*) *By the Wife.*

Repeated acts of unprovoked violence by a wife will be regarded as cruelty, although they may not inflict serious bodily injury upon the husband or imperil his safety. *Pickard* v. *Pickard*, 33 Law J. Rep. (N.S.) Prob. M. & A. 158.

Where a judicial separation is granted on the ground of the wife's cruelty, the Court has power to order the husband to make a provision for her. Ibid.

Though the physical effects of the wife's violence may not generally be so serious to the personal safety of the husband as the effects of his violence towards her, yet the moral result of the wife's violence to all the proper relations of married life is so serious, that the Court will interfere, and not drive the husband to the necessity of meeting force by force. *Prichard* v. *Prichard*, 3 Swab. & T. 523.

In such cases the Court will expect some provision to be made for the maintenance of the wife; overruling *White* v. *White* and *Dart* v. *Dart*. Ibid.

(*d*) *By Insane Person.*

Cruelty committed by an insane person is no ground for judicial separation. *Hall* v. *Hall*, 33 Law J. Rep. (N.S.) Prob. M. & A. 65; 3 Swab. & T. 347.

(*e*) *Condonation.*

A return to matrimonial cohabitation is necessary in order that there may be condonation. *Cooke* v. *Cooke*, 32 Law J. Rep. (N.S.) Prob. M. & A. 81; 3 Swab. & T. 126.

Delay in presenting a petition for judicial separation on the ground of cruelty is not of itself a bar to the suit, but it is a circumstance to be taken into consideration, and combined with others may be a ground for dismissing the petition as tending to shew that the suit is instituted for some collateral object and not for the purpose of protection. Ibid.

A wife in consequence of her husband's cruelty left his house. She afterwards came back, but refused to return to his bed except upon condition that he would restore her to her position in the household as his wife, with which he refused to comply. In consequence of his ill-treatment, she again left, and never returned. After the final separation, in consideration of the wife's agreement to apply part of her settled income for the benefit of the children, the husband promised to allow them to visit her from time to time. This promise he failed to perform, and in consequence of the breach of his agreement, and not from fear of personal violence, the wife, six years after the separation, instituted a suit for judicial separation:—Held, 1. That the husband's cruelty was not condoned; 2. That as the suit was instituted in order that the wife might have access to her children, which she could not otherwise obtain, unless by renewal of a cohabitation which would be dangerous, and as there was no proof that it was instituted for any purpose that had no relation to the ill-treatment she had suffered, and the peril of a renewal of cohabitation, she was entitled to a judicial separation. Ibid.

The word "condonation" has the same meaning in the Divorce Acts as it had in the Ecclesiastical Courts; and the doctrine of revival is equally applicable to it. Therefore, although the adultery complained of by the petitioner in a suit for dissolution of marriage has been condoned, the petitioner is entitled to a decree if it has been revived by subsequent cruelty. *Dent* v. *Dent*, 34 Law J. Rep. (N.S.) Prob. M. & A. 118; 4 Swab. & T. 105.

[And as to Condonation generally, see *post*, (K).]

(I) DESERTION.

[See (N) Pleading (*a*).]

(*a*) *Generally what amounts to.*

In a suit commenced on the 7th of November, 1861, by a wife for dissolution of marriage on the ground of adultery and desertion for two years, it appeared that the parties were married in 1852 and lived together until 1856, when the husband took an appointment in the Commissariat in China, leaving his wife and only child in England, his motive for doing so, according to his own statement made subsequently, being that "his marriage had been the curse of his life, and he was miserable in his home." From China he wrote frequently to his wife, expressing attachment to her, but always asking for money to pay debts incurred by his extravagance, and never shewing the least inclination to return. In 1859 he was tried by court-martial and dismissed the service. He then wrote to his wife expressing his determination never to return to England, but to go to Australia *via* Alexandria, and asked that money should be sent to him at Alexandria to pay his passage to, and enable him to begin life in, Australia. On the 22nd of October, 1859, he wrote from Alexandria acknowledging the receipt of this money, and saying that he had resolved to go out to Sydney, and hoped to start for that place from Alexandria on the 25th of October. Instead, however, of going to Sydney, he went to Paris, lost all his money at a gaming-table, and thence came to England, where he arrived about the 10th of November, and shortly after formed an adulterous connexion with a woman whom he proposed to marry. He did not communicate with his wife or her friends until the 10th of December, when he wrote to her expressing no wish to see her, and giving no address, but stating that he was penniless, and requesting her if she wished to hear further of him to put an advertisement in a newspaper:—Held, that his letters, construed by his acts, warranted the conclusion that from the time he left Alexandria he never intended to return to his wife, and had therefore deserted her for two years and upwards before the commencement of the suit. *Lawrence* v. *Lawrence*,

31 Law J. Rep. (N.S.) Prob. M. & A. 145; 2 Swab. & T. 575.

A married a woman, and, after cohabiting with her at her father's house for some weeks, left her. At his request she shortly afterwards went to him and remained with him for two or three days. He then sent her back to her father, saying that he could not support her. After the lapse of eighteen months, during which she did not hear from him, he went to her father's house, and asked to be allowed to see her. Her father refused to allow him to have any communication with her until he should be in a condition to support her. He then left, and never returned or asked her to return to him:—*Quære*, whether these facts established a case of desertion. *Harris* v. *Harris*, 31 Law J. Rep. (N.S.) Prob. M. & A. 6.

To neglect opportunities of consorting with a wife is not necessarily to desert her. *Williams* v. *Williams*, 33 Law J. Rep. (N.S.) Prob. M. & A. 172; 3 Swab. & T. 547.

So long as a husband treats his wife as a wife by maintaining such degree and manner of intercourse as might naturally be expected from a husband of his calling and means, he cannot be said to have deserted her. Ibid.

A husband and wife having failed in business, went into service in different families. For some years the husband constantly visited his wife once or twice a week when she was in London. After some years of such intercourse, the wife offered to purchase a business with her savings, in order that they might live together. The husband, who had then formed an adulterous intercourse with another woman, refused this offer, but continued to visit his wife as before:—Held, that the husband had not been guilty of desertion. Ibid.

*(b) Wilful Separation.*

A husband when reproached by his wife with an adulterous connexion he had formed with A said he wished to go and would rather be with A than with his wife. His wife said, "Go if you like, and when you are sick of A return to me," and she made him promise to return to her. He then left her, and never returned:—Held, that the conduct of the wife at the last interview did not shew assent by her to the separation, but that the husband had been guilty of desertion. *Haviland* v. *Haviland*, 32 Law J. Rep. (N.S.) Prob. M. & A. 65.

A husband and wife executed a deed of separation, but none of its provisions were ever carried into effect, and the cohabitation was continued after its execution. The husband subsequently deserted the wife:—Held, that she was entitled to relief on the ground of that desertion notwithstanding the deed. *Cock* v. *Cock*, 33 Law J. Rep. (N.S.) Prob. M. & A. 157; 3 Swab. & T. 514.

*(c) Effect of Offer to return to Cohabitation.*

Shortly after a marriage the husband, with the intention of bringing about a separation, so treated his wife as to compel her to leave him. She subsequently made several offers to return; but he refused to receive her. She continued willing to return, until she found that he was carrying on an adulterous intercourse, which had subsisted since the marriage. She then refused to return, except upon condition that such intercourse should cease:—Held, that the husband's conduct, before the wife became aware of his adultery, amounted to desertion, and that such desertion was not put an end to by her unwillingness to return while the adultery continued. *Graves* v. *Graves*, 33 Law J. Rep. (N.S.) Prob. M. & A. 66; 3 Swab. & T. 350.

An offer by a husband to return to cohabitation after he has deserted his wife for two years and upwards, and has committed adultery, does not take away her right to a decree of dissolution on the ground of such desertion coupled with adultery, the offence of desertion being complete before the offer was made. *Basing* v. *Basing*, 33 Law J. Rep. (N.S.) Prob. M. & A. 150; 3 Swab. & T. 516.

*(d) Protection Order.*

An order obtained pursuant to 20 & 21 Vict. c. 85. s. 21, by a married woman deserted by her husband, for the protection of property acquired since desertion, will not enable her to maintain an action commenced before the date of the order for injuries to or in respect of such property. *The Midland Rail. Co.* v. *Pye*, 30 Law J. Rep. (N.S.) C.P. 314; 10 Com. B. Rep. N.S. 179.

*Quære*—Whether it will enable her to sue for injuries in respect of which the cause of action is complete at the time of the order. Ibid.

(K) CONDONATION.

[See *ante*, (H) Cruelty (*e*).]

Condonation of adultery committed by a wife with A is a bar to any proceedings by the husband against A. If such condoned adultery is revived by the wife's subsequent misconduct, so as to entitle the husband to a decree of dissolution of marriage, A, though made a co-respondent in the suit, cannot be condemned in costs. *Norris* v. *Norris*, 30 Law J. Rep. (N.S.) Prob. M. & A. 111.

To a suit by a wife for a dissolution of marriage, on the ground of adultery coupled with cruelty, condonation of the cruelty is no bar. *Quære*—Whether condonation of one marital offence is valid if made in ignorance of another marital offence. *Dempster* v. *Dempster*, 31 Law J. Rep. (N.S.) Prob. M. & A. 20; 2 Swab. & T. 438.

*Semble*—That condoned adultery may be revived by undue familiarities short of adultery. *Winscom* v. *Winscom*, 33 Law J. Rep. (N.S.) Prob. M. & A. 45; 3 Swab. & T. 380.

A charge of adultery held not to be established upon the evidence. Ibid.

In order to establish condonation, it is not sufficient to prove that a husband returned to cohabitation with his wife after he was in possession of evidence of her adultery; it is necessary also to prove that he gave credit to that evidence, and took her back believing her to be guilty and intending to forgive her. *Ellis* v. *Ellis*, 34 Law J. Rep. (N.S.) Prob. M. & A. 100; 4 Swab. & T. 154.

(L) CONNIVANCE AND COLLUSION.

*(a) Connivance.*

In order to establish connivance by the husband at his wife's adultery, it must be shewn that he gave a willing consent to it, and was an accessory before the fact. If the husband, intending that adultery

should take place, does not interfere when he might do so, he is guilty of connivance. In a suit for dissolution of marriage, on the ground of the wife's adultery, a jury having found that the husband had connived at the adultery, the Court, being satisfied of the propriety of the verdict, dismissed the petition with costs. *Allen* v. *Allen*, 30 Law J. Rep. (N.S.) Prob. M. & A. 2.

A husband who gives a willing assent to an act of adultery by his wife, desiring that it shall be committed, is guilty of connivance, although he may take no active step towards procuring it to be committed, and may not be an accessory before the fact. *Marris* v. *Marris*, 31 Law J. Rep. (N.S.) Prob. M. & A. 69; 2 Swab. & T. 530.

*Quære*—Whether, in conducting a suit on behalf of the Queen's Proctor, the Attorney General can claim any privilege as in Crown cases. Ibid.

In order to establish connivance by a husband at his wife's adultery, it is not requisite that he should be an accessory before the fact—should have taken active measures to bring about the adultery; it is sufficient if he was cognizant that adultery would result from transactions which he approved of and consented to. *Glennie* v. *Glennie*, 32 Law J. Rep. (N.S.) Prob. M. & A. 17.

Connivance is knowledge of, and acquiescence in, the conduct complained of. *Boulting* v. *Boulting*, 33 Law J. Rep. (N.S.) Prob. M. & A. 33; 3 Swab. & T. 329.

Where a wife, who was a petitioner in a suit for judicial separation on the ground of adultery, had for many years before the commencement of the suit known of such adultery without complaint or remonstrance, and had been in receipt of an allowance from her husband, the Court held, that those facts were evidence to go to a jury in support of a charge of connivance. Ibid.

A husband wilfully abstaining from taking any steps to prevent an adulterous intercourse, which from what passes before his eyes he cannot but believe or reasonably suspect is likely to occur, is guilty of connivance, though there may be no corrupt intention on his part. *Timmings* v. *Timmings* disapproved of. (Per the *Lord Chancellor* and *Lord Chelmsford*, *Lord Wensleydale* dissenting.) *Gipps* v. *Gipps* (House of Lords), 33 Law J. Rep. (N.S.) Prob. M. & A. 161; 11 H.L. Cas. 1—affirming the decision below, 32 Law J. Rep. (N.S.) Prob. M. & A. 78; 3 Swab. & T. 116.

If a husband having the right to divorce his wife for adultery, abandons that right in consideration of a sum of money received from the adulterer, he can never afterwards be a petitioner for a divorce on the ground of his wife's criminal intercourse with the same person—(per *Lord Chelmsford*). Ibid.

A decree of dissolution of marriage on the ground of the wife's adultery will not be granted when the adultery has been brought about by persons acting on behalf of the petitioner, although without his knowledge. *Picken* v. *Picken*, 34 Law J. Rep. (N.S.) Prob. M. & A. 22.

Whilst the husband was abroad, his father employed A to watch the wife. A employed B. At B's instigation, but without the knowledge or concurrence of the petitioner or his father, the co-respondent induced the wife to commit adultery. The Court dismissed the petition. Ibid.

*(b) Collusion.*

In a suit for dissolution of marriage on the ground of the wife's adultery the adultery was proved, but it appeared from the evidence of witnesses called by the Court, that an agent employed by the petitioner to procure evidence and serve the citations on the respondents, then living together as man and wife, had, whilst on that mission, associated with them on intimate terms; had received money from the co-respondent; and had paid him money, which was afterwards repaid by the wife's father, in order that he might be enabled to complete the chain of evidence; that the father of the wife had paid money to the petitioner on his signing the petition, and also to induce him to proceed with the suit; had acted in concert with the petitioner in the conduct of the suit; and had aided in getting up the case by giving facilities for obtaining evidence of the adultery. The Court, being of opinion that the petition was prosecuted in collusion with the respondents, in compliance with the 30th section of the 20 & 21 Vict. c. 85, dismissed it. *Lloyd* v. *Lloyd*, 30 Law J. Rep. (N.S.) Prob. M. & A. 97.

When collusion has been established the petitioner cannot be examined for the purpose of contradicting or explaining the evidence of such collusion. Ibid.

If a husband, whose wife is leading a life of prostitution, pay money, or cause money to be paid to a person to commit an act of adultery with her, in order that he may obtain evidence to enable him to institute a suit for a dissolution of his marriage, the Court will not grant a decree in consequence of the act of adultery so committed with his concurrence. *Sugg* v. *Sugg*, 31 Law J. Rep. (N.S.) Prob. M. & A. 41.

Where A, a friend of the petitioner, offered B 5*l*. if he would obtain evidence against a respondent, and B made an arrangement with the co-respondent that he should commit adultery with the respondent and receive half the money, and the adultery was accordingly committed, and the money paid by A and divided between B and the co-respondent, the Judge Ordinary directed the jury that if the arrangement between B and the co-respondent was made without the knowledge and concurrence of the petitioner, the petitioner would be entitled to a decree by reason of the adultery committed in pursuance of the arrangement. Ibid.

In an undefended suit for dissolution of marriage on the ground of the adultery of the wife, it appeared at the hearing that the wife had given the petitioner's solicitor a photograph of herself and attended in court at the hearing to aid in her identification, and for so doing received money from the solicitor. The Court, notwithstanding, being satisfied upon the evidence that there was no collusion between the petitioner and respondent, pronounced a decree *nisi*. *Harris* v. *Harris*, 31 Law J. Rep. (N.S.) Prob. M. & A. 160.

In order to establish a charge of collusion against the petitioner and the respondent in a suit for dissolution of marriage, it is necessary to prove that there was some understanding or agreement between them. *Gethin* v. *Gethin*, 31 Law J. Rep. (N.S.) Prob. M. & A. 43.

Where a husband and wife, both of them being anxious to obtain a divorce, presented cross-petitions, and the husband's petition was dismissed upon his

own application, and he abstained from making any defence to his wife's petition, the Judge Ordinary directed the jury that if that course had not been taken in consequence of any understanding or agreement between the parties, but each had acted independently of the other, the petitioner was not guilty of collusion. Ibid.

### (M) PARTIES TO SUITS.

#### (*a*) *Committee of Lunatic.*

The committee of a lunatic may maintain a suit for judicial separation, on the ground of the adultery of the wife of the lunatic. *Woodgate* v. *Taylor*, 30 Law J. Rep. (N.S.) Prob. M. & A. 197; 2 Swab. & T. 512.

#### (*b*) *Curator ad Litem.*

A suit for dissolution of marriage cannot be maintained against a lunatic. Where such a suit had been instituted, the Court refused to appoint a curator *ad litem* to the respondent to enable the petitioner to proceed with the suit. *Bawden* v. *Bawden*, 31 Law J. Rep. (N.S.) Prob. M. & A. 94; 2 Swab. & T. 417.

#### (*c*) *Intervener.*

##### (1) *Queen's Proctor.*

The 23 & 24 Vict. c. 144. s. 7. enables any one of the public to give to the Court of the Judge Ordinary, between the decree *nisi* and the decree absolute for a divorce, information to relieve it from being misled on the subject of a divorce petition. That section confers on the Queen's Proctor the power to intervene in a case of collusion, but in that alone; and, except in such a case, if he takes any proceedings in a suit for divorce, he appears only as one of the public giving information to the Court, and under such circumstances the Court has no power to award him costs. *Lantour* v. *Her Majesty's Proctor*, 10 H.L. Cas. 685.

The Queen's Proctor cannot, without the leave of the Court, intervene in his official capacity to shew cause against a decree *nisi* for dissolution of marriage being made absolute. *Gray* v. *Gray*, 30 Law J. Rep. (N.S.) Prob. M. & A. 96.

Where the Queen's Proctor intervenes in a suit for dissolution of marriage before the hearing, and pleads collusion and that the petitioner has been guilty of adultery, his right to intervene cannot be defeated by the petitioner asking only for a decree of judicial separation; but he will be allowed to prove his pleas. *Drummond* v. *Drummond*, 30 Law J. Rep. (N.S.) Prob. M. & A. 177; 2 Swab. & T. 269.

The Court will not, at the hearing in such a case, allow the prayer of the petition to be altered into a prayer of judicial separation for the purpose of ousting the Queen's Proctor. Ibid.

The Queen's Proctor having intervened, during the progress of a suit for dissolution of marriage, and pleaded "that the petitioner and respondent had been acting in collusion, for the purpose of obtaining a divorce, contrary to the justice of the case," the Court ordered him to specify the nature of the collusion charged, but refused to order him to state the facts which he proposed to prove. *Jessop* v. *Jessop*, 30 Law J. Rep. (N.S.) Prob. M. & A. 193; 2 Swab. & T. 301.

Where the respondent denied the allegations of the petition, and these issues came on for trial at the same time as an issue raised on a plea of the Queen's Proctor, "that the petition had been filed by arrangement with the respondent and others acting on his behalf," the Court held that the Queen's Proctor had nothing to do with the issues raised between the parties, and that his counsel had no right to comment on the evidence relating to them. Ibid.

Though the Queen's Proctor may fail to establish a charge of collusion, the Court will not order the costs to be paid by the Crown if the petitioner's conduct has been such as to justify the intervention. Ibid.

If before a decree *nisi* for dissolution of marriage has been made absolute material facts which would justify the intervention of the Queen's Proctor come to the knowledge of the Court, it will refuse to make the decree absolute, and will direct the registrar to lay the matter before the Queen's Proctor, that he may intervene if he think fit. *Boulton* v. *Boulton*, 31 Law J. Rep. (N.S.) Prob. M. & A. 27; 2 Swab. & T. 405.

When the Queen's Proctor intervenes in his official capacity by leave of the Court, under the latter branch of the 7th section of 23 & 24 Vict. c. 144, and pleads to a petition, he cannot immediately after issue has been joined on his plea file affidavits under the 18th of the Further Rules of 1860, shewing cause against the decree being made absolute, inasmuch as that and the following rules are applicable only to the intervention of "any person," without the leave of the Court under the first branch of the section. *Boulton* v. *Boulton*, 31 Law J. Rep. (N.S.) Prob. M. & A. 76; 2 Swab. & T. 551.

After the expiration of three months from the pronouncing of a decree *nisi* for dissolution of marriage, the Queen's Proctor, without obtaining leave to intervene, entered an appearance and filed affidavits shewing that material facts had not been brought before the Court. An application was made for a decree absolute, notwithstanding such appearance, &c., upon the ground that the Queen's Proctor, if he does not obtain leave to intervene, can only shew cause against a decree *nisi* as one of the public, and within three months from the pronouncing of the decree:—Held, by the Court, rejecting the application, that cause may be shewn against a decree by any person at any time before it is made absolute. *Bowen* v. *Bowen*, 33 Law J. Rep. (N.S.) Prob. M. & A. 129; 3 Swab. & T. 530.

The Court has no jurisdiction to award the Queen's Proctor his costs under 23 & 24 Vict. c. 144. s. 7, unless he intervenes in his official capacity and proves collusion. Ibid.

The wife petitioned for dissolution; the husband made no answer; the hearing of the petition had been adjourned for further proof, pending which the Queen's Proctor intervened, and alleged the petitioner's adultery, who took issue thereon, and the Court allowed the proof of the original petition to be completed, and the issue as between the petitioner and Queen's Proctor to be set down for trial by a jury, retaining the same position in the cause-list as the original petition. *Gethin* v. *Gethin*, 2 Swab. & T. 406.

The Queen's Proctor can only intervene, in his official capacity, in a suit for dissolution of marriage

when he alleges collusion. He may, however, as one of the public, shew cause against a decree *nisi* being made absolute. *Masters* v. *Masters*, 34 Law J. Rep. (N.S.) Prob. M. & A. 7.

A respondent, by pleading in answer to a petition for dissolution of marriage material facts, of which no evidence is given at the hearing, does not bring them before the Court, within the meaning of the 7th section of 23 & 24 Vict. c. 144; but such facts may, after a decree *nisi* has been pronounced, be set up by one of the public as ground for not making the decree absolute. Ibid.

The respondent in her answer to a suit for dissolution of marriage charged the petitioner with adultery, and at the hearing called witnesses in support of the charge, but the issue was found against her. The Queen's Proctor subsequently intervened, and charged the petitioner with collusion, and also with the adultery pleaded by the respondent:—Held, that he was not barred from setting up such adultery by the respondent having pleaded it, and adduced evidence at the hearing to prove it. *Harding* v. *Harding*, 34 Law J. Rep. (N.S.) Prob. M. & A. 9.

When the Queen's Proctor intervenes after a decree *nisi*, and the affidavits filed by him and by the petitioner are contradictory, the Court will order the questions of fact in dispute to be tried by a jury. Ibid.

In a suit by a husband for dissolution of marriage the Queen's Proctor intervened after a decree *nisi*, and filed a plea on which issue was joined. An order was subsequently made, that the petitioner should attend in court on the hearing of the issue, and upon his non-appearance when the case came on for hearing, the Court reversed the decree, and dismissed the petition without requiring evidence in support of the plea. *Pollack* v. *Pollack*, 34 Law J. Rep. (N.S.) Prob. M. & A. 49.

The Queen's Proctor intervened in a suit for dissolution, and alleged collusion and the petitioner's adultery. The respondent did not appear. No evidence being tendered in support of the petition when the case came on for hearing, the Court dismissed the petition, without requiring evidence to be produced in support of the Queen's Proctor's pleas. *Sheldon* v. *Sheldon*, 34 Law J. Rep. (N.S.) Prob. M. & A. 80; 4 Swab. & T. 75.

An intervener shewing cause against a decree being made absolute, and alleging the same facts as those charged in the respondent's answer, and also collusion, is not bound to prove collusion before giving evidence of such facts. *Harding* v. *Harding*, 34 Law J. Rep. (N.S.) Prob. M. & A. 108; 4 Swab. & T. 145.

The petitioner is not a competent witness in a proceeding by an intervener shewing cause against a decree *nisi:* nor will the Court examine him under the 43rd section of the 20 & 21 Vict. c. 85. in support of his own case. Ibid.

The Court will refuse to make a decree *nisi* absolute, after the expiration of three months from the time when it was pronounced, in order to enable the Queen's Proctor to make inquiries, and to lay a case before the Attorney General for his directions, upon an affidavit being filed by the Queen's Proctor to the effect that he has received information of material facts, and that he intends to take the direction of the Attorney General. *Palmer* v. *Palmer*, 34 Law J. Rep. (N.S.) Prob. M. & A. 110; 4 Swab. & T. 143.

(2) *Other Persons.*

It is not competent for a person who has intervened in a suit for dissolution of marriage for the purpose of shewing cause against the decree *nisi* being made absolute, to object that the Court had no jurisdiction over the parties to the suit; nor to rely on, as material facts, charges which had been pleaded in answer to the petition but were abandoned at the trial; nor to support his opposition by matters which would only be ground for a motion by the parties for a new trial. *Forster* v. *Forster*, 32 Law J. Rep. (N.S.) Prob. M. & A. 206; 3 Swab. & T. 151.

At any time before a decree *nisi* of dissolution of marriage is made absolute, it is competent for one of the public to intervene, although three months may have elapsed since the decree was pronounced. *Clements* v. *Clements*, 33 Law J. Rep. (N.S.) Prob. M. & A. 74; 3 Swab. & T. 394.

The Court will not act upon affidavits filed in opposition to a decree *nisi*, unless it is satisfied that an intervener is properly before the Court. Ibid.

An appearance was entered for A, and affidavits were filed in opposition to a decree *nisi*. Affidavits were then filed, by the petitioner, shewing that A had never authorized the intervention. An appearance was then entered for B, and further affidavits were filed. The Court refused to take notice of the intervention of B, and being satisfied that A had never authorized the intervention in his name, made the decree absolute. Ibid.

*Semble*—That the Court will not act upon an intervention when satisfied that it is made at the instance of the respondent or co-respondent. Ibid.

A petition for dissolution of marriage was dismissed after decree *nisi*, on the ground of the petitioner's adultery, the charges of adultery proved by the intervener being identical with those contained in the respondent's answer but not proved by the respondent. *Harding* v. *Harding*, 34 Law J. Rep. (N.S.) Prob. M. & A. 129; 4 Swab. & T. 145.

The Court will allow persons who are not parties to a suit to intervene and plead upon the question of the custody, maintenance and education of the children of parents, whose marriage is the subject of the suit. *Chetwynd* v. *Chetwynd*, 34 Law J. Rep. (N.S.) Prob. M. & A. 130; 4 Swab. & T. 151.

[And see *ante*, (1), *Bowen* v. *Bowen*.]

(*d*) *Co-respondent.*

[See (T) Practice; (*r*) Damages.]

(*a*) *Generally who to be made.*

A petition, by a husband, for dissolution of marriage, charged adultery with A and also with divers other persons, and afterwards, in pursuance of an order of the Court, particulars of the general charge were given, alleging adultery with B. After an order had been obtained by the respondent for a commission to examine B, who was abroad, the petitioner applied for leave to make B a co-respondent. The Court refused the application, on the ground that it was not *bona fide*, but solely for the purpose of excluding B's evidence. *Codrington* v. *Codrington*,

33 Law J. Rep. (N.S.) Prob. M. & A. 62; 3 Swab. & T. 368.

In a suit for dissolution of marriage on the ground of the wife's adultery, the petitioner must make every man against whom adultery is alleged in the petition a co-respondent, unless on special grounds he is excused by the Court from doing so. *Carryer* v. *Carryer*, 34 Law J. Rep. (N.S.) Prob. M. & A. 47; 4 Swab. & T. 94.

*Quære*—Whether the want of evidence against the alleged adulterer, and the fact that he is resident abroad, are sufficient grounds for excusing the petitioner from making him a co-respondent. Ibid.

*(b) Dispensing with and dismissing.*

Although a wife has for many years been leading a life of prostitution, the husband, in a suit by him for dissolution of marriage, will not be excused from making a co-respondent, unless it appears that he knows of no person with whom she has committed adultery. *Hook* v. *Hook* overruled. *Quicke* v. *Quicke*, 31 Law J. Rep. (N.S.) Prob. M. & A. 28; 4 Swab. & T. 419.

*Semble*—That if a husband, who has been allowed to proceed without making a co-respondent, afterwards and before the trial acquire evidence as to the person with whom his wife committed adultery, and who was previously unknown, he ought to bring the matter before the Court. He need not do so when the sole evidence is the wife's confession. *Muspratt* v. *Muspratt*, 31 Law J. Rep. (N.S.) Prob. M. & A. 28.

The Court will not, upon the affidavit of the petitioner only, allow him to proceed without making a co-respondent. *Leader* v. *Leader*, 32 Law J. Rep. (N.S.) Prob. M. & A. 136.

Where the wife, the respondent, was alleged to be leading the life of a common prostitute and to have committed adultery with several persons, who were necessary witnesses to enable the petitioner to establish the charges of adultery, the petitioner was allowed to proceed without making a co-respondent. *Peters* v. *Peters*, 3 Swab. & T. 264.

Where, in a suit for dissolution of marriage, the alleged adulterer, who had been made a co-respondent, appeared under protest and pleaded to the jurisdiction, the Court, on the application of the petitioner, dismissed the co-respondent from the suit on payment of his costs. *Gaynor* v. *Gaynor*, 31 Law J. Rep. (N.S.) Prob. M. & A. 116.

*(c) Death of.*

A suit for dissolution of marriage abates on the death of the respondent; but the Court will not, on the application of the petitioner, order that the petition and affidavit in support of it be removed from the file. *Brocas* v. *Brocas*, 30 Law J. Rep. (N.S.) Prob. M. & A. 172; 2 Swab. & T. 383.

*Semble*—That when the co-respondent dies pending a suit for dissolution of marriage, a motion should be made for leave to strike his name out of the proceedings. *Sutton* v. *Sutton*, 32 Law J. Rep. (N.S.) Prob. M. & A. 156.

By the death of the petitioner a suit for dissolution of marriage abates. If, therefore, he dies after a decree *nisi* has been pronounced the Court cannot make it absolute. *Grant* v. *Grant*, 31 Law J. Rep. (N.S.) Prob. M. & A. 174; 2 Swab. & T. 522.

The petitioner in a suit for dissolution of marriage on the ground of the wife's adultery died after a decree *nisi* had been pronounced, and before the time for making it absolute had expired. On behalf of the children of the marriage the Court was moved to make the decree absolute, in order that an application might be afterwards made, under the 22 & 23 Vict. c. 61. s. 5. for an order varying the marriage settlement. The Court rejected the motion. Ibid.

(N) PLEADING.

*(a) Certainty, Particularity, Relevancy, and Impertinence.*

To a charge of cruelty, an answer alleging in general terms that the use of force was justified by the conduct of the petitioner is bad. The nature of the conduct should be stated, but particulars of time and place need not be given. *Shaw* v. *Shaw*, 31 Law J. Rep. (N.S.) Prob. M. & A. 35; 2 Swab. & T. 515.

In a suit for judicial separation on the ground of cruelty, cruelty may consist in the aggregate of the acts alleged in the petition, and each paragraph need not allege an independent act of cruelty sufficient in itself to warrant a decree. *Leete* v. *Leete*, 31 Law J. Rep. (N.S.) Prob. M. & A. 121; 2 Swab. & T. 568.

An allegation of an act relied upon as cruelty is not bad on demurrer, if such act could under any circumstances amount to cruelty. Ibid.

An allegation that the respondent was in the habit of using insulting and abusive language to the petitioner in the presence of third persons, is admissible as tending to shew the temper and habits of the respondent. Ibid.

A respondent may not plead and demur to the same part of the petition without leave of the Court. Ibid.

A petition by a wife for judicial separation on the ground of cruelty, alleged in the 4th and 6th paragraphs that the respondent on one occasion threw a silver spoon, and on another a walnut, at the petitioner, with great violence, and in the 8th that he was in the habit of using insulting language to the petitioner, and taunting and abusing her in the presence of the governess and servants. The respondent having demurred to these paragraphs, on the ground that none of the matters therein alleged amounted to cruelty, the Court set aside the demurrer as frivolous. The 9th paragraph alleged that the respondent was in the habit of beating and kicking the petitioner, but that she was unable to set forth the particular occasions. To this the respondent demurred, on the ground that he was not bound to answer such vague charges; and the Court set aside the demurrer as frivolous, holding that the generality of the charge was only ground for an application for particulars. Ibid.

In a petition for divorce on the ground of adultery, it is not competent to plead the ante-nuptial incontinence of the respondent, even though it and the adultery be charged to have been committed with the same person. *Fitzgerald* v. *Fitzgerald*, 32 Law J. Rep. (N.S.) Prob. M. & A. 12.

A petition for judicial separation on the ground of cruelty should specify all the acts of the respondent intended to be relied on as constituting cruelty. A general allegation, that during a specified time the

respondent "committed divers acts of cruelty," is bad, and is ground for an order that the petition be amended by specifying such acts, but not for an order that particulars of the acts of cruelty be given. *Goldney* v. *Goldney*, 32 Law J. Rep. (N.S.) Prob. M. & A. 13.

The answer to a suit for restitution of conjugal rights alleged that the petitioner had in a deed of separation covenanted not to compel or endeavour to compel the respondent to cohabit with him:—Held, that the averment was irrelevant, and must be struck out. *Hunt* v. *Hunt*, 32 Law J. Rep. (N.S.) Prob. M. & A. 168.

In answer to a petition for judicial separation on the ground of desertion, the respondent may set out facts shewing that there was reasonable cause for the desertion, but such facts should be stated succinctly. *Hill* v. *Hill*, 33 Law J. Rep. (N.S.) Prob. M. & A. 187.

Cruelty may consist in the aggregate of the acts alleged in a petition or answer, and each paragraph need not allege an independent act of cruelty sufficient in itself to warrant the relief sought. *Green* v. *Green*, 33 Law J. Rep. (N.S.) Prob. M. & A. 64.

To a petition by a woman for a decree of nullity, on the ground of impotence, the respondent pleaded that since the marriage the petitioner had committed adultery. The Court ordered the plea to be struck out as impertinent. *Taverner* v. *Ditchford*, 33 Law J. Rep. (N.S.) Prob. M. & A. 105.

*(b) Plea to the Jurisdiction.*

According to the practice of the Ecclesiastical Courts an objection to the jurisdiction might be taken at any time, though it was more usual that it should be taken at the commencement of the proceedings. The proper course, for a respondent who intends to object to the jurisdiction is to appear under protest, and if he wishes for time to plead to the jurisdiction to apply expressly for time to do so. A minor should sue by guardian and not by attorney. *Zychlinski* v. *Zychlinski*, 31 Law J. Rep. (N.S.) Prob. M. & A. 37; 2 Swab. & T. 420.

A respondent in a suit for dissolution of marriage who has appeared absolutely cannot plead a dilatory plea, *e.g.*, that by reason of the domicil of the parties the Court has no jurisdiction, nor can he raise such objection by act on petition. *Semble*, however, that at the hearing he may, notwithstanding, object to the jurisdiction. If a respondent intends to plead a dilatory plea he should appear by person and under protest. *Forster* v. *Forster*, 31 Law J. Rep. (N.S.) Prob. M. & A. 185.

*(c) Plea by Co-respondent of Discretionary Bar.*

A co-respondent may set up, in answer to a petition for dissolution, conduct of the petitioner, which, under the proviso to the 31st section of the Divorce Act, would give the Court a discretionary power to dismiss the petition; but he cannot give evidence of it unless it be pleaded. He is not precluded by the 33rd section from pleading it by the insertion in the petition of a claim for damages, though such a defence could not have been pleaded to an action for criminal conversation; the meaning of that section being, that in such a case the question of damages is to be dealt with, not that the record is to be framed, in the same manner as in actions for criminal conversation. *Seddon* v. *Seddon*, 30 Law J. Rep. (N.S.) Prob. M. & A. 12.

*(d) Claim of Damages.*

Where damages are claimed against the co-respondent, the petition should specify the amount claimed. *Quære*—Whether the counsel for the co-respondent can, upon his own authority, consent to a petition being amended by the insertion of the amount of damages claimed. *Spedding* v. *Spedding*, 31 Law J. Rep. (N.S.) Prob. M. & A. 96.

*(e) Petition by Father of Minor.*

In a suit for nullity instituted by the father of a minor, it must appear upon the face of the petition whether the father has instituted the suit in his own right or as guardian of the minor. *Wells* v. *Cottam*, 33 Law J. Rep. (N.S.) Prob. M. & A. 41; 3 Swab. & T. 364.

A guardian cannot appear and plead on behalf of a minor without having been duly elected and appointed. Ibid.

[And see *ante*, (*b*).]

*(f) Effect of Pleading over.*

An answer to a petition for restitution of conjugal rights, denying that the respondent withdrew from cohabitation without just cause, should state the cause of such withdrawal. If it does not, it is bad on demurrer, but the objection is waived by filing a replication. *Ward* v. *Ward*, 32 Law J. Rep. (N.S.) Prob. M. & A. 120.

*(g) Reforming Pleadings.*

[See (O) Amendment.]

*(h) Striking out Plea.*

To a petition by a wife for judicial separation on the ground of cruelty, the respondent pleaded adultery. The Court, on motion, refused to order the plea to be struck out, but left the petitioner to demur. *Hall* v. *Hall*, 32 Law J. Rep. (N.S.) Prob. M. & A. 117.

*Quære*—Whether adultery is an answer to a charge of cruelty. Ibid.

(O) AMENDMENT.

*(a) Of Petition.*

After the hearing of a petition of a wife for dissolution of marriage on the ground of adultery and cruelty, no decree having been pronounced, the Court allowed the petition to be amended by the addition of a charge of bigamy which came to the knowledge of the petitioner in the interval between the cause being set down for hearing and the hearing. *Walker* v. *Walker*, 30 Law J. Rep. (N.S.) Prob. M. & A. 214.

After the hearing of an undefended petition had been adjourned for further evidence, an allegation was added to the petition by the leave of the Court, and it was re-served upon the respondent. When it again came on for hearing, the Court treated it as a new petition, and required evidence of all the facts necessary to found a decree, as well as of the additional allegation. *Walker* v. *Walker*, 31 Law J. Rep. (N.S.) Prob. M. & A. 117.

A suit for judicial separation may be turned into one for dissolution of marriage without a fresh cita-

tion. *Cartlidge* v. *Cartlidge*, 31 Law J. Rep. (N.S.) Prob. M. & A. 135.

A wife, who had instituted a suit for judicial separation, on the ground of cruelty, subsequently discovered that her husband had also been guilty of adultery. The Court allowed her to amend her petition by adding the charge of adultery, and praying for dissolution of marriage, on the ground of cruelty and adultery, without extracting a fresh citation; but directed that the petition, when amended, should be re-served. Ibid.

A petition for a divorce on the ground of adultery must allege adultery in distinct terms. *Ambler* v. *Ambler*, 32 Law J. Rep. (N.S.) Prob. M. & A. 6.

A petition by a husband for dissolution of marriage contained an inferential, but not a distinct, charge of adultery at a specified time and place. Personal service on the respondent had been dispensed with. Neither the respondent nor co-respondent appeared. At the hearing, adultery at the said time and place having been proved, the Court allowed the petition to be amended by adding a distinct charge of adultery without requiring the petition to be re-served. Ibid.

If at the hearing the Court gives leave to amend the petition to meet the case proved, the petitioner being in court, it may be then amended and a decree *nisi* may be pronounced; but if leave to amend is only granted at a subsequent date after taking time to consider, and the petitioner fails to move for a decree until some considerable time after the amendment has been made, the decree must bear date on the day when pronounced, and cannot be ante-dated. Ibid.

A petition by a husband for dissolution of marriage charged adultery with G and claimed damages. The respondent denied the charge. The co-respondent appeared, but did not file an answer. At the trial, before any witnesses were examined, the claim for damages was withdrawn. The evidence of two witnesses tended to prove that the respondent, on the 24th of September, 1861, committed adultery with some person unknown; and another witness proved that at the same place and time of day, but on the 17th of July, 1861, a man named G had passed some hours in the respondent's company. Upon the application of the petitioner, the petition was then amended by substituting for the charge of adultery with G a charge of adultery with some person unknown. The jury found a verdict for the respondent. Subsequently a rule for a new trial was made absolute upon affidavits that the latter witness had made a mistake in her evidence, and that the circumstance sworn to by her took place on the 24th of September, 1861. Upon the application of the petitioner, the Court ordered the petition and record to be amended by re-inserting the charge of adultery with G upon payment of his costs, but refused to allow the re-insertion of the claim for damages. *Jago* v. *Jago*, 32 Law J. Rep. (N.S.) Prob. M. & A. 48.

When adultery is the ground of a petition it should be distinctly alleged. It is not sufficient to allege that the petitioner "is informed and believes" that the respondent has committed adultery. When leave to amend such a petition is granted, if there is no appearance, it must be re-served. *Spilsbury* v. *Spilsbury*, 32 Law J. Rep. (N.S.) Prob. M. & A. 126; 3 Swab. & T. 210.

Where the respondent is in default by failing to file an answer in due course, he cannot object to a paragraph of the petition on the ground of irrelevancy. *Burrell* v. *Burrell*, 32 Law J. Rep. (N.S.) Prob. M. & A. 136.

Where in the affidavit verifying the petition for dissolution of marriage the co-respondent's christian name was stated to be John instead of William, and a similar mistake was made in the citation and petition, the Court allowed the citation and petition to be amended, and did not require the affidavit to be re-sworn. *Reuss* v. *Reuss*, 32 Law J. Rep. (N.S.) Prob. M. & A. 168.

An application for an order that a pleading be reformed, is an application to the discretion of the Court, and in exercising this discretion the Court will not, as in case of demurrer, consider whether or not the pleading is good in law; but whether or not it may prejudice the opposite side in the conduct of his case. *Griffith* v. *Griffith*, 33 Law J. Rep. (N.S.) Prob. M. & A. 81; 3 Swab. & T. 355.

A petition for dissolution of marriage on the ground of adultery and cruelty charged cruelty "in and during the months of April and May 1861." The respondent filed an answer denying the charges of the petition. Upon the trial of the cause, at which the respondent did not appear, the petitioner failed to prove cruelty at the time alleged, but established cruelty in June and July, 1861:—Held, that the petition might be amended by substituting the date of the cruelty proved. *Bunyard* v. *Bunyard*, 32 Law J. Rep. (N.S.) Prob. M. & A. 176.

The Court will not order a pleading to be amended unless it is so framed as to embarrass the opposite side. *Green* v. *Green*, 33 Law J. Rep. (N.S.) Prob. M. & A. 83.

Leave granted to amend a petition for dissolution of marriage by adding a claim for damages. *Bartlett* v. *Bartlett*, 34 Law J. Rep. (N.S.) Prob. M. & A. 64.

### (*b*) *Of Answer.*

A co-respondent, in the same paragraph of his answer, charged the petitioner with adultery with several women. The Court rejected a motion that the answer should be amended by inserting each charge in a separate paragraph, but without costs. *Hunt* v. *Hunt*, 31 Law J. Rep. (N.S.) Prob. M. & A. 163; 2 Swab. & T. 574.

To a petition alleging adultery on divers occasions in September and October, 1862, the respondent pleaded a denial of the adultery, and, further, that if she had committed adultery as alleged, the petitioner condoned it up to the 29th of September, 1862. The Court refused to order the latter plea to be struck out upon motion. *Windham* v. *Windham*, 32 Law J. Rep. (N.S.) Prob. M. & A. 89.

A wife petitioned for judicial separation, on the ground of cruelty and adultery; the respondent traversed the charges, and afterwards obtained leave to amend his answer by adding a counter-charge of adultery. Before leave to amend was granted, and after an order for payment of the wife's taxed costs, the respondent became bankrupt on his own petition. An application to rescind the order for the amendment of the answer, on the ground that the respondent had become bankrupt solely for the purpose of avoiding payment of his wife's costs, and that the

order was made by the Court in ignorance of the bankruptcy, was rejected. *Greatorex* v. *Greatorex*, 34 Law J. Rep. (N.S.) Prob. M. & A. 9.

(*c*) *Of Appearance.*

By appearing absolutely a respondent admits the jurisdiction of the Court, and he will not be allowed afterwards to amend the appearance by appearing under protest with a view to plead to the jurisdiction. *Garstin* v. *De Garston*, 34 Law J. Rep. (N.S.) Prob. M. & A. 45; 4 Swab. & T. 73.

(P) EVIDENCE.

(*a*) *In general.*

Evidence of acts of adultery, subsequent to the date of the latest act charged in the petition, is admissible, for the purpose of shewing the character and quality of previous acts of improper familiarity. *Boddy* v. *Boddy*, 30 Law J. Rep. (N.S.) Prob. M. & A. 23.

Upon the question of incapacity, although no application had been made for a monition or order for a personal inspection of either of the parties, the Court received medical evidence of an examination. *Serrell* v. *Serrell*, 31 Law J. Rep. (N.S.) Prob. M. & A. 55; 2 Swab. & T. 422.

Evidence to prove a species of cruelty not pleaded in the petition is not admissible; though evidence of violent demeanour and language not pleaded, but leading up to and making probable acts of violence pleaded, may be admissible. *Jewell* v. *Jewell*, 2 Swab. & T. 573.

In an undefended suit the Court refused to admit evidence that the respondent had infected the petitioner with the venereal disease, there being no allegation in the petition that cruelty of that nature had been committed, although there was a general charge of cruelty. *Squires* v. *Squires*, 33 Law J. Rep. (N.S.) Prob. M. & A. 172; 3 Swab. & T. 541.

(*b*) *Of the Parties.*

[See (Q) Witness.]

(*c*) *Admissions on the Pleadings.*

When the Queen's Proctor intervenes, and alleges matter which would be ground for reversing a decree *nisi* for dissolution of marriage, and such allegations are admitted by the petitioner by his replication, the Court will act on those admissions without requiring the proof of the facts admitted. *Boulton* v. *Boulton*, 31 Law J. Rep. (N.S.) Prob. M. & A. 115; 2 Swab. & T. 638.

When, after a decree *nisi* for dissolution of marriage at the suit of the husband had been pronounced, the Queen's Proctor intervened, and pleaded that the petitioner and the respondent had been acting in collusion for the purpose of obtaining a divorce, contrary to the justice of the case, and with that intent kept from the knowledge of the Court that the petitioner had been guilty of bigamy and adultery, and had by such conduct conduced to his wife's adultery, and the petitioner replied, admitting the charges of bigamy and adultery, but denying collusion, and that his conduct had conduced to the adultery of his wife, and pleaded that before the bigamy his wife had been guilty of adultery, the Court, upon the admissions in the replication, without requiring evidence of the facts therein stated, reversed the decree *nisi*, dismissed the petition, and condemned the petitioner in the costs of the intervention. Ibid.

(*d*) *Depositions.*

Where a witness permanently resident abroad is examined under a commission, the presumption is, that the residence abroad continues at the time of the trial, and but slight evidence of his absence abroad is sufficient. But to make the deposition of a witness examined under a commission on account of his intended temporary absence abroad, or on account of illness, admissible at the trial, clear proof must be given that he is beyond the jurisdiction, or unable from illness to attend. *Pollack* v. *Pollack; Mills* v. *Mills*, 30 Law J. Rep. (N.S.) Prob. M. & A. 183; 2 Swab. & T. 310.

*Quære*—Whether the examination of a witness taken under the order of the Court can be read in evidence at the trial, if the witness is prevented from attending it by pregnancy only. *Haviland* v. *Haviland*, 32 Law J. Rep. (N.S.) Prob. M. & A. 144.

The written statements by a sick person to a medical man of the symptoms of his malady are not admissible in evidence, although the medical man has given advice upon the faith of such statement. *Witt* v. *Witt*, 32 Law J. Rep. (N.S.) Prob. M. & A. 179; 3 Swab. & T. 143.

(*e*) *Proceedings in other Suits: Estoppel.*

A verdict obtained upon the evidence of the parties to a suit, and the decree founded thereon, are not admissible, as evidence of the facts thereby established, in another suit between the same parties in which their evidence is inadmissible. *Stoate* v. *Stoate*, 30 Law J. Rep. (N.S.) Prob. M. & A. 102; 2 Swab. & T. 223.

In a suit by the wife for judicial separation, on the ground of cruelty and desertion, a jury having, upon the evidence of the parties and others, found the charges proved, the Court decreed a judicial separation:—Held, in a suit by the husband for dissolution of marriage on the ground of the wife's adultery, that the verdict and decree in the suit for judicial separation were not admissible in evidence to prove charges of cruelty and desertion set up by the wife in her answer, because to admit them would be in effect to make use of the evidence of the parties in a suit in which their evidence was inadmissible. Ibid.

The Court will not order that the evidence taken under a commission in a cross-suit may be used at the hearing of a suit between the same parties. *Hill* v. *Hill*, 30 Law J. Rep. (N.S.) Prob. M. & A. 197.

The principle on which the common law doctrine of estoppel rests is applicable to matrimonial suits, and, therefore, the judgment of this Court, upon a matter directly in issue, is conclusive upon the same matter between the same parties in another suit. *Sopwith* v. *Sopwith*, 30 Law J. Rep. (N.S.) Prob. M. & A. 131; 2 Swab. & T. 160.

*Semble*, however, if the same issue be triable on different principles as to the admissibility of evidence in the two suits, that the doctrine of estoppel would not apply. Ibid.

Where a matter (*e.g.* adultery) is pleaded by way of defence to a matrimonial suit, the same strictness

of proof is required to establish it as if it had been alleged in a petition as the foundation of a suit. Ibid.

In a suit, by a wife, for a judicial separation, on the ground of adultery, the husband denied the adultery, and upon the trial of that issue the Court pronounced that the adultery was not proved, and dismissed the petition. The husband subsequently filed a petition for restitution of conjugal rights:—Held, that the wife was estopped from pleading in bar the same acts of adultery as those alleged in the former suit. Ibid.

A decree founded on the evidence of the parties does not estop them from controverting, in another suit in which such evidence is inadmissible, a fact found by the decree. *Bancroft* v. *Bancroft*, 34 Law J. Rep. (N.S.) Prob. M. & A. 14; 3 Swab. & T. 597.

*(f) Privileged Communications.*

A petitioner in a suit for judicial separation was asked, in cross-examination, if she had not instructed her solicitor to institute a suit for restitution of conjugal rights instead of a suit for judicial separation:—Held, that she was bound to answer the question. *Maccann* v. *Maccann*, 32 Law J. Rep. (N.S.) Prob. M. & A. 29; 3 Swab. & T. 142.

*(g) Proof of Marriage.*

(1) *In British Colonies.*

Marriages of British subjects in British plantations are governed by the common law of England, unless it is otherwise provided by the Imperial legislature or that of the colony. Therefore, evidence of the solemnization by a clergyman of the Church of England according to the rites and ceremonies of that Church and of cohabitation, was held sufficient proof of a marriage between British subjects in Norfolk Island, then a British penal settlement. *Limerick* v. *Limerick*, 32 Law J. Rep. (N.S.) Prob. M. & A. 92.

(2) *In Foreign Countries.*

A certificate of a marriage in a foreign country, not purporting to be a copy of an entry in the register of marriages kept by the law of that country, but only containing a reference to the register, cannot be received as evidence of the marriage, although it would be evidence of the marriage in the foreign courts. *Finlay* v. *Finlay*, 31 Law J. Rep. (N.S.) Prob. M. & A. 149.

In a suit for dissolution of marriage, it appeared that the petitioner and respondent had lived together for five years in Virginia, and were received in society as man and wife; that by the law in force in Virginia, when the cohabitation began, no religious ceremony was necessary to the validity of a marriage, nor was any registry of marriages required to be kept; and that in consequence of war in Virginia, the record of any religious ceremony which might have taken place could not now be obtained:—Held, that there was sufficient proof of the marriage. *Rooker* v. *Rooker*, 33 Law J. Rep. (N.S.) Prob. M. & A. 42; 3 Swab. & T. 576.

Identity may be proved by circumstantial evidence. Ibid.

*(h) In Aggravation of Damages.*

On an issue of adultery raised between husband and wife, to be tried by a jury, who have also to assess damages against a co-respondent who has not appeared, no evidence which is not admissible against the respondent can be given to shew that the co-respondent has been guilty of adultery; but evidence in aggravation of damages is admissible. The jury found a verdict for the respondent, and assessed the damages at one farthing. *Stone* v. *Stone*, 3 Swab. & T. 608.

(Q) WITNESS.

*(a) Competency.*

In answer to a petition for dissolution of marriage on the ground of adultery, the wife pleaded countercharges of cruelty and desertion, and prayed for a judicial separation:—Held, that the wife's evidence was inadmissible to prove cruelty and desertion. *Whittal* v. *Whittal*, 30 Law J. Rep. (N.S.) Prob. M. & A. 43.

The fact that a husband's answer to a suit for restitution of conjugal rights pleads adultery by the wife, and prays a judicial separation, does not render the evidence of the husband inadmissible. *Burroughs* v. *Burroughs*, 31 Law J. Rep. (N.S.) Prob. M. & A. 56; 2 Swab. & T. 544.

In a suit by a wife for judicial separation on the ground of adultery coupled with cruelty, the evidence of the parties is inadmissible; but if the husband has appeared and has filed an answer, the Court will at the hearing, upon the wife abandoning the charge of adultery, allow it to be struck out of the petition, in order that such evidence may be admitted. *Hudson* v. *Hudson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 5; 3 Swab. & T. 314.

Petition for judicial separation dismissed upon the facts proved. Ibid.

In a suit by a husband for dissolution of marriage, the only evidence of the wife's adultery was a confession by her and proof of some slight familiarities between her and the co-respondent. The Court deemed this evidence insufficient, and under the 43rd section of 20 & 21 Vict. c. 85. examined the petitioner, who was the sole witness of an act of impropriety conclusively proving adultery, and upon his evidence pronounced a decree *nisi*, but refused to condemn the co-respondent, who had not been personally served, in costs. *Tatham* v. *Tatham*, 33 Law J. Rep. (N.S.) Prob. M. & A. 140; 3 Swab. & T. 511.

*(b) Commission to examine.*

Where the husband applies for a commission to examine witnesses abroad, and the wife does not oppose, the Court will grant the application, upon the husband's paying into the registry a sum sufficient to defray the wife's expenses incidental thereto. *Baily* v. *Baily*, 30 Law J. Rep. (N.S.) Prob. M. & A. 47; 2 Swab. & T. 112.

As a general rule, a commission to examine witnesses in a suit will not be granted before issue joined. *Shaw* v. *Shaw*, 31 Law J. Rep. (N.S.) Prob. M. & A. 95; 2 Swab. & T. 642.

When a commission to examine witnesses is granted in a suit in which no appearance has been entered, the Commissioner is nominated in the registry, and not by the petitioner. *Lodge* v. *Lodge*, 32 Law J. Rep. (N.S.) Prob. M. & A. 93.

An application for a commission to examine witnesses may be refused on the ground of unreasonable delay. *Stone* v. *Stone*, 34 Law J. Rep. (N.S.) Prob. M. & A. 33.

(*c*) *Examination.*

(1) *Notice of.*

Where a notice was served on the respondent's attorney in London, at two o'clock on Saturday, that a witness would be examined under an order of Court on the following Monday at Bath, the Court held that such notice was insufficient, and rejected the deposition. *Fitzgerald* v. *Fitzgerald*, 33 Law J. Rep. (N.S.) Prob. M. & A. 39; 3 Swab. & T. 397.

(2) *Before Trial.*

In a suit for dissolution of marriage, the Court, before the time for entering an appearance by the co-respondent had expired, allowed the petitioner to examine a proposed witness who was dangerously ill. *Stone* v. *Stone*, 31 Law J. Rep. (N.S.) Prob. M. & A. 136.

When a petition has been filed the Court will allow witnesses who are about to go abroad to be examined before service of the citation. *Brown* v. *Brown*, 33 Law J. Rep. (N.S.) Prob. M. & A. 203.

*Quære*—Whether depositions taken upon such an examination are admissible in evidence at the hearing. Ibid.

(3) *At the Trial.*

Where, at the hearing of a suit for dissolution of marriage, the petitioner, in pursuance of an order under section 43. of the 20 & 21 Vict. c. 85, is present; if the Court allows the counsel of the respondent to call him, he must be treated as the witness of the respondent. He cannot be cross-examined by the respondent; and before he is sworn the respondent's case must be opened. *Giles* v. *Giles*, 32 Law J. Rep. (N.S.) Prob. M. & A. 209.

If the respondent's counsel calls witnesses, the Court will expect him to open his own case and comment on the petitioner's evidence before he calls his own witnesses. If the co-respondent's counsel examines a witness called by the respondent, he can do so only by way of examination in chief, adopting the witness as his own. *Glennie* v. *Glennie*, 3 Swab. & T. 109.

(*d*) *Cross-examination.*

If a wife, in a suit by her for dissolution of marriage, on the ground of adultery and cruelty, gives evidence in support of the charge of cruelty, she cannot, in cross-examination, be asked questions tending to shew that she has been guilty of adultery. *Fisher* v. *Fisher*, 30 Law J. Rep. (N.S.) Prob. M. & A. 24.

A respondent who, in his answer, simply denies the cruelty charged in a petition, may cross-examine the petitioner, if called, as to her general conduct, for the purpose of impeaching her credit, but her answer as to any matters not bearing upon the issue cannot be contradicted. *Baker* v. *Baker*, 32 Law J. Rep. (N.S.) Prob. M. & A. 145; 3 Swab. & T. 213.

(*e*) *Evidence to contradict.*

Under the 23rd section of "The Common Law Procedure Act, 1854," 17 & 18 Vict. c. 125, it is not competent for a party to prove that his own witness has formerly made a statement inconsistent with his present testimony. *Ryberg* v. *Ryberg*, 32 Law J. Rep. (N.S.) Prob. M. & A. 112.

A petition by a husband for dissolution of marriage claimed damages. The co-respondent traversed the adultery, and charged the petitioner with cruelty. At the trial the petitioner called witnesses as to his general conduct towards his wife; and on the part of the co-respondent evidence was given of specific acts of cruelty:—Held, that, in reply, the petitioner might call witnesses to contradict the evidence of specific acts of cruelty, but not to prove his general conduct. *Narracott* v. *Narracott*, 33 Law J. Rep. (N.S.) Prob. M. & A. 61; 3 Swab. & T. 408.

(R) ALIMONY.

(*a*) *Pendente Lite.*

(1) *Right to.*

By obtaining an order of protection, a wife does not deprive herself of her right to alimony *pendente lite* in a suit subsequently instituted by her for dissolution of marriage. *Hakewill* v. *Hakewill*, 30 Law J. Rep. (N.S.) Prob. M. & A. 254.

The institution of vexatious suits, by the wife against the husband, is a ground for allotting alimony *pendente lite* at less than the usual rate. Ibid.

Where the husband, a pilot in the Bengal pilotage service, whose annual salary, when on full pay, was 540*l.*, was, at the time of an application for alimony *pendente lite*, in England, upon six months' leave of absence without pay, and he had neither property nor income, the Court refused to allot alimony. *Fletcher* v. *Fletcher*, 31 Law J. Rep. (N.S.) Prob. M. & A. 82; 2 Swab. & T. 434.

Where the husband, a respondent, has not entered an appearance, alimony *pendente lite* by consent will not be allotted. *Clarke* v. *Clarke*, 31 Law J. Rep. (N.S.) Prob. M. & A. 165.

In a suit for dissolution of marriage, instituted by an infant husband, by his guardian, it appeared from the answer to a petition for alimony *pendente lite* that the sole property to which the husband was entitled was a contingent reversionary interest:—Held, that the wife was not entitled to alimony. *Beavan* v. *Beavan*, 31 Law J. Rep. (N.S.) Prob. M. & A. 166; 2 Swab. & T. 652.

In allotting alimony *pendente lite* the wife must be considered as innocent. Her omission to file an answer to a petition charging her with adultery is no ground for refusing to allot alimony or allotting less than the usual amount. *Smith* v. *Smith*, 32 Law J. Rep. (N.S.) Prob. M. & A. 91.

Where the answer to a petition for alimony alleged that the wife was in possession of property of the husband, the Court refused to allot alimony until she should account for the same. *Bremner* v. *Bremner*, 32 Law J. Rep. (N.S.) Prob. M. & A. 119; 3 Swab. & T. 249.

Where the husband had no income, and his only property was a legacy of 500*l.*, not payable until eleven months after the application for alimony, the Court refused to allot alimony *pendente lite*. *Brown* v. *Brown*, 32 Law J. Rep. (N.S.) Prob. M. & A. 144; 3 Swab. & T. 217.

A wife who is undergoing a sentence of imprisonment for felony is, nevertheless, entitled to alimony

*pendente lite*. *Kelly* v. *Kelly*, 32 Law J. Rep. (N.S.) Prob. M. & A. 181.

An order that alimony *pendente lite* be paid to the wife will, on her application, be varied by making the alimony payable to the wife or to her solicitor, but she must bear the costs of the application. Ibid.

Where a wife was undergoing a sentence of imprisonment the Court refused so to vary the order without an affidavit by her that she wished the alteration to be made. Ibid.

Where a husband in his answer alleged that he was in insolvent circumstances, and that his only income was weekly wages of meat, drink, washing and lodging, and 4*s*. a week, the Court refused to allot alimony *pendente lite*. *Semble*—That a wife, by applying to the Court for an allotment of alimony, upon the husband's answer is not precluded from afterwards examining witnesses in support of her petition. *Capstick* v. *Capstick*, 33 Law J. Rep. (N.S.) Prob. M. & A. 105.

(2) *When and how long payable.*

The wife is entitled to an allotment of alimony *pendente lite* at any time before the hearing, although evidence has been taken *de bene esse* in support of the petition which proves that she has been guilty of adultery. *Phillips* v. *Phillips*, 34 Law J. Rep. (N.S.) Prob. M. & A. 107; 4 Swab. & T. 129.

A decree *nisi* for dissolution of marriage is final as between the parties, and therefore on such a decree being pronounced, alimony *pendente lite* ceases to be payable. Where a husband has obtained such a decree, the Court will not make it absolute, though the time for doing so has arrived, until arrears of alimony *pendente lite* are paid. *Latham* v. *Latham*, 30 Law J. Rep. (N.S.) Prob. M. & A. 163; 2 Swab. & T. 299.

Alimony *pendente lite* is payable from the date of the service, not of the return, of the citation. *Nicholson* v. *Nicholson*, 31 Law J. Rep. (N.S.) Prob. M. & A. 165.

*Semble*—That alimony *pendente lite* in a suit by a husband continues payable after a decree *nisi*, and until it is made absolute. *Nicholson* v. *Nicholson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 127; 3 Swab. & T. 214.

In suits for dissolution of marriage on the ground of the wife's adultery, alimony *pendente lite* ceases when the adultery has been finally established. Therefore, if the cause is heard by the Court, it ceases when the decree *nisi* is pronounced; if it is tried by a jury, it ceases when the time for moving for a new trial has elapsed without an application for a new trial being made, or if such a motion has been made and refused, when the time for appealing against such refusal has elapsed. *Wells* v. *Wells*, 33 Law J. Rep. (N.S.) Prob. M. &. A. 151; 3 Swab. & T. 542.

The trial of a suit by the wife for judicial separation being postponed at her instance, the Court directed the payment of the alimony *pendente lite* which had been allotted to her to be suspended from the date of the postponement until the cause was tried. *Rogers* v. *Rogers*, 34 Law J. Rep. (N.S.) Prob. M. & A. 87; 4 Swab. & T. 82.

(3) *Amount of, and how ascertained.*

When the accounts of the husband's income, in his answer to a petition for alimony, are complicated, the Court may refer it to the Registrar to ascertain what is the amount of income admitted by the answer. *Smith* v. *Smith*, 30 Law J. Rep. (N.S.) Prob. M. & A. 207.

In accordance with the practice of the Ecclesiastical Courts, a husband is not entitled to deduct from his income the annual premium payable upon a policy of insurance upon his life; but where such a policy was settled upon trust for the benefit of his wife and children after his death, and the annual premium was deducted by his employers from his salary, and paid over by them to the insurance office in pursuance of an agreement with them, the Court deducted the amount of the premium in estimating his income. *Forster* v. *Forster*, 31 Law J. Rep. (N.S.) Prob. M. & A. 84; 2 Swab. & T. 553.

Where the answer to a petition for alimony alleges that property of which the husband is owner is mortgaged, it should state the date of the mortgage and the name of the mortgagee as well as the amount of the mortgage debt. *Crampton* v. *Crampton*, 32 Law J. Rep. (N.S.) Prob. M. & A. 142.

All the valuable property of the husband will be taken into account in allotting alimony, although he may derive no income from it. Therefore the value of shares in a joint-stock company, although no dividend is payable upon them, and the annual value of houses occupied by the husband or by others rent free, should be stated in the answer. Ibid.

Payments made by the husband to the wife, since the service of the citation, will be deducted from alimony *pendente lite*. Ibid.

The adultery of the wife is no ground for allotting less than the usual amount of alimony *pendente lite*, and the averment of such adultery in the answer is irrelevant. Ibid.

The circumstance that the husband has to maintain several children, the issue of a former marriage, is no ground for allotting less than one-fifth of his income as alimony *pendente lite*. *Hill* v. *Hill*, 33 Law J. Rep. (N.S.) Prob. M. & A. 104.

(4) *To whom payable.*

The Court will not make an order for the payment of alimony *pendente lite* to the wife's attorney without a written consent from her. *Brown* v. *Brown*, 34 Law J. Rep. (N.S.) Prob. M. & A. 102; 4 Swab. & T. 144.

(*b*) *Permanent Alimony.*

[See *ante*, (A), *Harmer* v. *Harmer*.]

(1) *When and on what Principles awarded.*

The amount of permanent alimony is not varied by the amount of marital delinquency. In allotting it regard should be had to the status of both parties, but it can never be increased in order to mulct the guilty party. *Hooper* v. *Hooper*, 30 Law J. Rep. (N.S.) Prob. M. & A. 49.

In the absence of proof that the husband's income has altered, permanent alimony will be awarded upon the income upon which alimony *pendente lite* was allotted, and neither party will be allowed to dispute the correctness of the estimate then taken. *Franks* v. *Franks*, 31 Law J. Rep. (N.S.) Prob. M. & A. 25.

*Quære*—Whether, upon the application for permanent alimony, a party can shew that there has been

such alteration in the husband's income, unless he has previously filed a pleading setting forth the facts on which he relies. Ibid.

In the absence of proof that the husband's income has altered since the application for alimony *pendente lite*, permanent alimony will be allotted upon that which appeared then to be his income, although the wife may since have discovered that his income at that time was greater. *Greenwood* v. *Greenwood*, 32 Law J. Rep. (N.S.) Prob. M. & A. 136.

Where the husband's income has diminished since the allotment of alimony *pendente lite*, he may, upon the application for permanent alimony, bring that fact before the Court by affidavit. It is not necessary that he should file a petition alleging such a diminution. *Davies* v. *Davies*, 32 Law J. Rep. (N.S.) Prob. M. & A. 152.

Principles of allotment. *Wilcocks* v. *Wilcocks*, 32 Law J. Rep. (N.S.) Prob. M. & A. 205.

Where a petition for alimony alleges that the husband has a "net annual income of," &c., he must in his answer state the amount of his gross income, and specify any deductions claimed. It is not sufficient if he states merely the amount of his net annual income. *Nokes* v. *Nokes*, 33 Law J. Rep. (N.S.) Prob. M. & A. 24; 3 Swab. & T. 529.

In stating the income derived from land, the answer should state the gross rental and specify the outgoings. Ibid.

An allegation in an answer, "to the best of my judgment I value my stock-in-trade at," &c., is sufficient. Ibid.

The wife applied for permanent alimony on a decree for judicial separation by reason of cruelty. The husband stated on affidavit that, since the petition for alimony *pendente lite*, he had parted with his business (which was the principal source of income) for a yearly payment of 300*l.* for seven years, and 5 per cent. on the value of warehouse, stock-in-trade, debts, &c. The Court held that, in allotting alimony, the 300*l.* yearly must be taken as income, observing that, if the income really failed, the husband could apply for reduction of alimony. *Moore* v. *Moore*, 3 Swab. & T. 606.

The Court possesses larger powers than the Ecclesiastical Courts possessed to enforce orders for the payment of alimony. But in making orders for the payment of permanent alimony after a decree of judicial separation, it is bound by the same rules as the Ecclesiastical Courts, and therefore it will not order a husband to execute a deed charging his property with the payment of alimony, as it would thereby prevent him from making use of his property for the purpose of endeavouring to increase his income. *Hyde* v. *Hyde*, 34 Law J. Rep. (N.S.) Prob. M. & A. 63; 4 Swab. & T. 80.

In allotting permanent alimony the husband's income in respect of an annuity payable to him for a term of ten years must be taken during the term to be the amount of the annuity, and not a percentage on the present value of the annuity. *Moore* v. *Moore*, 34 Law J. Rep. (N.S.) Prob. M. & A. 146.

(2) *Amount awarded.*

Where the only income of the husband was 60*l.* a year, derived from independent property, and it appeared that he had turned his wife out of doors, and that his mistress was living with him, the Court awarded a moiety of the income as permanent alimony. *Avila* v. *Avila*, 31 Law J. Rep. (N.S.) Prob. M. & A. 176.

(3) *Deductions.*

In allotting alimony where the wife is supporting herself by her own exertions, her earnings must be taken into consideration. *Goodheim* v. *Goodheim*, 30 Law J. Rep. (N.S.) Prob. M. & A. 162; 2 Swab. & T. 250.

In the allotment of alimony, a voluntary annual allowance made to the husband by a parent forms no part of the husband's faculties. *Haviland* v. *Haviland*, 32 Law J. Rep. (N.S.) Prob. M. & A. 67; 3 Swab. & T. 114.

Upon the allotment of alimony, if a husband has contracted to pay off a debt by annual instalments, the amount of each instalment may be deducted from his annual income. *Patterson* v. *Patterson*, 33 Law J. Rep. (N.S.) Prob. M. & A. 36.

(4) *Examination as to.*

Where the answer of a husband to a petition for alimony is not sufficiently explicit, he will, under the 12th rule of Further Rules, be ordered to give a further and fuller answer; but he will not be ordered to attend the hearing that he may be examined in open court, unless his answer is evasive. *Clark* v. *Clark*, 31 Law J. Rep. (N.S.) Prob. M. & A. 32.

(5) *To whom payable.*

When alimony is by the terms of the order allotting it made payable to the wife, the husband is not bound, at her request, to pay it to her solicitor. The Court allowed such an order to be amended by making the alimony payable to the wife's solicitor, but refused to allow her the costs of the motion. *Parr* v. *Parr*, 32 Law J. Rep. (N.S.) Prob. M. & A. 90.

(6) *Other Matters.*

If permanent alimony has been allotted to a wife on her obtaining a decree of judicial separation, and the husband afterwards obtains a decree *nisi* for dissolution of marriage on the ground of her adultery, the Court will not, before that decree has been made absolute, discharge the order for payment of alimony. *Stoate* v. *Stoate*, 30 Law J. Rep. (N.S.) Prob. M. & A. 108.

Under Rule 29, which requires that eight days at least before moving for permanent alimony notice of the motion should be given, the eight days must be reckoned exclusive of the day on which the notice is given and of that on which the motion is made. *Robinson* v. *Robinson*, 30 Law J. Rep. (N.S.) Prob. M. & A. 189.

Where a wife was the unsuccessful party in two suits, the one brought by herself for a judicial separation on the ground of cruelty, the other by the husband on the ground of adultery, the Court refused to entertain a petition by her for permanent alimony, filed subsequently to the rule *nisi*, and antecedently to the final decree. *Quære*—Whether the decree *nisi* is not final as regards the parties. *Winstone* v. *Winstone*, 30 Law J. Rep. (N.S.) Prob. M. & A. 109; 2 Swab. & T. 246.

After a decree *nisi* for dissolution of marriage at the suit of the wife, the husband will not be ordered

to attend in court that he may be examined on his answer to the petition for alimony *pendente lite*, with a view to getting an order that he secure a provision to the wife under the 32nd section of the 20 & 21 Vict. c. 85. The wife may, however, examine witnesses to shew the husband's means. *Mead* v. *Mead*, 31 Law J. Rep. (N.S.) Prob. M. & A. 30.

Where an answer is filed to a petition for alimony *pendente lite*, but no such alimony is allotted, and the wife afterwards applies for permanent alimony, she will not be allowed to file a fresh petition, but, upon giving notice, may examine witnesses to contradict the statements in the husband's answer to the petition for alimony *pendente lite*. *Sykes* v. *Sykes*, 31 Law J. Rep. (N.S.) Prob. M. & A. 38.

If upon an application for permanent alimony the wife desires to shew that the husband's income has increased or that her own has diminished since alimony *pendente lite* was allotted, her proper course is to file a petition alleging such increase or diminution. *Fisk* v. *Fisk*, 31 Law J. Rep. (N.S.) Prob. M. & A. 60.

*Quære*—Whether when such a petition has been filed, respondent is entitled to file an answer thereto. Ibid.

The original order for payment of alimony is entered in the court book, and an office copy of it is delivered to the party in whose favour it is made. *Parr* v. *Parr*, 32 Law J. Rep. (N.S.) Prob. M. & A. 91.

The proper mode of effecting service of such an order is to leave a copy, and at the same time to produce the original office copy. Ibid.

### (c) *Permanent Maintenance.*

#### (1) *For the Wife.*

*Quære*—Whether, when a decree *nisi* for dissolution of marriage has been pronounced, the Court can, before the time for making it absolute has arrived, order that the husband make a provision for the wife, under section 32. of 20 & 21 Vict. c. 85. *Laxton* v. *Laxton*, 30 Law J. Rep. (N.S.) Prob. M. & A. 208.

*Quære*—Whether *Latham* v. *Latham* is rightly decided. Ibid.

The rule of the Ecclesiastical Courts as to the amount of permanent alimony awarded to a wife who had obtained a divorce *a mensa et thoro*, furnishes no guide for the exercise of the discretion of the Court in determining what provision should be made by a husband for a wife who has obtained a decree of dissolution of marriage. The principles by which the Court will be guided in exercising that discretion are, that the wife having by her husband's misconduct been deprived of her position, she ought not to purchase redress at the cost of being left destitute; that it would be impolitic to give a wife any great pecuniary interest in obtaining a dissolution of the marriage tie; and that such provision should be payable only so long as the wife remains chaste and unmarried. *Fisher* v. *Fisher*, 31 Law J. Rep. (N.S.) Prob. M. & A. 1; 2 Swab. & T. 410.

Where a wife, who had obtained a decree of dissolution of marriage, had no fortune, and her husband had some, and also trading profits, neither large nor certain, the Court considered that the wife was entitled to a maintenance only, and ordered that the husband should secure to her an annuity of 100*l.* for the support of herself and her daughter, payable so long as she should remain chaste and unmarried, to be reduced to 80*l.* if the daughter should die or marry. Ibid.

In exercising the power given by the 32nd section of 20 & 21 Vict. c. 85, of ordering the husband to make provision for a wife who has obtained a decree of dissolution of marriage, the Court will generally be guided by the principles laid down in *Fisher* v. *Fisher*, where the husband was ordered to secure to the wife, so long as she should remain chaste and unmarried, an annuity sufficient to maintain her. There may, however, be circumstances in a case which would justify the Court in ordering a more liberal provision for the wife. A wife having obtained a decree of dissolution of marriage on the ground of adultery and desertion, the Court, taking into consideration the conduct of the parties and other circumstances, ordered the husband to secure to her the payment of the sum of 2,000*l.* absolutely. *Morris* v. *Morris*, 31 Law J. Rep. (N.S.) Prob. M. & A. 33.

The Court has no jurisdiction to order that a husband should make a provision for a wife separated from him on the ground of her cruelty. *Dart* v. *Dart*, 32 Law J. Rep. (N.S.) Prob. M. & A. 125; 3 Swab. & T. 208.

In awarding a permanent provision under the 32nd section of the 20 & 21 Vict. c. 85. to a woman whose marriage has been dissolved by reason of her husband's misconduct, the Court will in future act upon the same principles as those upon which the Ecclesiastical Courts allotted permanent alimony after a decree of divorce *a mensa et thoro*, and will order him to secure to her about one-third of the joint income. *Fisher* v. *Fisher* overruled. *Sidney* v. *Sidney*, 34 Law J. Rep. (N.S.) Prob. M. & A. 122; 4 Swab. & T. 178.

An order for permanent provision under the 32nd section forms part of the decree absolute. Ibid.

After a decree *nisi* for dissolution of marriage at the suit of the wife, an application was made, under section 32. of 20 & 21 Vict. c. 85, for an order that the husband should secure to his wife a sum of money; but as it appeared that the husband's income, derived from a profession, only amounted to 300*l.* a year, and the wife, in addition to an income of 12*l.*, was entitled in reversion on the death of a person aged eighty to property which would produce an income of 70*l.*, the Court declined to make any order. *Rawlins* v. *Rawlins*, 34 Law J. Rep. (N.S.) Prob. M. & A. 147; 4 Swab. & T. 158.

#### (2) *For Children.*

Where a decree of judicial separation at the suit of the wife had been pronounced, and the Court had ordered that she should have the custody of three children, all under the age of seven, alimony *pendente lite* having been allotted on the assumption that the husband's income was 400*l.* per annum, the Court allotted to the wife 160*l.* per annum as permanent alimony, 100*l.* for herself and 20*l.* per annum for each of the children. *Whildon* v. *Whildon*, 30 Law J. Rep. (N.S.) Prob. M. & A. 174; *nom.* *Whieldon* v. *Whieldon*, 2 Swab. & T. 388.

On pronouncing a decree *nisi* for dissolution of marriage on the ground of the adultery of a wife,

who on her marriage had a fortune of 1,678*l.*, which was not settled, but was received by the husband, the Court ordered that the husband should settle 1,000*l.* upon trust that the interest be applied for the benefit of the wife so long as she conducted herself properly and remained unmarried; and that upon her interest ceasing, the fund should be held in trust for the children of the marriage in equal shares; that the 1,000*l.* damages awarded against the co-respondent should be paid to the husband in lieu of the sum he would have to settle, and that the decree should be suspended until the settlement should be made. *Bent* v. *Bent*, 30 Law J. Rep. (N.S.) Prob. M. & A. 175; 2 Swab. & T. 392.

A wife was entitled to the interest of 4,000*l.* vested in trustees for her life, with a power of appointment amongst her children. In a suit for judicial separation on the ground of her adultery, the adultery having been proved, the Court ordered that the trustees of the wife should pay over a moiety of her income to trustees named by the petitioner to be applied by the latter to the maintenance and education of the children of the marriage. The Court cannot interfere with a power of appointment vested in a wife. *Seatle* v. *Seatle*, 30 Law J. Rep. (N.S.) Prob. M. & A. 216.

The Court has no power to order that a provision should be made for the maintenance and education of a child above the age of sixteen. *Webster* v. *Webster*, 31 Law J. Rep. (N.S.) Prob. M. & A. 184.

(3) *Settled Property.*

The Court will not make an order as to the application of the settled property of the parties until after a decree *nisi* for dissolution of marriage has been made absolute. *Horne* v. *Horne*, 30 Law J. Rep. (N.S.) Prob. M. & A. 111.

On an application for an order as to settled property, the settlement should be brought before the Court upon affidavit, and the Court upon consideration of the facts proved at the trial will decide as to the order to be made. *Horne* v. *Horne*, 30 Law J. Rep. (N.S.) Prob. M. & A. 200.

A respondent who is served with a copy of a petition for dissolution of marriage, praying also for an order as to the settled property, if he does not appear, is not entitled to notice of the application. Ibid.

Under a post-nuptial settlement, two-thirds of the dividends of certain stock, to which the wife at the time of the marriage was entitled, were settled upon the wife for life for her separate use, and the remaining one-third on the husband for life, with benefit of survivorship for life, the corpus of the said fund, after the death of the survivor, to go to the issue of the marriage. The Court directed that, until further orders, the husband's portion of the income of the settled property should be paid to the wife, and in the event of her death in his lifetime the whole of the income, until further order, should be applied to the benefit of the child. *Boynton* v. *Boynton*, 30 Law J. Rep. (N.S.) Prob. M. & A. 156; 2 Swab. & T. 275.

By a marriage settlement property was settled upon the husband for life, then upon the wife for life, then upon the children of the marriage. The marriage having been dissolved on the ground of the adultery of the wife, who continued to cohabit with the co-respondent, the Court, under section 5. of 22 & 23 Vict. c. 61, ordered that after the death of the petitioner the settled property should, in the event of the respondent surviving the petitioner, be applied to the benefit of the children of the marriage as if the respondent were dead. *Pearce* v. *Pearce*, 30 Law J. Rep. (N.S.) Prob. M. & A. 182.

By settlements made before and after the marriage 724*l.* consols, the property of the husband, and 700*l.*, and also some leaseholds, the property of the wife's father, were settled upon the wife for life, and after her death on the husband for life, and after the death of the survivor upon the children of the marriage. The Court, after a decree absolute for dissolution of marriage at the suit of the wife, made an order, under section 5. of 22 & 23 Vict. c. 61, that the trustees of the settlements should deal with the proceeds of the property which came from the wife as if the husband was dead at the date of the decree absolute, but as to the 724*l.* settled by the husband, refused to alter the settlement. *Johnson* v. *Johnson*, 31 Law J. Rep. (N.S.) Prob. M. & A. 29.

The Court has no power in a suit for dissolution of marriage to alter the settlements where there is no issue of the marriage. *Dempster* v. *Dempster*, 31 Law J. Rep. (N.S.) Prob. M. & A. 113.

By an ante-nuptial settlement personal property of the wife, producing an annual income of about 85*l.*, was settled upon the wife for life, remainder upon the husband for life, remainder upon the issue of the marriage. The husband brought no property into the settlement. The marriage having been dissolved on the ground of the wife's adultery, and it appearing that the husband's means were not sufficient for the maintenance of himself and his child, the only issue of the marriage, of which he had the custody, the Court, under section 5. of 22 & 23 Vict. c. 61, ordered that during the life of the wife 20*l.* of her annual income should be paid by the trustees of the settlement for the benefit of the child. *Webster* v. *Webster*, 32 Law J. Rep. (N.S.) Prob. M. & A. 29; 3 Swab. & T. 106.

A petition for an order as to the application of settled property should give full information as to the means of the applicant. Ibid.

Where a marriage is dissolved on the ground of the wife's adultery, the Court will not, under section 5. of 22 & 23 Vict. c. 61, deprive the husband of any interest he takes under a settlement, even for the purpose of applying it for the benefit of the children of the marriage. *Thompson* v. *Thompson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 39; 2 Swab. & T. 649.

After a decree *nisi* for dissolution of marriage had been granted, the petitioner filed a petition praying for an order as to the application of settled property. Before the decree was made absolute, the respondent was served abroad with a copy of the petition and with a notice that after the decree absolute the Court would be moved to make the order prayed:—Held, that the Court had power to entertain the application in the absence of the respondent. *Semble*—That if no petition had been filed but notice only of an intended application had been given to the respondent, the Court could not have made an order as to the settled property. *Lawrence* v. *Lawrence*, 32 Law J. Rep. (N.S.) Prob. M. & A. 124; 3 Swab. & T. 207.

Under the marriage settlement of her father, a

wife, upon the ground of whose adultery a divorce had been granted, was entitled to a sum of money after the death of her father in the event of his not otherwise disposing of it:—Held, that this was not property to which the wife was entitled in reversion, and that the Court therefore had no power under section 45. of 20 & 21 Vict. c. 85. to order a settlement of it. *Stone* v. *Stone*, 33 Law J. Rep. (N.S.) Prob. M. & A. 95; 3 Swab. & T. 372.

A husband, with moneys received by him in right of his wife, purchased railway stock, which was transferred into their joint names. By a deed of separation, this stock was vested in trustees upon trust for the husband for life, then for the wife for life, and afterwards for the children of the marriage, subject to the proviso that in the event of the marriage being dissolved the trusts should become null and void. The marriage was dissolved on the ground of the wife's adultery, and the trustees thereupon sold the railway stock and paid the proceeds to the wife:—Held, that assuming the deed of separation to be a post-nuptial settlement within the meaning of the 22 & 23 Vict. c. 61. s. 5, the trusts of the deed having determined, the Court had no power to deal with the property comprised in it. Ibid.

*Semble*—That such a deed is a post-nuptial settlement within the meaning of 22 & 23 Vict. c. 61. s. 5. Ibid.

Where the petitioner had entered into a covenant binding his estate with the payment of an annuity to the respondent, in the event of her surviving him, the Court directed the annuity, when recovered, to be paid for the benefit of the children of the marriage. *Callwell* v. *Callwell*, 3 Swab. & T. 259.

After a final decree of dissolution of marriage, the Court may make an order as to the application of settled property for the benefit of children of the marriage, although the petitioner be dead. *Ling* v. *Ling*, 34 Law J. Rep. (N.S.) Prob. M. & A. 52; 4 Swab. & T. 99.

## (S) CHILDREN.

[See *ante*, (R) (*c*) (2).]

### (*a*) *Custody of.*

Where the children, with regard to whom an order for custody was applied for, were a girl aged twenty and two boys aged respectively eighteen and sixteen,—the Court held, that the 35th section of the Divorce Act, 1857, gave no jurisdiction; and that where the parent would have no power of control, the Court has none. *Ryder* v. *Ryder*, 30 Law J. Rep. (N.S.) Prob. M. & A. 44; 2 Swab. & T. 225.

The Court may confer a benefit upon parties not before it, by ordering maintenance, though it cannot interfere with their liberty by an order made in a suit to which they are not parties. Ibid.

A decree of dissolution of marriage at the suit of the wife having been pronounced, the Court directed that, until further order, she should have the custody of a child, the only issue of the marriage, that she should not remove it out of the jurisdiction without the permission of the Court, and that the father should have reasonable access to it. *Boynton* v. *Boynton*, 30 Law J. Rep. (N.S.) Prob. M. & A. 156; 2 Swab. & T. 275.

In the interval between a decree *nisi* for dissolution of marriage being pronounced and its being made absolute, the only order the Court can make as to the custody of children is an interim order, under section 35. of 20 & 21 Vict. c. 85. *Cubley* v. *Cubley*, 30 Law J. Rep. (N.S.) Prob. M. & A. 161.

The father is entitled at common law to the custody of the child at its mother's breast. The Court in making an order as to the custody *pendente lite* will not, unless some good cause is shewn, take away this right. *Cartledge* v. *Cartledge*, 31 Law J. Rep. (N.S.) Prob. M. & A. 85; 2 Swab. & T. 567.

The Court will not, at the hearing of a cause, entertain an application for the custody of children if it is founded upon evidence not admissible in the cause, nor an application for permanent alimony. They should be made on a motion day. But at the hearing the Court may direct that the petitioner have the custody of children until further order, if the facts proved in the cause would warrant such an order, *e.g.*, if the adultery of the respondent be proved. *Wallace* v. *Wallace*, 32 Law J. Rep. (N.S.) Prob. M. & A. 34.

The Court refused to order that a wife who had obtained a decree of judicial separation should have the custody of an idiot child which was properly taken care of by the husband, where the custody was asked for, in order that it might be placed in an asylum for its own benefit, and not in order that the wife might have the solace of its society. *Semble*—That an application for the custody of a child upon such a ground should be made to the Court of Chancery. *Cooke* v. *Cooke*, 32 Law J. Rep. (N.S.) Prob. M. & A. 180; 3 Swab. & T. 248.

The Court will not, at the hearing of a suit, order that the petitioner have the custody of the children of the marriage unless the petition prays for such custody. *Boddy* v. *Boddy*, 33 Law J. Rep. (N.S.) Prob. M. & A. 163.

When a marriage is dissolved on the ground of the wife's adultery, the Court will not order that she have the custody of or access to the children of the marriage. *Bent* v. *Bent*, 30 Law J. Rep. (N.S.) Prob. M. & A. 175; 2 Swab. & T. 392.

Where a petition for dissolution of marriage is dismissed, the Court has no power to make an order as to the custody of, or access to, the children of the marriage. *Seddon* v. *Seddon*, 31 Law J. Rep. (N.S.) Prob. M. & A. 101; 2 Swab. & T. 640.

### (*b*) *Access to.*

[See *ante*, (*a*) *Bent* v. *Bent* and *Seddon* v. *Seddon*.]

For the principles on which access to a child is granted or refused to a mother petitioning under 2 & 3 Vict. c. 54. see *In re Winscom*, 2 Hem. & M. 540.

After a decree *nisi* for dissolution of marriage on the ground of the wife's adultery, the Court will not order that she have access to the children of the marriage. *Clout* v. *Clout*, 30 Law J. Rep. (N.S.) Prob. M. & A. 176; 2 Swab. & T. 391.

After a decree of judicial separation has been pronounced, the Court will not order that the wife have access to children of the marriage, unless application be made by petition. *Anthony* v. *Anthony*, 30 Law J. Rep. (N.S.) Prob. M. & A. 208.

The Court has jurisdiction, *pendente lite*, to order that one of the parties to the suit shall have access merely to the children of the marriage. *Thompson* v.

*Thompson*, 31 Law J. Rep. (N.S.) Prob. M. & A. 213; 2 Swab. & T. 402.

On an application for an order for access to children pending suit on behalf of the mother, the Court will require to be satisfied that the motive is natural love and affection for the children, and that the applicant has no indirect object in view; as to which, lapse of time in making the application may be material. The Court will also consider the convenience of all parties in the circumstances, and how the children would probably be affected if the order were made. *Codrington* v. *Codrington*, 3 Swab. & T. 496.

### (T) PRACTICE.

#### (a) *Trial of Causes.*

##### (1) *Directions as to Mode of Trial.*

When the pleadings are complete the Court will, upon the application of a petitioner, direct the mode of trial, although he may not have complied with an order to furnish particulars of a charge in the petition. *Gough* v. *Gough*, 32 Law J. Rep. (N.S.) Prob. M. & A. 128.

In 1860 a wife filed a petition for dissolution of marriage on the ground of adultery and cruelty. When the cause came on for trial it was withdrawn from the jury by agreement of the parties, the petitioner undertaking not to institute other proceedings in the Divorce Court. In 1863 the wife instituted a fresh suit for dissolution of marriage on the ground of adultery and cruelty, the acts of misconduct alleged in the petition being, with the exception of some acts of adultery of later date, the same as those charged in the first petition. The respondent pleaded the agreement in bar. Upon application by the petitioner for directions as to the mode of trial, the Court refused to make any order, upon the ground that the institution of the second suit was a gross breach of good faith and a violation of the agreement, by which the petitioner had surrendered irrevocably any legal right to relief in respect of misconduct charged in the first petition. *Rowley* v. *Rowley*, 33 Law J. Rep. (N.S.) Prob. M. & A. 54; 3 Swab. & T. 338.

In a suit by a husband for dissolution of marriage, the respondent and co-respondent traversed the adultery, and the respondent further counter-charged adultery and cruelty. The petitioner having allowed the time for filing a replication to the respondent's answer to expire without replying or obtaining further time, the respondent moved the Court to order the trial of this cause:—Held, that the pleadings being incomplete, the Court could not order the mode of trial. *Broadwood* v. *Broadwood*, 34 Law J. Rep. (N.S.) Prob. M. & A. 10.

Where issue has been joined in a matrimonial suit, the Court will not refuse to give directions as to the mode of trial, as such refusal is tantamount to a dismissal of the petition, and cannot be appealed from to the House of Lords. *Rowley* v. *Rowley*, 34 Law J. Rep. (N.S.) Prob. M. & A. 97; 4 Swab. & T. 137.

##### (2) *By the Court.*

The determination of issues of fact raised by pleas to the discretion of the Court under the proviso to section 31. of 20 & 21 Vict. c. 85. rests solely with the Court. *Narracott* v. *Narracott*, 33 Law J. Rep. (N.S.) Prob. M. & A. 132; 3 Swab. & T. 408.

##### (3) *By the Full Court.*

The Judge Ordinary will not, except for some sufficient reason, order a suit, which he is empowered by 23 & 24 Vict. c. 144. to hear alone, to be heard before the full Court. The desire of one of the parties that it may be so heard, and the probability that difficult questions of law may arise at the hearing, do not constitute a sufficient reason. *Bevan* v. *Bevan*, 30 Law J. Rep. (N.S.) Prob. M. & A. 23.

##### (4) *By Affidavits.*

When leave is granted to prove a petition by affidavits, the order granting such leave must be drawn up before the hearing, and should be filed with the other papers. *Webb* v. *Webb*, 32 Law J. Rep. (N.S.) Prob. M. & A. 63.

When the affidavits filed by a person shewing cause against a decree being made absolute and the affidavits in answer raise issues not proper to be decided on affidavits, the Court will order the issues to be tried by a jury. They cannot be tried by the Court itself on oral evidence. *Masters* v. *Masters*, 34 Law J. Rep. (N.S.) Prob. M. & A. 7.

##### (5) *By Jury.*

The Queen's Proctor is on the same footing with all the other suitors of the Court. *Gray* v. *Gray*, 31 Law J. Rep. (N.S.) Prob. M. & A. 83.

*Quære*—Whether a suitor for dissolution of marriage is entitled under the statute to a jury. Ibid.

When a question of impotence is raised in a suit, the appointment of two medical inspectors rests with the Court; but it will allow the parties to select them, and should they not agree, each will be allowed to nominate one. *C*—— v. *C*——, 32 Law J. Rep. (N.S.) Prob. M. & A. 12.

The respondent, in answer to a suit for restitution of conjugal rights, pleaded the impotency of the petitioner. The Court, upon the application of the petitioner, ordered the cause to be tried by a jury, notwithstanding the respondent's objection to that mode of trial. Ibid.

Although in a suit for judicial separation the Court, under section 36. of 20 & 21 Vict. c. 85, may in its discretion refuse to direct that questions of fact be tried by a jury, it will generally at the request of either of the parties allow a jury. The circumstance that cruelty is in issue is no ground for refusing a jury. *Taylor* v. *Taylor*, 32 Law J. Rep. (N.S.) Prob. M. & A. 126.

Where a cause is tried by a jury, the jury may be asked for a verdict upon issues of fact raised by pleas to the discretion of the Court, as an assistance to the Court in forming its opinion, but their verdict may be dispensed with. *Narracott* v. *Narracott*, 33 Law J. Rep. (N.S.) Prob. M. & A. 132; 3 Swab. & T. 408.

There is no identity in legal effect between the written statement of questions of fact to be tried, prepared under section 38. of 20 & 21 Vict. c. 85, and the Nisi Prius record in an action. Ibid.

##### (6) *By Issues at the Assizes.*

Where, upon a petition for dissolution of marriage, it appeared that by far the greater part of the witnesses to the facts in the suit resided at a great

distance from London, the Court directed issues upon the charges and counter-charges of adultery and cruelty to be tried at the assizes. *Richardes* v. *Richardes*, 30 Law J. Rep. (N.S.) Prob. M. & A. 48.

Where an issue is ordered to be tried at the assizes, under section 40. of 20 & 21 Vict. c. 85, it should be framed as an issue sent by the Court of Chancery. *Hogg* v. *Hogg*, 32 Law J. Rep. (N.S.) Prob. M. & A. 209.

(*b*) *Postponing the Trial.*

The Court will, under 23 & 24 Vict. c. 144. s. 7, grant leave for the Queen's Proctor to intervene in a suit for dissolution of marriage upon the statement of counsel, without affidavit, that the Attorney General has directed the Queen's Proctor to apply for such leave, but will not order the hearing of the petition to be postponed in order that he may plead to the petition, unless an affidavit shewing grounds for such postponement be filed, and notice be given to the parties. *Anonymous case*, 30 Law J. Rep. (N.S.) Prob. M. & A. 88; 2 Swab. & T. 249.

The Court will not postpone the trial of a cause on the application of one of the parties if no notice of the motion has been given to the other party. *Hepworth* v. *Hepworth*, 30 Law J. Rep. (N.S.) Prob. M. & A. 198; 2 Swab. & T. 514.

(*c*) *Setting down Cause for Trial.*

Where five months had elapsed since the Court had directed that a cause should be tried without jury, and the petitioner had not set down the cause for trial, the Court, on the application of the respondent, gave him leave to set it down for trial if the petitioner should not do so within a fortnight. *Semble*—That there is no provision in the Rules as to setting down a cause for trial, except where it is ordered to be tried by jury. *Hare* v. *Hare*, 32 Law J. Rep. (N.S.) Prob. M. & A. 7; 2 Swab. & T. 218.

(*d*) *Re-entering after Amendment.*

Where a petition has been set down for hearing and is afterwards amended and re-served, it must be re-entered in the usual course, and cannot be restored to the place the original suit occupied in the list of causes. *Milner* v. *Milner*, 30 Law J. Rep. (N.S.) Prob. M. & A. 103.

(*e*) *Proceedings at the Trial.*

(1) *Generally.*

The respondent's counsel may not controvert allegations of the petition not denied by the answer; but on the assumption that such allegations are true, he may cross-examine the witnesses and address the Court, for the purpose of shewing that a decree ought not to be pronounced. *Tollemache* v. *Tollemache*, 30 Law J. Rep. (N.S.) Prob. M. & A. 113.

The respondent's counsel cannot reserve his comments on the petitioner's evidence until he sums up his own evidence. *Glennie* v. *Glennie*, 32 Law J. Rep. (N.S.) Prob. M. & A. 17.

The co-respondent's counsel, if he calls no witnesses, should address the Court after the opening speech of the respondent's counsel. Ibid.

The co-respondent's counsel, by examining the witnesses of the respondent, adopts them as his own. Ibid.

(2) *Right to begin.*

Where, in a suit for dissolution by husband against wife, the wife pleaded that the marriage was null on account of the husband's impotency, the Court held that, there being substantially a traverse of the marriage, the petitioner had the right to begin. *Serrell* v. *Serrell*, 31 Law J. Rep. (N.S.) Prob. M. & A. 55; 2 Swab. & T. 422.

Where the Judge Ordinary is sitting without a jury, as the question of the fact of the marriage must be proved before him, the right to begin is not taken from the petitioner from the consideration that the only real issue in the case lies upon the respondent. *Burroughs* v. *Burroughs*, 31 Law J. Rep. (N.S.) Prob. M. & A. 56; 2 Swab. & T. 544.

Upon an appeal from an order discharging a rule *nisi* for a new trial, the appellant must begin. *Yeatman* v. *Yeatman*, 33 Law J. Rep. (N.S.) Prob. M. & A. 54; 3 Swab. & T. 361.

Upon such an appeal where notice has been given to the other side, the question for the Court is, not whether a rule *nisi* should be granted, but whether such rule should be made absolute or discharged. Ibid.

(3) *Non-appearance of Parties.*

When a jury has been sworn to try issues in a matrimonial suit, and neither of the parties appear, the Court will discharge the jury. *Haydon* v. *Haydon*, 30 Law J. Rep. (N.S.) Prob. M. & A. 112.

(*f*) *New Trial.*

(1) *Notice of Application for.*

It is no ground for suspending the decree *nisi* after a verdict for the petitioner in a suit for dissolution of marriage that the respondent has given notice of an application for a new trial. *Stone* v. *Stone*, 32 Law J. Rep. (N.S.) Prob. M. & A. 117; 3 Swab. & T. 212.

(2) *General Principles as to granting.*

In granting new trials in matrimonial suits the Court will be guided by the same principles as are the Courts of Common Law. *Miller* v. *Miller*, 31 Law J. Rep. (N.S.) Prob. M. & A. 73; 2 Swab. & T. 427.

It is not a sufficient ground for setting aside the verdict of a jury as against the weight of evidence, that the Judge before whom the cause was tried would have found a different verdict. Unless the Judge is dissatisfied with the verdict, and there is reason for believing that, but for impatience, prejudice or misapprehension on the part of the jury, the verdict would not have been given, a new trial will not be granted. Ibid.

A new trial will not be granted on the ground that further evidence could be laid before the jury on a second trial, if such evidence could, by the exercise of reasonable diligence, have been obtained before the first trial. Ibid.

If a verdict has been found against two co-respondents in a suit for dissolution of marriage, and the Court afterwards, on the application of one of them, grants a new trial, on the ground that the verdict against him was contrary to the weight of evidence, there must be a new trial as to both, and pending that application the petitioner is not entitled to a

decree absolute as to the other. *Walker* v. *Walker*, 31 Law J. Rep. (N.S.) Prob. M. & A. 26.

*Semble*—That if the petitioner consented to the verdict being entered for the co-respondent who applied for a new trial he would be entitled to a decree. Ibid.

*Quære*—Whether, in matrimonial suits, if the verdict on one only of two issues is unsatisfactory, a new trial ought to be granted as to both. *Cartlidge* v. *Cartlidge*, 32 Law J. Rep. (N.S.) Prob. M. & A. 126; 3 Swab. & T. 406.

*Semble*—That where in a suit by a wife for dissolution of marriage, on the ground of adultery and cruelty, the petitioner obtains a verdict upon both issues, and a new trial as to one of them is afterwards applied for, the petitioner may abandon that issue and ask for a judicial separation upon the ground of the other charge. Ibid.

Where it is necessary for the petitioner to establish two points in order to obtain the prayer of the petition, the Court would not, even if dissatisfied with the verdict of the jury on one point, send that down for a new trial, because, if a different verdict were found on that point, it would not be sufficient to ground the relief prayed. *Fitzgerald* v. *Fitzgerald*, 3 Swab. & T. 400.

The Judge Ordinary had held that notice given to the opposite solicitor at a quarter before two P.M. on Saturday, in London, of an examination of a witness to be held at Bath at two P.M. on the following Monday, was not a reasonable and sufficient notice to enable such solicitor to attend and cross-examine, and had therefore refused to admit evidence so taken. In the circumstances, the Court refused to interfere with the ruling of the Judge Ordinary. Ibid.

Per *Channell, B.*—When a question to determine the admissibility of evidence has been decided by a Judge presiding at a trial by jury, the decision of the Judge on such question may be reviewed by a Court of Appeal. Ibid.

The Judge Ordinary—*Quære*, whether such decision of a Judge presiding at a trial is properly subject to the revision of a Court of Appeal. Ibid.

### (3) *Verdict against Evidence.*

Where there is a conflict of evidence upon an issue of adultery (the Queen's Proctor intervening), the Court will not grant a new trial on the ground that the verdict is contrary to the evidence, unless it is dissatisfied with the verdict. *Gethin* v. *Gethin*, 31 Law J. Rep. (N.S.) Prob. M. & A. 57; 2 Swab. & T. 560.

The Court will not grant a new trial, on the ground that witnesses called upon the first trial have wilfully suppressed material facts. Ibid.

A rule for a new trial upon the ground that a verdict is against the weight of evidence will not be granted, unless the Court is satisfied with reasonable certainty that there has been error or miscarriage. *Scott* v. *Scott*, 33 Law J. Rep. (N.S.) Prob. M. & A. 1; 3 Swab. & T. 319.

A rule for a new trial will not be granted upon affidavits which do not shew surprise, but merely state that during the trial and after the close of the applicant's case material evidence had come to his knowledge. Ibid.

Where a verdict, finding that the respondent in a suit for dissolution of marriage has been guilty of adultery, is against the weight of evidence, a new trial may be granted, although the Judge who tried the cause is not dissatisfied with the verdict. *Stone* v. *Stone*, 34 Law J. Rep. (N.S.) Prob. M. & A. 33.

In a suit by a husband, for dissolution of marriage, claiming damages, the respondent denied the adultery, and the co-respondent, who had not been personally served, did not appear. The jury found that the respondent had committed adultery with the co-respondent, and assessed the damages against the latter at 2,000*l.* The respondent having applied for a new trial, on the ground that the verdict was against the weight of evidence, the Judge Ordinary (*Sir C. Cresswell*), who had tried the cause, refused a rule. On appeal, his decision was reversed by a majority of the full Court, who set aside the verdict as against the respondent and the co-respondent, and made a rule absolute for a new trial as to both. Ibid.

Subsequently, the co-respondent, who was resident in Canada, and who had not heard of the institution of the suit until just before the trial, when it was too late for him to come to England, applied for leave to appear and file an answer. The Judge Ordinary (*Sir J. P. Wilde*) granted the application, upon condition that before the trial he should give security for costs; and on non-compliance with that condition, ordered the appearance and answer to be taken off the file. Ibid.

### (4) *Inconsistent Verdict.*

An inconsistency in the verdict of a jury is no ground for a new trial, unless it is such that their opinion upon the substantial question for their decision cannot be ascertained. *Ellyatt* v. *Ellyatt*, 33 Law J. Rep. (N.S.) Prob. M. & A. 137; 3 Swab. & T. 503.

In a suit by a husband for dissolution of marriage, the jury found that the respondent had committed adultery with the co-respondent, and that the petitioner had connived at his wife's adultery, and they assessed substantial damages against the co-respondent:—Held, 1. That as there was no reason to doubt that the jury fully understood the meaning of the term, and had intended to find that the petitioner had been guilty of connivance, the inconsistency in their verdict was no ground for a new trial; 2. That as the Court was bound to dismiss the petition if it should find that the petitioner had been guilty of connivance, the co-respondent might apply for such dismissal; 3. That the co-respondent was not entitled to costs; 4. That the respondent was entitled to all her costs. Ibid.

### (5) *Mistake.*

In a suit by a wife for judicial separation on the ground of cruelty, the respondent denied the cruelty, but before the trial signed a written consent to the decree being pronounced, upon the erroneous statement of his solicitor that, upon the production of such consent at the trial, no evidence of the charges in the petition would be given. At the trial counsel appeared for the respondent, but called no witnesses. In support of the charges in the petition witnesses were examined, and the written consent was put in evidence, and a verdict was found for the petitioner:—Held, by the full Court, affirming the decision of

the Judge Ordinary, that it was no ground for granting a rule for a new trial that the respondent had, in consequence of his being misled by his solicitor, abstained from adducing evidence to contradict the charges in the petition, and that thereby his character had been injured. *Hill* v. *Hill*, 31 Law J. Rep. (N.S.) Prob. M. & A. 193; 2 Swab. & T. 407.

A mistake made by a witness in his evidence, if it be one likely to have disturbed the judgments, and to have misled the minds of the jury, is ground for granting a new trial. *Jago* v. *Jago*, 32 Law J. Rep. (N.S.) Prob. M. & A. 10; 3 Swab. & T. 103.

(6) *Misdirection.*

It is no ground for a new trial that the Judge in his summing-up did not give as much weight to some parts of the evidence as they may have deserved. *Codrington* v. *Codrington*, 34 Law J. Rep. (N.S.) Prob. M. & A. 60; 4 Swab. & T. 63.

(7) *On Affidavits.*

Where a rule *nisi* for a new trial has been granted on affidavits, and affidavits have been filed in answer, the party obtaining the rule will not be allowed to file affidavits in reply until the rule is argued. *Nicholson* v. *Nicholson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 135.

(8) *Appeal against Order for.*

The Court has the power to extend the time (fourteen days) limited by 23 & 24 Vict. c. 144. s. 2, for appealing against a decision of the Judge Ordinary granting or refusing a rule for a new trial. *Boulting* v. *Boulting*, 33 Law J. Rep. (N.S.) Prob. M. & A. 81.

(*g*) *Motions, Orders, and Decrees.*

(1) *Form of Decree.*

In a suit for dissolution of marriage by a husband the respondent and co-respondent denied the adultery, and the co-respondent further pleaded connivance. The cause was heard by the Court, who pronounced a decree, the minute of which in the Court Book was, "The Judge Ordinary having deliberated, by his final decree dismissed the petition, &c.," the ground of dismissal not being stated. Upon the application of the petitioner, the Court afterwards varied the decree by stating therein that the Court was of opinion that the adultery was proved, but that the petitioner had connived at it, and thereupon dismissed the petition. *Gipps* v. *Gipps*, 32 Law J. Rep. (N.S.) Prob. M. & A. 179.

(2) *Motion for Decree Absolute.*

Upon a motion to make a decree of dissolution of marriage absolute, a copy of the decree *nisi* should be filed. *Fowler* v. *Fowler*, 31 Law J. Rep. (N.S.) Prob. M. & A. 31.

When a petition of appeal for the reversal of a decree *nisi* has been presented to the House of Lords, and the Court is afterwards moved to make the decree absolute, the appeal having been withdrawn, that fact should appear by affidavit. Where such an affidavit had not been filed, but the defendant's counsel admitted that the fact was so, the Court made the decree absolute. *Baily* v. *Baily*, 31 Law J. Rep. (N.S.) Prob. M. & A. 163.

An application to make absolute a decree *nisi* for dissolution of marriage should be supported by affidavits of search for appearance by any person and of non-appearance, and if an appearance has been entered, that no affidavits in opposition to the decree have been filed. *Boddy* v. *Boddy*, 32 Law J. Rep. (N.S.) Prob. M. & A. 95.

The affidavit, upon which is founded a motion to make absolute a decree *nisi* of dissolution of marriage, should shew that search was made in the registry at a recent date. The Court refused to make a decree absolute on the 4th of November upon an affidavit of search on the 1st of October. *Stone* v. *Stone*, 32 Law J. Rep. (N.S.) Prob. M. & A. 7; 3 Swab. & T. 113.

(3) *Opposing.*

A respondent against whom a decree *nisi* for dissolution of marriage has been pronounced, cannot shew cause against the decree being made absolute, under section 7. of 23 & 24 Vict. c. 144. *Stoate* v. *Stoate*, 30 Law J. Rep. (N.S.) Prob. M. & A. 173; 2 Swab. & T. 384.

Where affidavits have been filed in opposition to a decree *nisi*, the petitioner cannot in answer file an affidavit made by himself. *Stoate* v. *Stoate*, 32 Law J. Rep. (N.S.) Prob. M. & A. 120.

(4) *Service of.*

Where orders had been made that the husband should pay the wife's costs and alimony *pendente lite*, and the husband had assigned the property, and could not be found, the Court allowed substituted service of the orders by leaving them at the last known residence of the husband, at his attorney's office, and at the address given in the appearance book. *Nuttall* v. *Nuttall*, 31 Law J. Rep. (N.S.) Prob. M. & A. 164.

(5) *Enforcing.*

A decree was made in a suit in the Divorce Court whereby the husband was ordered to pay to the wife an annuity of 100*l.*, payable by monthly instalments. This decree was registered in the books of judgments kept in this court, and the Court refused to order it to be struck out, leaving the question of how far it could be made available against the husband open for discussion. *Ex parte Holden*, 32 Law J. Rep. (N.S.) C.P. 111; 13 Com. B. Rep. N.S. 641.

(*h*) *Petition.*

(1) *Amendment and Re-service.*

A petition, by a husband, for a dissolution of marriage, alleged that the respondent, at a specified time and place, committed adultery with A. The respondent did not appear. At the hearing, the Court refused to allow the petition to be amended by adding to that charge the words "or with some person whose name is unknown to your petitioner," without re-service. *Wallace* v. *Wallace*, 32 Law J. Rep. (N.S.) Prob. M. & A. 47.

A petition, by a husband, for dissolution of marriage did not charge adultery, but alleged that the respondent and co-respondent were "living and cohabiting together." Neither of the respondents appeared. At the hearing the Court refused to allow the petition to be amended, by inserting a charge of

adultery, without re-service. *Forman* v. *Forman*, 32 Law J. Rep. (N.S.) Prob. M. & A. 80.

If a respondent, misnamed in a petition, has been served, but has not appeared, the petition, when amended, must be re-served. *Kisch* v. *Kisch*, 33 Law J. Rep. (N.S.) Prob. M. & A. 115.

(2) *Withdrawing.*

Where the Queen's Proctor has, under 23 & 24 Vict. c. 144. s. 7, intervened after a decree *nisi* for dissolution of marriage has been pronounced, the petitioner will not be allowed to withdraw his petition; but the Court will hear the evidence in support of the pleas filed by the Queen's Proctor. *Gray* v. *Gray*, 30 Law J. Rep. (N.S.) Prob. M. & A. 119; 2 Swab. & T. 263.

The Court will allow the wife to withdraw her petition for judicial separation, and file one for dissolution of marriage, if her proctor has not received from the husband her costs in the former suit. *Ashley* v. *Ashley*, 30 Law J. Rep. (N.S.) Prob. M. & A. 175; 2 Swab. & T. 388.

C, the wife, obtained a decree *nisi* for dissolution of her marriage, the husband not appearing, after which the Queen's Proctor intervened and pleaded collusion between petitioner and respondent, and alleged that the petitioner had herself been living in adultery, and prayed to dismiss the petition and condemn the parties, or one of them, in costs; whereupon the Judge Ordinary was moved on behalf of the petitioner to direct the petition to be taken off the file of the Court, which he refused to do, and it was held, on appeal to the full Court, that the Judge Ordinary was right in such refusal. *Gray* v. *Gray*, 2 Swab. & T. 266.

*Quære*—If the petitioner had prayed to dismiss her petition on payment by her of the costs incurred up to that time by the Queen's Proctor's intervention. Ibid.

Leave granted to withdraw a petition for judicial separation and file a petition for dissolution of marriage upon the same grounds as those alleged in the first petition. *Massey* v. *Massey*, 32 Law J. Rep. (N.S.) Prob. M. & A. 141.

(3) *Dismissing.*

When issues raised in a suit for dissolution of marriage come on for trial by a jury, the petitioner will not be allowed to withdraw the record; but on his application, if there is no opposition by the other parties, the petition will be dismissed. When by agreement between the parties a petition for dissolution of marriage is dismissed, the Court will not allow such agreement to be made an order of Court for the purpose of enforcing its terms. *Ryder* v. *Ryder*, 30 Law J. Rep. (N.S.) Prob. M. & A. 164.

A wife who has been guilty of adultery since the commencement of the suit is not entitled to a decree of judicial separation on the ground of cruelty; but upon proof of such adultery the Court will dismiss the petition, although the respondent may not have recriminated. *Drummond* v. *Drummond*, 30 Law J. Rep. (N.S.) Prob. M. & A. 177; 2 Swab. & T. 269.

*Semble*—That if the respondent is aware that the petitioner has been guilty of adultery, his omission to recriminate is evidence of collusion. Ibid.

The Court will not dismiss a petition by the husband for dissolution of marriage, except upon payment of the wife's taxed costs and the costs of the motion. *Pearce* v. *Pearce*, 30 Law J. Rep. (N.S.) Prob. M. & A. 182.

When a verdict has been found for the respondent the Court will not dismiss the petition until the month allowed by the Rules for moving for a new trial has elapsed. *Hitchcock* v. *Hitchcock*, 30 Law J. Rep. (N.S.) Prob. M. & A. 198; 2 Swab. & T. 513.

A motion to dismiss a petition after a verdict for the respondent should be supported by an affidavit that no application for a new trial has been lodged in the registry. *Hill* v. *Hill*, 30 Law J. Rep. (N.S.) Prob. M. & A. 198; 2 Swab. & T. 515.

After a decree *nisi* for dissolution of marriage at the suit of the wife had been pronounced, the wife renewed marital intercourse with her husband, and informed her attorney that she did not wish any further proceedings to be taken in the suit. Upon an application by the husband to dismiss the petition, the Court declined to accede to it, but said that, if both parties consented, it would order all proceedings in the suit to be stayed. *Lewis* v. *Lewis*, 30 Law J. Rep. (N.S.) Prob. M. & A. 199; 2 Swab. & T. 394.

*Quære*—Whether the Court at the instance of the parties can dismiss a petition for dissolution of marriage after a decree *nisi* has been pronounced. Ibid.

Where issues in a suit for dissolution of marriage have been tried by a jury the Court will not dismiss the petition on the application of the petitioner until the time allowed by the rules for moving for a new trial has elapsed. *Aliter* if all the parties concur in the application. *Seddon* v. *Seddon*, 31 Law J. Rep. (N.S.) Prob. M. & A. 31.

If at the hearing no one appears on behalf of the petitioner, the respondent has a right to have the petition dismissed. *Desmarest* v. *Desmarest*, 31 Law J. Rep. (N.S.) Prob. M. & A. 34.

Dismissing petition on respondent's application after notice of abandonment by petitioner. *Symons* v. *Symons*, 31 Law J. Rep. (N.S.) Prob. M. & A. 84; 2 Swab. & T. 435.

When directions as to the trial of a cause have been given, and the petitioner fails to set it down for trial in due course, the Court will not, on the *ex parte* application of the respondent, dismiss the petition; but will grant a rule *nisi*, calling on the petitioner to shew cause why the petition should not be dismissed. *Stuart* v. *Stuart*, 32 Law J. Rep. (N.S.) Prob. M. & A. 110; 3 Swab. & T. 219.

In a suit, by a husband, for dissolution of marriage, the co-respondent appeared, but filed no answer. Upon a motion, by the petitioner, for the dismissal of the petition, as against the co-respondent, on the ground that there was no evidence against him, it was held that the application could only be granted upon payment of the co-respondent's costs. *Smith* v. *Smith*, 34 Law J. Rep. (N.S.) Prob. M. & A. 11.

After a decree for dissolution of marriage, on the ground of the wife's adultery, the husband, who was respondent in a cross-suit for restitution of conjugal rights, which had not been heard, moved that the petition should be dismissed. The wife refused to consent to its dismissal, except upon payment of her costs up to the date of the decree absolute:—Held, that as it did not appear in the suit for restitution that the wife had been guilty of adultery, the Court could not, without her consent, dismiss the petition;

but that as her adultery disentitled her to costs, the respondent, if she did not consent, might put on the record a plea that she had been found guilty of adultery. *Rolt* v. *Rolt*, 34 Law J. Rep. (N.S.) Prob. M. & A. 51; 3 Swab. & T. 604.

(4) *Dismissing Second Petition.*

A petition was filed by a wife for judicial separation on the ground of cruelty; a citation issued, but the respondent was not served. Afterwards the wife's solicitor, who was unaware of the former proceedings, in pursuance of fresh instructions, filed another petition for judicial separation, on the ground of cruelty and adultery, and issued a citation which, with a copy of the petition, was served on the respondent, who entered an appearance. The first citation could not be found. The Court rejected a motion on behalf of the wife, that the second petition should be taken off the file, or should be dismissed, and that a fresh citation should issue on the first petition, in order that the petitioner might proceed upon the first petition. *Turner* v. *Turner*, 31 Law J. Rep. (N.S.) Prob. M. & A. 134; 2 Swab. & T. 426.

(*i*) *Citation.*

(1) *Form and Requisites of.*

If the name of a respondent is mis-spelt in the citation, and there is no appearance, the Court will not order that service of such citation shall be deemed sufficient, but a fresh one must be extracted. *Cotton* v. *Cotton*, 32 Law J. Rep. (N.S.) Prob. M. & A. 133.

Where a petition for dissolution of marriage has been served in which a mistake is made in the Christian name of the person with whom the respondent is alleged to have committed adultery, the Court will allow it to be amended, but it must be re-served. *Love* v. *Love*, 32 Law J. Rep. (N.S.) Prob. M. & A. 134.

When the address of the respondent is unknown, he may be described in the citation as late of the last known place of his residence. *Forster* v. *Forster*, 32 Law J. Rep. (N.S.) Prob. M. & A. 134; 3 Swab. & T. 158.

(2) *Service of.*

(i) *Personal.*

An affidavit of service of the citation, &c. should allege that the party served is a respondent in the suit. *Temple* v. *Temple*, 31 Law J. Rep. (N.S.) Prob. M. & A. 34.

In a suit for dissolution of marriage, if the respondent does not appear, proof must be given at the hearing of the identity of the respondent and the person served with the citation. *Goldsmith* v. *Goldsmith*, 31 Law J. Rep. (N.S.) Prob. M. & A. 163.

The Court will not allow a suit to proceed upon the mere undertaking of an attorney to accept service of the citation for the respondent. Personal service on the respondent is necessary, unless the Court has dispensed with such service. *Milne* v. *Milne*, 34 Law J. Rep. (N.S.) Prob. M. & A. 143; 4 Swab. & T. 183.

An affidavit of service of a citation which refers to the certificate of service indorsed on the citation, and states that such indorsement is true, is insufficient; it should state in terms that the citation was served. *Rich* v. *Rich*, 32 Law J. Rep. (N.S.) Prob. M. & A. 77.

(ii) *By Advertisement.*

When an order has been made, dispensing with personal service upon a respondent, a copy of it should be brought in with the other papers, when the Court is moved to direct the mode of trial. The insertion in a newspaper of advertisements on the 7th and 14th of a month, is a sufficient compliance with an order to advertise twice with the interval of a week. *Elsley* v. *Elsley*, 32 Law J. Rep. (N.S.) Prob. M. & A. 145.

Where a respondent is cited by advertisement and leave to amend the petition is afterwards granted, the amended petition need not be advertised. *Smith* v. *Smith*, 32 Law J. Rep. (N.S.) Prob. M. & A. 145; 3 Swab. & T. 216.

(*k*) *Appearance.*

(1) *Time for Entering and Leave to appear.*

An appearance may be entered at any time within twenty-one days from the service of the citation in a matrimonial suit. *Child* v. *Child*, 33 Law J. Rep. (N.S.) Prob. M. & A. 156; 3 Swab. & T. 537.

In a suit, by the husband, for dissolution of marriage the wife did not appear. The co-respondent filed an answer, and the issue raised was set down for trial. The Court subsequently allowed the wife to enter an appearance upon an affidavit by her denying the adultery, and stating that she had been prevented by poverty from appearing earlier, but directed that the costs should not be taxed against the husband. *Bent* v. *Bent*, 30 Law J. Rep. (N.S.) Prob. M. & A. 160.

An issue raised by the respondent in a suit by the husband for dissolution of marriage, in which damages were claimed against the co-respondent, having been set down for trial by a jury, the Court refused to allow the co-respondent, on the day previous to that fixed for the trial, to enter an appearance, on the ground that the application was then too late. *Pounsford* v. *Pounsford*, 30 Law J. Rep. (N.S.) Prob. M. & A. 188.

(2) *Search for.*

The Court refused to make absolute a decree *nisi* of dissolution of marriage pronounced on the 30th of January, upon an affidavit that on the 30th of the ensuing April search had been made in the registry, and that no appearance had been entered in opposition to the decree, the search having been made a day too soon. *Serrill* v. *Serrill*, 31 Law J. Rep. (N.S.) Prob. M. & A. 114; 2 Swab. & T. 636.

(*l*) *Affidavits.*

(1) *Entitling.*

In a suit of nullity by the wife, an affidavit entitled *S.* v. *C*, instead of *S.* falsely called *C.* v. *C*, was rejected. *Sutherland* v. *Croomie*, 32 Law J. Rep. (N.S.) Prob. M. & A. 125; 3 Swab. & T. 210.

(2) *Filing.*

In a suit for dissolution of marriage, triable upon affidavits, in which there was no appearance, a motion for further time to file affidavits was granted, notwithstanding the 35th Rule, which directs that, "In cases to be tried upon affidavit, the petitioner and respon-

dent shall file their affidavits within eight days from the filing of the last proceeding." *Davis* v. *Davis*, 33 Law J. Rep. (N.S.) Prob. M. & A. 139.

(*m*) *Particulars.*

(1) *Of Acts of Adultery.*

By obtaining further time to plead the respondent waives any objection to the sufficiency of the charge of adultery in the petition. He is still, however, entitled to particulars of the charge. *Hepworth* v. *Hepworth*, 30 Law J. Rep. (N.S.) Prob. M. & A. 215.

A petition by a husband for dissolution of marriage alleged that on divers occasions since a specified date the respondent had accompanied the co-respondent to divers places in Bristol and its neighbourhood unknown to the petitioner, and had committed adultery with the co-respondent. The Court ordered that particulars of this charge should be given, or that the petitioner should file an affidavit that he was unable to do so. *Higgs* v. *Higgs*, 32 Law J. Rep. (N.S.) Prob. M. & A. 64.

In a suit by a husband for dissolution of marriage, the petitioner, in pursuance of an order made on the application of the respondent, delivered particulars in which he alleged generally adultery with A at Malta "between 1859 and 1862 and during a journey in Switzerland, Savoy, Sardinia and Italy." Upon application for further and better particulars, it appearing that the information of the petitioner was solely derived from a diary and certain correspondence of the respondent, the Court ordered that unless particulars, setting out the dates and occasions of the alleged adultery, should be given to the respondent, ten days before the trial, the petitioner should be precluded at the trial from giving any save documentary evidence of the adultery charged. *Codrington* v. *Codrington*, 33 Law J. Rep. (N.S.) Prob. M. & A. 53; 3 Swab. & T. 368.

A petition for divorce by a husband in the 3rd paragraph alleged that the respondent, since the 8th of October, 1846, had on divers occasions committed adultery; and in the 4th that the respondent had, since April, 1864, up to the date of the petition, been habitually visited at her residence at &c., by A, and had on divers of such occasions and particularly on the night of the 31st of August, 1864, committed adultery with A:—Held, first, that it was not sufficient to give particulars of the dates when, places where, and persons with whom, the adultery alleged in the 3rd paragraph was committed; but that the petition must be amended by setting out such particulars. Secondly, that the respondent was not entitled to particulars of the adultery charged in the 4th paragraph. *Porter* v. *Porter*, 33 Law J. Rep. (N.S.) Prob. M. & A. 207; 3 Swab. & T. 596.

When a petition contains a general charge of adultery of which particulars are ordered and delivered, the petitioner ought, if he intends to give evidence of acts of adultery not included in the particulars, to give notice of them to the other side a reasonable time before the hearing. If he does not give such notice, the trial will be adjourned. *Bancroft* v. *Bancroft*, 34 Law J. Rep. (N.S.) Prob. M. & A. 31; 3 Swab. & T. 610.

Where a trial was adjourned on the ground that the evidence tendered in support of a general charge of adultery took the other side by surprise, the Court made no order as to the costs of the adjournment, on the ground that both parties were to blame for the state of the pleadings and the record. Ibid.

(2) *Of Collusion.*

Where the Queen's Proctor obtains the leave of the Court to intervene, and pleads collusion between the petitioner and respondent, such plea is a good plea; but the petitioner is entitled to be acquainted with the character of the collusion intended to be charged, by way of specification or particulars. *Jessop* v. *Jessop*, 2 Swab. & T. 301.

(*n*) *Inspection and Production of Documents.*

*Semble*—That the Court has jurisdiction to order that one of the parties to a suit be at liberty to inspect and take copies of a document in the possession of the other party, for the purpose of framing a pleading or supporting a suit or defence. *Shaw* v. *Shaw*, 31 Law J. Rep. (N.S.) Prob. M. & A. 95; 2 Swab. & T. 642.

P petitioned for dissolution of marriage and for assessment of damages. The Judge, on summons, at the instance of the co-respondent, ordered the petitioner to bring into the registry letters written by the respondent to him, or to file an affidavit that he had no such letters, or that they contained no such matters as suggested by the affidavits in support of the summons. *Pollard* v. *Pollard*, 3 Swab. & T. 613.

(*o*) *Staying Proceedings.*

Under 20 & 21 Vict. c. 85. s. 43. the Court has only power to order that the petitioner attend on the hearing of the petition. It cannot, therefore, order his attendance at the hearing of the case of the Queen's Proctor, if the intervention was after a decree *nisi* had been pronounced. *Semble*, however, that though the Court has no power in such a case to order the attendance of the petitioner it may stay proceedings in the suit until he appears. *Pollack* v. *Pollack*, 32 Law J. Rep. (N.S.) Prob. M. & A. 28; 2 Swab. & T. 648.

Where cross-suits had been instituted by the husband for dissolution and by the wife for judicial separation, in which the same issues were raised, the Court stayed proceedings in the wife's suit, which had been commenced after that of the husband, until after the hearing of the husband's suit. *Osborne* v. *Osborne*, 33 Law J. Rep. (N.S.) Prob. M. & A. 38; 3 Swab. & T. 327.

Where the same issues are raised in cross-suits, and an order is made for a commission to examine witnesses, it will be drawn up in such a form that the evidence will be admissible in both suits. Ibid.

(*p*) *Answer: Leave to file.*

An answer filed, without the leave of the Judge Ordinary, after the time allowed by the Rules for filing it has elapsed, may be treated by the petitioner as a nullity. *Avila* v. *Avila*, 30 Law J. Rep. (N.S.) Prob. M. & A. 104.

An application for leave to file an answer after the cause has been set down for trial, must be supported by an affidavit shewing reasonable ground for granting it. *Jago* v. *Jago*, 32 Law J. Rep. (N.S.) Prob. M. & A. 49.

(q) *Payment into Court.*

The Court has no power to order immediate execution for the recovery of damages awarded against the co-respondent and ordered to be paid to the petitioner, nor to order that such damages be paid into court. *Pounsford* v. *Pounsford*, 30 Law J. Rep. (N.S.) Prob. M. & A. 188; 2 Swab. & T. 389.

A sequestration having been issued against the estate of M, who was the plaintiff in an action in which he had recovered 65*l.* 5*s.* and costs, the Court ordered the solicitor for the defendant in that action to pay the 65*l.* 6*s.* into the registry, not to be paid out until further order; the solicitor to have notice of any application respecting it, so that he might enforce his lien for any extra costs to which he might be entitled, and to be indemnified against costs which he might incur in enforcing his lien beyond the amount of the fund. *Munt* v. *Munt*, 31 Law J. Rep. (N.S.) Prob. M. & A. 134.

(r) *Damages.*

(1) *Unfounded Claim for.*

A petitioner having claimed damages from a co-respondent, evidence was produced by the co-respondent shewing that the respondent was leading an abandoned life when he made her acquaintance, and raising a strong suspicion that the petitioner must have been aware of that fact:—Held, that the co-respondent ought not to be condemned in costs on the ground that the claim for damages was improper under the circumstances. *Manton* v. *Manton*, 34 Law J. Rep. (N.S.) Prob. M. & A. 121; 4 Swab. & T. 159.

(2) *Assessment and Measure of.*

In assessing damages against the co-respondent, the jury are to take into consideration the same circumstances as would have been considered by a jury in an action for criminal conversation. *Comyn* v. *Comyn*, 32 Law J. Rep. (N.S.) Prob. M. & A. 210.

In the assessment of damages against a co-respondent the measure of damages is the value of the wife of whom the husband has been deprived. As a general rule, evidence of the co-respondent's means is inadmissible. *Semble*, however, that the jury may take his wealth into consideration, if he has used it as a means of seducing the wife. *Cowing* v. *Cowing*, 33 Law J. Rep. (N.S.) Prob. M. & A. 149.

(3) *Application and Investment of.*

A jury having assessed the damages against a co-respondent at 250*l.*, the Judge Ordinary ordered the petitioner to assign his interest in them to a trustee for the benefit of the child of the marriage. *Clark* v. *Clark*, 31 Law J. Rep. (N.S.) Prob. M. & A. 61; 2 Swab. & T. 520.

In a suit by a husband for a dissolution of marriage, a jury assessed the damages against the co-respondent at 1,000*l.*, and the co-respondent was condemned in costs. The Court ordered the damages to be paid to the petitioner in trust to pay thereout such costs as should not be recovered against the co-respondent, and as to the residue in trust for the children of the marriage in equal shares, to be paid to them on attaining twenty-one. *Spedding* v. *Spedding*, 32 Law J. Rep. (N.S.) Prob. M. & A. 31.

Upon pronouncing a decree of dissolution of marriage on the ground of the wife's adultery, the Court ordered that the damages (2,500*l.*) assessed by the jury should be applied, in the first instance, to the payment of so much of the petitioner's costs out of pocket as should not be taxed against the co-respondent, and that the residue should be settled upon the respondent for life *dum casta vixerit*; and after her death, or on breach of that condition, upon the issue of the marriage. *Narracott* v. *Narracott*, 33 Law J. Rep. (N.S.) Prob. M. & A. 132; 3 Swab. & T. 408.

In a suit by a husband for dissolution of marriage, no order was made that a portion of the damages should be settled on the wife for life "*dum casta vixerit.*" The Court refused afterwards to vary the order by making the wife's interest continue only "*dum casta et innupta vixerit.*" *Narracott* v. *Narracott*, 34 Law J. Rep. (N.S.) Prob. M. & A. 54; 4 Swab. & T. 76.

After an order had been made directing the application of damages, which had been assessed against a co-respondent, for the benefit of the petitioner, the respondent and their children, an agreement was made between the petitioner and co-respondent in which no provision was made for securing to the children the benefit which they would have taken under the order. The Court, on the application of the respondent, although her interests were not affected, enforced the order. *Forster* v. *Forster*, 34 Law J. Rep. (N.S.) Prob. M. & A. 88; 4 Swab. & T. 131.

Where a husband had obtained a decree of dissolution, upon the ground of adultery, with 150*l.* damages against the co-respondent, permanent alimony was refused, but the damages awarded were ordered to be invested in the purchase of a government annuity for the wife's benefit. *Latham* v. *Latham*, 30 Law J. Rep. (N.S.) Prob. M. & A. 43.

(4) *Speedy Payment of.*

Where damages, awarded by a jury against the co-respondent in a suit by the husband for dissolution had been ordered to be paid to the petitioner, and it appeared that he was in danger of losing them, the Court ordered they should be paid within ten days. *Bent* v. *Bent*, 30 Law J. Rep. (N.S.) Prob. M. & A. 189.

(s) *Attachment.*

(1) *Generally.*

A husband who has been served with a decree in a suit for restitution of conjugal rights ordering him to take his wife home, is bound to take the first step by inviting her to return to him. If he does not, an attachment will be issued. If he has not appeared in the suit, notice of the motion for an attachment is not requisite. *Alexander* v. *Alexander*, 30 Law J. Rep. (N.S.) Prob. M. & A. 173; 2 Swab. & T. 385.

An affidavit of non-payment of taxed costs and alimony to the person to whom they are ordered to be paid cannot be read on a motion for an attachment if filed subsequently to the notice of motion. *Symons* v. *Symons*, 30 Law J. Rep. (N.S.) Prob. M. & A. 215.

Where it is sought to charge a second attachment

upon a person already in custody under a prior writ, the practice of the Court is, conformably with that of the Court of Chancery, that, upon motion for such writ, a *habeas* should issue to the keeper of the Queen's Prison to bring up the prisoner, and, upon his being present on the day named, that he should be charged accordingly. *Dickens* v. *Dickens*, 31 Law J. Rep. (N.S.) Prob. M. & A. 59; 2 Swab. & T. 521.

An attachment will not be granted for non-payment of money pursuant to order, unless a copy of the order be annexed to or recited in the affidavit of service. *Lidmore* v. *Lidmore*, 32 Law J. Rep. (N.S.) Prob. M. & A. 134.

An attachment for non-payment of alimony was granted, although the order did not state to whom payment was to be made, where it appeared that the wife and her solicitor had at the same time demanded payment of the husband and he had paid neither. *Ladmore* v. *Ladmore*, 32 Law J. Rep. (N.S.) Prob. M. & A. 157.

(2) *Contempt.*

The use of threatening expressions to a person cognizant of facts in issue in a suit with the intention of intimidating him and preventing him from giving evidence at the hearing, is a contempt of Court. *Shaw* v. *Shaw*, 31 Law J. Rep. (N.S.) Prob. M. & A. 35; 2 Swab. & T. 517.

Threatening a petitioner to publish concerning him a statement of facts unless he withdraws his petition, is a contempt of Court. *In re Mulock*, 33 Law J. Rep. (N.S.) Prob. M. & A. 205; 3 Swab. & T. 599.

A party who is in contempt for non-compliance with an order of the Court cannot be heard, except for the purpose of purging the contempt. *Garstin* v. *De Garston*, 34 Law J. Rep. (N.S.) Prob. M. & A. 45; 4 Swab. & T. 73.

(*t*) *Sequestration.*

A bankrupt who has obtained an order of discharge under the Bankruptcy Act, 1861, is thereby protected from any proceeding to enforce the payment of alimony for the non-payment of which he has been attached before the order of discharge. A sequestration against his estate for such alimony therefore will not be granted. *Dickens* v. *Dickens*, 31 Law J. Rep. (N.S.) Prob. M. & A. 183; 2 Swab. & T. 645.

On non-payment of certain sums due by way of alimony and costs, a writ of sequestration issued against the respondent's property, and an order was made on K to pay into court a sum of money awarded in an action in the Queen's Bench to be paid by K to respondent. On motion on behalf of petitioner to order such sum to be paid out in part satisfaction of her attorney's taxed costs and her own alimony, the Court refused to make such order, H and F, respondent's attorneys in the action in the Queen's Bench, having satisfied the Court, on affidavit, that they had a lien for costs in that cause exceeding the sum so paid into court. *Munt* v. *Munt*, 2 Swab. & T. 661.

(*u*) *Change of Attorney.*

Where an order has been made for the change of the attorney in a suit; the order must be drawn up and filed in the registry, before any step can be taken by the fresh attorney. *Grice* v. *Grice*, 32 Law J. Rep. (N.S.) Prob. M. & A. 134.

(U) Costs.

(*a*) *Of the Wife.*

(1) *General Points.*

In a suit for dissolution of marriage on the ground of the wife's adultery, the respondent and co-respondent denied the charge, and the respondent further charged the petitioner with adultery. It appeared at the hearing that this latter charge was substantially the joint defence of the respondent and co-respondent. A jury found that the respondent and co-respondent had not been guilty of adultery, and also that the petitioner had not been guilty of adultery. It was held, the respondent was entitled to the whole of her costs incurred in supporting the first issue, although they should exceed the sum deposited in the registry, but that as to the second issue she was entitled only to a moiety of the costs incurred. *Burroughs* v. *Burroughs*, 31 Law J. Rep. (N.S.) Prob. M. & A. 124.

By section 51. of the Divorce Act, the Court which hears the suit has absolute authority over costs, and no appeal as to costs only lies. The settled practice of the Court is, that the wife, if she fails, will not be entitled to taxed costs beyond the sum of money paid into court by the husband at the order of the Registrar. In the present case the Court rejected a motion for an order on the husband to pay the balance of the wife's taxed costs above such sum of money paid into court, and condemned the wife's solicitor in costs of the motion. *Glennie* v. *Glennie*, 3 Swab. & T. 109.

*Quære*—Whether, if dissatisfied with the Registrar's order, the wife's solicitor ought not then to have applied to the Judge Ordinary to vary such order. Ibid.

Where a new trial is granted on the application of the wife, the Court cannot impose upon her the terms of payment of costs if she has no means, but the husband must pay the costs of both parties. *Nicholson* v. *Nicholson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 127; 3 Swab. & T. 214.

A wife, pending a suit by her for a judicial separation, returned to cohabitation, no order for the taxation of her costs having been made. The husband, therefore, applied to have the petition dismissed:—Held, that it could be dismissed only upon payment of the wife's costs. *Cooper* v. *Cooper*, 33 Law J. Rep. (N.S.) Prob. M. & A. 71; 3 Swab. & T. 392.

In a suit by a husband for dissolution of marriage, a jury found that the wife had committed adultery. On a new trial, granted on the ground of surprise, the wife succeeded. The Court being of opinion that the case was trumped up by the husband, condemned him in the wife's costs of both trials, and also in the costs of the rule for a new trial. *Nicholson* v. *Nicholson*, 33 Law J. Rep. (N.S.) Prob. M. & A. 114.

The dismissal of a petition does not prevent the Court from enforcing, by attachment, the payment of alimony and costs previously ordered to be paid by the petitioner. *Bremner* v. *Bremner*, 33 Law J. Rep. (N.S.) Prob. M. & A. 202; 3 Swab. & T. 378.

Where in a suit by a husband for dissolution of marriage, the co-respondent is found to have been guilty of adultery, under such circumstances as

would entitle the petitioner to the costs of that issue, the dismissal of the petition on the ground of the petitioner's adultery does not necessarily disentitle him to such costs. Ibid.

Where a wife, in her answer to a petition for dissolution, traversed the adultery charged, and brought several counter-charges against the petitioner, which appeared at the hearing to be entirely without foundation, the Court made the following order as to her costs of the hearing: her costs to be taxed as if she had only traversed the adultery and had gone to trial on that issue alone, all costs of and occasioned by the rest of her answer being disallowed: from her costs thus taxed, any costs to be deducted which the petitioner had reasonably incurred for the purpose of meeting the charges made against him in the answer; and the residue, if any, to be paid to the respondent out of the sum deposited in the registry by the petitioner to meet her costs of the hearing. *Clark* v. *Clark*, 34 Law J. Rep. (N.S.) Prob. M. & A. 71; 4 Swab. & T. 111.

The general rule that in a matrimonial suit the husband is liable for the wife's costs does not apply to a suit of nullity of marriage where the *de facto* husband and wife are both made respondents and the marriage is declared null. Where, however, in such a suit the wife's costs may be considered to be consequent on the husband's conduct (*e.g.*, if by his importunity she was induced to contract an invalid marriage), the Court may, under the 51st section of 20 & 21 Vict. c. 85, order them to be paid by the *de facto* husband, provided there was reasonable ground for her defending the suit, but not otherwise. *Wells* v. *Cottam*, 34 Law J. Rep. (N.S.) Prob. M. & A. 12; 3 Swab. & T. 593.

(2) *Interlocutory Motions.*

A wife, who unsuccessfully makes or opposes an interlocutory motion in a matrimonial suit, is not entitled to the costs. Accordingly, it was held that the costs of an unsuccessful motion by a wife for access to the children of the marriage, and of an unsuccessful opposition by her to a motion for further particulars of the charges made by her in her petition, should not be allowed. *Hepworth* v. *Hepworth*, 30 Law J. Rep. (N.S.) Prob. M. & A. 253.

The fee of counsel for advising on the sufficiency of an answer, which is special, and not a mere traverse of the allegations in the wife's petition, will be allowed on the taxation of costs. Ibid.

Where, upon the husband's answer to a petition for alimony *pendente lite*, it appears that he has no means, the Court will refuse to allot alimony; but the wife will be entitled to her costs of moving for an allotment. *Gaynor* v. *Gaynor*, 31 Law J. Rep. (N.S.) Prob. M. & A. 144.

The costs of an application by a wife for time to plead will not be allowed, unless the application was rendered necessary by the default of the husband. *Harding* v. *Harding*, 31 Law J. Rep. (N.S.) Prob. M. & A. 76; 2 Swab. & T. 549.

Where a wife obtained an order for the attendance of the husband on the hearing of her petition for alimony, for the purpose of being examined thereon, and the husband was examined accordingly, but his evidence satisfied the Court of the truth of his answer, the costs of the motion for the order were disallowed. Ibid.

(3) *Of the Hearing.*

Where the husband had paid a sum into the registry to meet the wife's costs of the hearing of the petition, and had died shortly before the time appointed for the hearing, the Court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors, and the payment to them of such taxed costs out of the fund in the registry, with leave to the solicitors of the husband's executor to attend the taxation. *Hall* v. *Hall*, 3 Swab. & T. 390.

In a suit for dissolution of marriage the wife, before the hearing, obtained the usual order for the taxation of her costs. The Registrar made an appointment, and found that her taxed costs, up to the date of the order, amounted to 9*l.* 11*s.* 6*d.*, and that 90*l.* would be a reasonable sum to be paid into the registry to cover the wife's costs of the hearing, but he declined to make his report to that effect, as the petitioner's solicitor was not present, and he made a second appointment. In the interim the cause was heard, and the wife failed in the suit:—Held, that she was not entitled to the costs incurred before the date of the order, nor to the costs of the hearing. *Gough* v. *Gough*, 33 Law J. Rep. (N.S.) Prob. M. & A. 136.

When a petition by a husband is dismissed with costs, the wife is entitled to her costs of the hearing, though they may exceed the sum for which security has been given. *Cooke* v. *Cooke*, 34 Law J. Rep. (N.S.) Prob. M. & A. 15; 3 Swab. & T. 603.

A wife who has obtained a decree *nisi* is entitled to an order for the payment of her surplus costs of the hearing beyond the amount deposited in the registry, notwithstanding that a motion for a new trial and a bill of exceptions are pending. *Chetwynd* v. *Chetwynd*, 34 Law J. Rep. (N.S.) Prob. M. & A. 65; 4 Swab. & T. 108.

(4) *De Die in Diem.*

In a suit for nullity of marriage, instituted by the father of the husband in his own right against the husband and wife, the wife is not entitled to have her costs *de die in diem* taxed against the petitioner. *Wells* v. *Wells*, 33 Law J. Rep. (N.S.) Prob. M. & A. 72; 3 Swab. & T. 364.

(5) *Security for.*

The inability of the husband, respondent in a matrimonial suit, to deposit in the registry, or give security for a sum of money to defray the wife's costs of the hearing pursuant to order, is no ground for refusing an attachment against him for non-compliance with the order. *Hepworth* v. *Hepworth*, 31 Law J. Rep. (N.S.) Prob. M. & A. 18; 2 Swab. & T. 414.

When the husband is petitioner, and does not comply with such an order, the Court will stay the suit. Ibid.

The 32nd section of the 20 & 21 Vict. c. 85. empowers the Court, in a suit for dissolution of marriage, to make such an order as to the wife's costs of the hearing, as it may make in a suit for judicial separation. Ibid.

The guardian who institutes a suit in behalf of an infant husband will be ordered to pay into the registry, or give security for a sum of money to

meet the wife's costs of the hearing. *Beavan* v. *Beavan*, 31 Law J. Rep. (N.S.) Prob. M. & A. 166; 2 Swab. & T. 652.

(6) *Of Special Jury.*

*Semble*—That when, upon the application of a wife, a cause is tried by a special jury, the Court may, in its discretion, refuse to allow the wife the costs of the special jury. *Scott* v. *Scott*, 32 Law J. Rep. (N.S.) Prob. M. & A. 40.

(7) *Suing in Forma Pauperis.*

A wife suing *in forma pauperis* for a dissolution of marriage, if she obtains a decree, is entitled to costs. *Afford* v. *Afford*, 30 Law J. Rep. (N.S.) Prob. M. & A. 174; 2 Swab. & T. 387.

(8) *Payment into Court.*

In a suit by a wife for judicial separation, the Judge Ordinary having reason to believe that it had been instituted not for the purpose of obtaining a decree, but for the purpose of obtaining costs from the husband, and being satisfied by affidavits that the petitioner was a drunken and profligate woman, and that she had for many years been living in open adultery, directed that her taxed costs incurred prior to the hearing should be deposited in the registry until further order, instead of being paid over to her attorney. *Rogers* v. *Rogers*, 34 Law J. Rep. (N.S.) Prob. M. & A. 87; 4 Swab. & T. 82.

(*b*) *Against Wife.*

A wife, after a decree *nisi* of dissolution of marriage on the ground of her adultery, became entitled to 500*l*., which was the only property she possessed. The Court refused to order, under the 45th section of 20 & 21 Vict. c. 85, that a part of this should be applied to the repayment of costs incurred by the husband in the suit, although she had been guilty of gross misconduct, and had increased the costs of the suit by an unfounded countercharge against the husband. *Semble*—That the Court would have made such an order if the residue of the wife's property would have been sufficient to maintain her. *Carstairs* v. *Carstairs*, 33 Law J. Rep. (N.S.) Prob. M. & A. 170; 3 Swab. & T. 538.

(*c*) *Against Co-respondent.*

The Court may order the costs of the proceedings to be paid by the co-respondent where the adultery is established, although the petitioner may not have prayed for such costs. *Finlay* v. *Finlay*, 30 Law J. Rep. (N.S.) Prob. M. & A. 104.

Where in a suit for dissolution of marriage, on the ground of the wife's adultery, the adultery of the wife is proved, but the petition is dismissed under the 31st section of 20 & 21 Vict. c. 85, on account of the husband's marital misconduct, the wife is entitled to all her costs, though they may exceed the sum paid into the registry, and the co-respondent will not be condemned in costs. *Starkey* v. *Starkey*, 30 Law J. Rep. (N.S.) Prob. M. & A. 118.

Where in a suit for dissolution of marriage by a husband, the adultery of the wife is proved, but the petition is dismissed under the 31st section of 20 & 21 Vict. c. 85, on account of the husband's marital misconduct, the co-respondent will not be condemned in costs, nor will he be allowed his costs. *Seddon* v. *Seddon*, 31 Law J. Rep. (N.S.) Prob. M. & A. 101; 2 Swab. & T. 640.

When, in a suit for dissolution of marriage, the co-respondent is condemned in costs, he is liable for the costs of the petitioner and respondent incurred in obtaining an alteration of a marriage settlement. *Gill* v. *Gill*, 33 Law J. Rep. (N.S.) Prob. M. & A. 43; 3 Swab. & T. 359.

The exercise of the discretion as to costs vested in the Court by the 34th section of the 20 & 21 Vict. c. 85. depends upon the opinion of the Court as to the conduct of all the parties in each case; and even if it is proved that the co-respondent knew the respondent to be a married woman when the adultery was committed, it does not necessarily follow that he will be condemned in the whole of the costs. *Codrington* v. *Codrington*, 34 Law J. Rep. (N.S.) Prob. M. & A. 60; 4 Swab. & T. 63.

Where a respondent, in her answer, charged the petitioner with wilful neglect and misconduct, and that charge was negatived by the verdict of the jury, and a decree was granted on the ground of her adultery with the co-respondent and with another person who was not a party to the suit, the Court, being of opinion that the conduct of the petitioner had been such as to invite reasonable challenge, refused to condemn the co-respondent in the whole of the costs of the suit, and condemned him in those costs only which had been incurred in proving the respondent's adultery with him. Ibid.

(*d*) *To Co-respondent.*

In a suit for dissolution of marriage the jury found that the respondent had been guilty of adultery, but that there was not sufficient evidence against the co-respondent. The co-respondent's conduct having been such as to lead to a reasonable suspicion in the mind of the petitioner that he had been guilty of adultery, the Court refused to allow him his costs. *Robinson* v. *Robinson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 210.

The Court will not always order the petitioner to pay the co-respondent's costs when the petition is dismissed. In a case where the jury were discharged without giving a verdict, and the petitioner did not proceed to a second trial, but allowed his petition to be dismissed, the Court, under the peculiar circumstances of the case, declined to order him to pay the co-respondent's costs. *Bancroft* v. *Bancroft*, 34 Law J. Rep, (N.S.) Prob. M. & A. 144.

(*e*) *Against Petitioner.*

At the trial of issues joined in a suit for dissolution of marriage on the ground of the wife's adultery, no one appearing on behalf of the petitioner, the jury returned a verdict that the respondent had not committed adultery with the co-respondent. No application having been afterwards made for a new trial, the Court, upon the motion of the co-respondent, dismissed the petition, and condemned the petitioner in costs. *Potts* v. *Potts*, 32 Law J. Rep. (N.S.) Prob. M. & A. 32.

Where in a suit for dissolution of marriage by a husband the adultery was proved, but the petition was dismissed on the ground of the gross misconduct of the petitioner, the Court refused to make any order as to the costs of the petitioner or co-respon-

dent. *Hick* v. *Hick*, 34 Law J. Rep. (N.S.) Prob. M. & A. 11.

(*f*) *Of Queen's Proctor.*

Where the solicitors for the petitioner and respondent conducted the proceedings in a suit for dissolution of marriage in such a way as to give rise to a reasonable suspicion of collusion, and the Queen's Proctor thereupon obtained leave to intervene and shew cause against the decree *nisi* being made absolute, but it appeared, on shewing cause, that neither of the parties to the suit had been implicated in the irregularities of their solicitors, the Court made absolute the decree *nisi*, and made no order as to the costs of the intervention. *Cox* v. *Cox*, 30 Law J. Rep. (N.S.) Prob. M. & A. 255; 2 Swab. & T. 306.

The Queen's Proctor, under section 7. of 23 & 24 Vict. c. 144, can only intervene in his official capacity in a case of collusion; and where no case of collusion has been made out, he merely appears to shew cause against the decree *nisi* as one of the public, and the Court has no jurisdiction to award him his costs. *Lautour* v. *Her Majesty's Proctor* (House of Lords), 33 Law J. Rep. (N.S.) Prob. M. & A. 89; 10 H.L. Cas. 685.

The Queen's Proctor intervened in a suit for dissolution of marriage and pleaded, charging the petitioner with adultery and collusion. The petitioner traversed both charges, but before the issues were tried moved the Court to dismiss the petition. The Queen's Proctor not consenting, the Court rejected the motion on the ground that the Queen's Proctor would be entitled to his costs if he established collusion. *Joyce* v. *Joyce*, 33 Law J. Rep. (N.S.) Prob. M. & A. 200.

Where, on the intervention of the Queen's Proctor, after a decree *nisi* on the ground of the wife's adultery, it was proved that the petitioner, subsequent to his wife's adultery and a sentence of divorce *a mensa et thoro*, obtained by reason of such adultery, had himself been adulterously cohabiting with a woman, the Court rescinded the decree *nisi*, dismissed the petition, and condemned the petitioner in the costs of the Queen Proctor's intervention. *Latour* v. *Latour*, 2 Swab. & T. 524.

(*g*) *Taxation.*

The principle of taxation of costs in matrimonial suits is as between party and party, but not as between party and party in the common law courts. The costs of issues found against the wife will be allowed her, unless they have been vexatiously and improperly put upon the record. *Allen* v. *Allen*, 30 Law J. Rep. (N.S.) Prob. M. & A. 9; 2 Swab. & T. 107.

The number of witnesses whose expenses are to be allowed is a question for the discretion of the Registrar, who should allow the expenses of such as there was reasonable ground for calling or subpœnaing. Ibid.

The reasonable expenses of journeys and inquiries taken and instituted for the purpose of procuring information should also be allowed. Ibid.

The costs of a party's appearance on a motion will not be allowed if such appearance is unnecessary, although he may have received notice to appear from the opposite side. *Frebout* v. *Frebout*, 30 Law J. Rep. (N.S.) Prob. M. & A. 214.

Term refresher fees will be allowed on the taxation of costs. *Stoate* v. *Stoate*, 30 Law J. Rep. (N.S.) Prob. M. & A. 214.

When two separate motions were made on the same day for an attachment against the husband, the one for non-payment of costs, the other for non-payment of alimony, the Court, in granting an attachment, allowed the costs of only one motion. *Watts* v. *Watts*, 31 Law J. Rep. (N.S.) Prob. M. & A. 29.

When an application is made in court which might have been made in chambers, the applicant, if successful, is only entitled to such costs as would have been incurred in chambers. *Higgs* v. *Higgs*, 32 Law J. Rep. (N.S.) Prob. M. & A. 64.

The Court will not order the Registrar to review his taxation of a bill of costs, unless it appears that such taxation is wrong in principle. *Cooke* v. *Cooke*, 33 Law J. Rep. (N.S.) Prob. M. & A. 79; 3 Swab. & T. 374.

(*h*) *Enforcing Payment of.*

(1) *By Suspending Judgment.*

Where a party to a suit has failed to obey an order for the payment of costs, the Court will not upon his application give judgment until the costs be paid, or a valid reason for their non-payment be given. *Chichester* v. *Mure*, 32 Law J. Rep. (N.S.) Prob. M. & A. 120.

(2) *By Attachment.*

The Court granted an attachment for non-payment of costs after substituted service of the order for payment. *Miller* v. *Miller*, 31 Law J. Rep. (N.S.) Prob. M. & A. 165.

An attachment for non-payment of costs ordered to be paid within a specified time will be granted though there has not been a personal demand. *Nicholls* v. *Nicholls*, 31 Law J. Rep. (N.S.) Prob. M. & A. 115; 2 Swab. & T. 637.

The omission to indorse on a writ of attachment issued for non-payment of costs the amount of the costs, is a mere irregularity, which will be waived by delay in applying to the Court to set aside the writ. *Pearson* v. *Pearson*, 31 Law J. Rep. (N.S.) Prob. M. & A. 102; 2 Swab. & T. 546.

Service of an order for payment of costs is effected by leaving an office copy of the order with the party chargeable, and at the same time producing the original order. Unless the original be produced, the attachment for non-payment of costs will not be granted. *Davies* v. *Davies*, 31 Law J. Rep. (N.S.) Prob. M. & A. 104; 2 Swab. & T. 437.

Where service cannot be effected in consequence of the original order being filed in the registry, the Court will, upon motion, direct that it be delivered out that it may be served. Ibid.

The Court refused to issue an attachment against a husband for non-payment of the wife's costs in a suit for judicial separation, in which she was the petitioner, upon an affidavit being made by him shewing that he had not the means of paying them. *Holland* v. *Holland*, 34 Law J. Rep. (N.S.) Prob. M. & A. 65; 4 Swab & T. 78.

## DOCK COMPANY.

[See NEGLIGENCE—RATE.]

## DOCKYARDS.

[The more effectual protection of Her Majesty's naval and victualling stores provided for by 27 & 28 Vict. c. 91.]

## DOGS.

[See NEGLIGENCE.]

[Owners of dogs in England and Wales rendered liable for injuries by dogs to cattle and sheep by 28 & 29 Vict. c. 60.]

## DOMICIL.

[The law in relation to the wills and domicil of British subjects dying whilst resident abroad, and of foreign subjects dying whilst resident within Her Majesty's dominions, amended by 24 & 25 Vict. c. 121.]

(A) WHEN ACQUIRED BY RESIDENCE.
(B) FOREIGN OR ENGLISH.
(C) CHANGE OF.

### (A) WHEN ACQUIRED BY RESIDENCE.

Officers of the East India Company's service attaining the rank of Colonel, being allowed to reside in Europe subject to orders to return, can acquire a domicil of residence there, notwithstanding they are liable to be called upon to return to India. *The Attorney General* v. *Pottinger*, 30 Law J. Rep. (N.S.) Exch. 284; 6 Hurls. & N. 733.

Sir Henry Pottinger, born in Ireland, went, in 1804, to India, as a cadet in the East India Company's service, and resided there until 1840, when he left Bombay, the presidency to which he was attached, and came to England, having attained the rank of Colonel, and colonels by the express rules of the service were allowed to reside in Europe, subject to orders for return to duty in India. In 1841 he was sent as minister from this country to China, and returned in 1844, and purchased and furnished a house in London, and resided there for a short period, when he went to the Cape as Governor, where he remained until 1848, when he was appointed by the East India Company Governor of Madras, where he resided until 1854, when he returned to England, and remained there from June 1854 to September 1855, going in the first instance to his London house, and afterwards removing to various places on account of his health. In September 1855, being advised to winter in a warmer climate, he went to Malta, where he died in March 1856. Before he left England he made his will, in which he was described as of London. At Malta he made two codicils; in one he was described as then residing at Malta, and in the second as of London and then residing in Malta:—Held, that the testator, in 1844, acquired a domicil in England, notwithstanding that he continued down to his death in the East India Company's service, and had while in England frequently expressed his intention on account of domestic circumstances to return to reside in India. Ibid.

A testator, having a Scotch domicil of origin, went to India in 1840, where he purchased a coffee plantation, and continued to reside and carry on his trade till 1858, when, on account of ill health, he came over to this country, and resided here and in Scotland for eighteen months, after which he returned to his plantation in India, and lived there till his death, in 1860:—Held, that the testator had acquired an Anglo-Indian domicil, which was not changed at the time of his death, and that his property was not liable to legacy duty *Allardice* v. *Onslow*, 33 Law J. Rep. (N.S.) Chanc. 434.

*Semble*—The circumstance that a foreign fixed residence is adopted merely with the view to the acquisition of a fortune, and with an ulterior intention of returning home, is not sufficient to prevent the place of residence from becoming that of domicil. Ibid.

### (B) FOREIGN OR ENGLISH.

Personal property may be subject to succession duty, although exempt from legacy duty by reason of the testator having a foreign domicil. *In re Capdevielle*, 33 Law J. Rep. (N.S.) Exch. 306; 2 Hurls. & C. 985.

The testator, born in France, of French parents, became a merchant's clerk at Gibraltar, and in 1830 went to reside at Manchester, to purchase goods for his firm; and he subsequently became a shipping agent there until his death in 1859. He occupied weekly lodgings, and also paid a weekly sum for his board. He paid two visits to his native place (in 1835 and 1846), and in the latter year bought an estate there; and a solemn act was passed before a notary at his native place for the preservation of his co-hereditary right of succession over some landed property there. In this act the testator was described as "merchant, of Manchester, in England, native of Montory," and his relatives (nephew and nieces, parties to the deed) declared in it that he had not forfeited his hereditary rights to the estate, and that he desired to maintain his right. During the whole time his intention was to return to France and die there, and he always deemed and considered himself a Frenchman, and not an Englishman; but he never fixed upon any period when his return should take place, and he lived at Manchester with the intention of remaining there for an indefinite period:—Held (*Pollock, C.B. dissentiente*), that the domicil of the testator was French, and, consequently, that his personal property in England was not liable to legacy duty. Held (*Bramwell, B.* hesitating), that the testator's personal property was liable to succession duty. *Moorhouse* v. *Lord* commented upon. Ibid.

Upon a claim, on the part of the Crown, for payment of legacy duty, treating the testator as domiciled in England, it appeared that the testator (whose name was English, but whose place of birth was unknown,) had held a commission in the English army, but had sold out in 1810, and retired to France, where he resided until his death in 1820, placing an illegitimate son at a French school. His will, made at Paris in 1819, was in the English form. He left property in the French funds, and none in England:—Held, upon the foregoing facts, that the

presumption was against an English domicil, and that in the absence of proof by the Crown of English domicil, legacy duty was not payable. *The President of the United States* v. *Drummond*, 33 Law J. Rep. (N.S.) Chanc. 501; 33 Beav. 449.

Upon a question whether the domicil of a testator, who was a native of France, was English or French, the principal evidence went to shew, in support of the English domicil, that he came to England when he was eighteen; that he carried on a business in London for above twenty years; that he always resided in England, with occasional visits to his native country; that he married an Englishwoman according to the English rites; that he took leases of his business premises in England for twenty-one years; that he voted at an election; that he served the office of headborough; that he consulted a lawyer as to obtaining letters of naturalization; that his children were registered and baptized in England according to the English form; that he made an English will which would have been inoperative in France; and that he repeatedly expressed his intention of making England his home, and becoming an Englishman. And in support of the French domicil, that he purchased a piece of land in his native village, and often said he should build a house there, and return to live in France; that he paid a visit every year to France; that he placed his children at school in France, and by his will appointed his brother, who resided in France, one of the executors and guardians of his children:—Held, upon the balance of evidence, that the testator's domicil was English. *Drevon* v. *Drevon*, 34 Law J. Rep. (N.S.) Chanc. 129.

(C) CHANGE OF.

A mere change of residence is not sufficient to constitute a change of domicil, although it may be tolerably certain that the new residence will be continued for life. There must be an intention to change the domicil. *Moorhouse* v. *Lord* (House of Lords), 32 Law J. Rep. (N.S.) Chanc. 295; 10 H.L. Cas. 272.

In 1805 J S, a native of Scotland, went to the East Indies, and, with the exception of one year only, resided there from that time until his death, which took place in 1830. During a part of the time of his residence in India he was an indigo planter, and during the remainder he was a merchant and banker at Calcutta. Between 1805 and 1814 he constantly corresponded with his family, but none of his letters were preserved. In 1814 he became entitled to an estate in Scotland under the will of his father, subject to certain charges. On his receiving the news, he wrote a letter to his mother (which was preserved), in which he expressed an intention to return to Scotland when his affairs would allow it. Between 1819 and 1830 he wrote several letters, which were in evidence, to the trustees of his father's will respecting his estate, and in these letters he constantly referred to his intention to return to Scotland:—Held, by the Master of the Rolls, and, on appeal, by the Lords Justices, that J S never lost his domicil of origin, and did not acquire an Anglo-Indian one. *Jopp* v. *Wood*, 34 Law J. Rep. (N.S.) Chanc. 212; 34 Beav. 88.

In order to acquire a new domicil there must be an intention to abandon the existing domicil. Ibid.

Consequently a native of one country who goes to another, with the intention of residing there for the mere purpose of trading or making a fortune, does not, by length of residence alone, gain a domicil there. Ibid.

Whether, in the absence of all other evidence, an intention of abandonment of domicil might be inferred from long residence elsewhere than at the place of domicil—*quære*. Ibid.

The principle and exceptional nature of the decisions establishing that acceptance of a commission or office, in the East Indies, under the East India Company amounted to an adoption of an Anglo-Indian domicil considered and explained. Ibid.

## DONATIO MORTIS CAUSA.

Money due on a policy and on a banker's deposit note held to pass as *donationes mortis causa*, by the delivery of the policy and note. *Amis* v. *Witt*, 33 Beav. 619.

## DOWER.

[See FREEBENCH.]

(A) ELECTION.
(B) WHEN BARRED OR FORFEITED.
(C) TO WHAT IT EXTENDS.

(A) ELECTION.

A testator made a provision for his widow, expressly in lieu and satisfaction of any estate or interest to which she might be entitled, as his widow, out of his real and personal estate. The widow enjoyed this provision, but, as the certificate found, "in ignorance of her right to dower":—Held, sixteen years after testator's death, that she was still entitled to elect. *Sopwith* v. *Maughan*, 30 Beav. 235.

Where a testator having granted an annuity to his widow under his will directed that if she persisted in any claim on the residue of his property, she was to forfeit the annuity:—Held, the widow was not put to her election, but was entitled both to her dower and to the annuity. *Wetherell* v. *Wetherell*, 4 Giff. 51.

(B) WHEN BARRED OR FORFEITED.

W, a married man, entitled in fee simple in possession to real estate, became bankrupt. On a sale of his estate by the assignees, the deed of conveyance, after reciting that W and his wife joined for the purpose thereinafter mentioned, the operative part, omitting altogether the name of the wife, proceeded as follows: "the said W hath, and by this present deed intended to be acknowledged by the said 'wife' as her act and deed, doth bargain, sell," &c. The deed was executed and acknowledged by the wife in accordance with the provisions of the Fines and Recoveries Act. The wife survived W:—Held, that the wife had effectually barred her right to dower. *Dent* v. *Clayton*, 33 Law J. Rep. (N.S.) Chanc. 503.

A widow's right to sue in equity for dower held to be barred where she had not, for upwards of thirty years, taken any proceedings, either at law or in

equity, to have it assigned to her. *Marshall* v. *Smith*, 34 Law J. Rep. (N.S.) Chanc. 189.

A wife forfeits her dower under the statute of Westminster the 2nd, by her adultery, though it may have been brought about by the misconduct of her husband. *Bostock* v. *Smith*, 34 Beav. 57.

(C) To what it extends.

The Dower Act (3 & 4 Will. 4. c. 105.) extends to lands of gavelkind tenure. *Farley* v. *Bonham*, 30 Law J. Rep. (N.S.) Chanc. 239; 2 Jo. & H. 177.

## DRAINAGE ACTS.

[See Inclosure.]

## EASEMENT.



### (A) Subjects of Easements.

#### (a) *Right to Stone for Repair of Highways.*

The right for the inhabitants of a township to take stones from the land of another person for the purpose of repairing the highways, is a profit *à prendre*, and cannot therefore be claimed by custom; neither can it be claimed by prescription, as inhabitants are incapable by that description of taking such an easement, unless under a grant which would incorporate them. *Constable* v. *Nicholson*, 32 Law J. Rep. (N.S.) C.P. 240; 14 Com. B. Rep. N.S. 230.

#### (b) *Right to cut down Trees.*

To an action of trespass for cutting down and carrying away trees growing in the close of the plaintiff, the defendant pleaded an immemorial enjoyment of a right in one A B, the owner in fee of a close called Bloody Field, and all those whose estate he had, and his and their tenants, to enter the close of the plaintiff, and to cut down and convert to their own use the trees growing there, such right being claimed as appurtenant to the close of the said A B, but the plea did not allege that the timber so taken was to be used in any way in or about the said close of A B. Averment that the defendant was tenant to A B of the said close; and that the trees were cut down by the defendant in exercise of such right. There were other pleas, which set up the enjoyment of a precisely similar right for sixty years and thirty years respectively; and also a plea alleging a grant by a deed, which was lost, by the then owner in fee of the close of the plaintiff to the then owner in fee of the close of the defendant, of the right now claimed:—Held, that all the pleas were bad, as the right claimed being a right in gross could not pass with the occupation of the land. *Bailey* v. *Stevens*, 31 Law J. Rep. (N.S.) C.P. 226; 12 Com. B. Rep. N.S. 91.

*Semble*, also, that such a right could not pass with the ownership of land; and per *Willes, J.*, except in the case of landlord and tenant, in order that rights over the land of one may be attached to the land of another so as to pass with the ownership of the land, they must be such rights as are beneficial to the owner of the dominant tenement only so long as he remains owner of that tenement, and to other persons are of no benefit whatever. Ibid.

### (B) Acquisition of Easements.

[By prescription, see *Tapling* v. *Jones*, *post*, (F)(c)].

A and B occupied adjoining houses as tenants to the same landlord under long leases, which were made on the same day and to expire at the same time. B, by building on his own premises, obstructed the access of light to a window in A's house through which the light had passed without interruption for more than twenty years:—Held, that A by the twenty years' user had acquired a right to the light, and might maintain an action against B for obstructing it, though they occupied their premises as tenants, and under the same landlord. *Frewen* v. *Phillips* (Ex. Ch.), 30 Law J. Rep. (N.S.) C.P. 356; 11 Com. B. Rep. N.S. 449.

E, being seised in fee of a house, and also of land adjoining, granted, in 1855, a building lease of the land to trustees for ninety-nine years, and in the following year he conveyed the fee in the same land to them. In 1857 E conveyed the house in fee to G, under whom the plaintiff became entitled to the possession of the house. The defendant, subsequently, with the authority of the trustees, built on the land conveyed to them, so as materially to obstruct the light and air which for upwards of twenty years had come to the plaintiff's windows. The defendant did not build according to the plan contained in the building lease, but according to a different plan sanctioned by the trustees. Had he built according to the plan in the lease, the light and air coming to the plaintiff's windows would have been obstructed, but not to the same extent. Down to the time of the building lease there had never been, so far as could be traced, any severance either in the title to or possession or occupancy of the land and house, but they had been occupied and used together by the proprietors for upwards of fifty years:—Held, that the plaintiff had no right of action against the defendant for obstructing the light and air coming to his windows. *White* v. *Bass*, 31 Law J. Rep. (N.S.) Exch. 283; 7 Hurls. & N. 722.

The 3rd section of the Prescription Act (2 & 3 Will. 4. c. 71), limiting twenty years as the period for acquiring an indefeasible right to the access and use of light, is retrospective, so that such an easement may be acquired by virtue of enjoyment prior to passing the act. *Simper* v. *Foley*, 2 Jo. & H. 555.

An union of the ownership of dominant and servient tenements for different estates does not extinguish an easement of this description, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives. Ibid.

Where a right to an easement of this description is acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against the owner of the reversion. Ibid.

From 1841 to 1845, K was the owner in fee and occupier of a dry dock and a coal-wharf adjoining. During this joint ownership and occupation the bowsprits of ships entering the dock for repair commonly projected for about fourteen feet over the coal-wharf. In 1845 K put up the dock and the wharf for sale by auction in separate lots. The coal-wharf only was sold, and was conveyed by K to the defendant without any reservation, the conveyance containing the usual estate clause. In August, 1846, the dock was let to R M for twenty-one years, and in 1861 it was sold and conveyed to S subject to the lease. From the commencement of the occupation of R M, as lessee, down to 1863 the bowsprits of vessels using the dock had been suffered by the defendant, but not as of right, to project over the wharf as theretofore. In 1863 the defendant commenced the construction of warehouses on the wharf, which would effectually prevent vessels entering the dock from projecting their bowsprits as previously, and thus confine the use of the dock to smaller vessels. Upon a bill filed by S and R M against K,—Held, by the Master of the Rolls, that the defendant when he purchased the coal-wharf must have known that the use of the dock would require that the bowsprits of large vessels should overhang the wharf; that this was therefore an easement essential to the occupation of the dock, and that the defendant must be restrained from doing anything to prevent its full enjoyment. But, upon appeal to the Lord Chancellor, this decision was reversed, and the bill dismissed with costs. *Suffield* v. *Brown*, 33 Law J. Rep. (N.S.) Chanc. 249.

The doctrine that where an owner of two properties conveys one of them to a purchaser, a reservation or re-grant will be implied in favour of the owner of all those continuous and apparent quasi-easements which are necessary for the due enjoyment of the property retained—approved by the Master of the Rolls—but, on appeal, denied by the Lord Chancellor to be law. Ibid.

If the owner of two adjoining tenements conveys one of them to a purchaser absolutely, the tenement so sold is discharged from any quasi-servitudes to which it was subjected by the vendor during his ownership of both properties, and the purchaser is not bound to take notice of the manner in which the tenement purchased has been used for the convenience of the adjoining and unsold tenement (per the Lord Chancellor). Ibid.

*Pyer* v. *Carter* (1 Hurls. & N. 916; 26 Law J. Rep. (N.S.) Exch. 258) questioned. Ibid.

There being two tenants of adjoining houses held under the same landlord, the tenant of one of the houses acquired a right of way to his vaults through the adjoining vaults. The landlord sold both properties at one sale, with a condition that they were to be subject to and with the benefit, as the case might be, of all subsisting rights or easements of way or passage so far as any lot might be affected thereby:—Held, that, the vendor being subject to no liability as to right of way, the purchaser of one tenement could not enforce a right of way as against the other. *Daniel* v. *Anderson*, 31 Law J. Rep. (N.S.) Chanc. 610.

A tin-mine in Cornwall which had been immemorially worked by tin-bounders under the peculiar custom of the county, was abandoned in 1856, and from that period had been worked by the plaintiffs, who claimed to be the owners of the mine, but by what title it did not appear. The tin-bounders had immemorially used, for the purposes of their mining operations, the water flowing from an old artificial watercourse, passing through the land of the defendants; and, upon the flow of the water therefrom being obstructed by the defendant, the plaintiffs filed their bill to restrain the obstruction:—Held, that the plaintiffs, not being entitled to work the mines by virtue of any estate derived from the bounders, and having themselves been in possession less than twenty years, had no prescriptive right to the use of the water. *Ivimey* v. *Stocker*, 34 Law J. Rep. (N.S.) Chanc. 633: reversed on appeal, 35 Law J. Rep. (N.S.) Chanc. 467.

## (C) Particular Easements.

### (a) *Light.*

[See *ante*, (B), and *post*, (F).]

### (b) *Air.*

A right to free passage of air is not an easement within the meaning of section 2. of the Prescription Act, 2 & 3 Will. 4. c. 71: affirming the decision below, 30 Law J. Rep. (N.S.) C.P. 384; 10 Com. B. Rep. N.S. 268. *Webb* v. *Bird* (Ex. Ch.), 31 Law J. Rep. (N.S.) C.P. 335; 13 Com. B. Rep. N.S. 841.

A grant of a free passage of air to a windmill over the soil of another cannot be presumed from twenty years' user of the windmill: for the presumption of a grant only arises in cases where the owner of the servient tenement had it in his power to prevent the enjoyment, and did not; and it is not practically in the power of an owner of neighbouring land to preclude the passage of air to a windmill. Ibid.

### (c) *Way.*

*Semble*—There may be a dedication of a highway to the public, subject to the right of the occupiers of the land to place things upon it, causing inconvenience, but not actual obstruction, to the public. *Morant* v. *Chamberlain* or *Chamberlin*, 30 Law J. Rep. (N.S.) Exch. 299; 6 Hurls. & N. 541.

The corporation of Yarmouth are, and have been from the time of King John, the owners of a quay, over which, as far back as the reign of Charles the Second, a public highway has existed, and as far back as living memory, but not from time immemorial, the occupiers of houses adjoining the quay, as of right and without interruption, used it for the deposit of anchors and other incumbrances, for their own convenience, causing inconvenience, but not actual obstruction, to the public. At court leets in the reign of Charles the First, inhabitants of the town, including occupiers of the houses, were fined for overburdening the quay to the impediment and

obstruction of the public. The plaintiff, as surveyor of the highways, in attempting to remove anchors and other goods actually obstructing the highway, was assaulted by the defendant, who to an action for the assault pleaded a justification in defence of the goods as the servant of the owner. The plaintiff replied that the goods were obstructing a highway, and justifying the removal by the plaintiff as one of the public. The defendant rejoined that the highway was subject to the right of user of the land by the occupiers for the purpose of placing anchors and other things, and that the occupiers always had such right, and that no way was ever dedicated otherwise than subject to such right, and justifying as the servant of P, the occupier of the *locus in quo* :—Held, on a special case stating the above facts that the Court was not justified in drawing the inference that there was a dedication of the way subject to the right in question, and that therefore the plaintiff was entitled to judgment on the issue in fact on the rejoinder, but that the defendant was entitled to judgment on a demurrer to the rejoinder, as the limited dedication set up might exist in law. Ibid.

The owner of land built a house on the front of it with a cottage at the back, the access to the cottage being by a passage through the house. He conveyed the cottage to the defendant, in fee, with the right of passage, and two years afterwards he conveyed the house, with a garden to the plaintiff, in fee. From the time the house was built, the plaintiff and the prior owners and occupiers of it used a part of the passage, which was included in the ground conveyed to the defendant, for the purpose of passing between the house and the garden and offices, through a doorway opening from that part of the passage into the garden. There was, however, another mode of getting into the garden through a room in the house. Within twenty years of the building of the house, the defendant blocked up the doorway:—Held, that the plaintiff had not, as owner of the house, any right of way over the part of the passage in question, either by necessity or otherwise. *Dodd* v. *Burchall*, 31 Law J. Rep. (N S.) Exch. 364; 1 Hurls. & C. 113.

The conveyance to the defendant described the land as containing the dimensions shewn and delineated on a plan in the margin, "be the same a little more or less," and purported to convey it as it was then held and enjoyed by the vendor. The plan specified the dimensions in feet and inches, and the measurement corresponded with the actual measurement to a few inches:—Held, that the description could not be controlled or affected by the fact that six feet of the part of the passage purporting to be conveyed to the defendant was also included in the subsequent conveyance to the plaintiff, and had been treated as part of No. 1 by being covered in and included in the curtilage. Ibid.

Where one grants to another a right of way, the latter must bear the expense of making it available, by forming the road, keeping it in repair, and erecting the necessary fences—*semble*. *Ingram* v. *Morecraft*, 33 Beav. 49.

A was possessed of a close the only way to which was along a green lane between two other closes, one of which belonged to A and the other to B. In the absence of any direct evidence of ownership, the jury were told that they might presume the soil of the lane to belong in moieties to the owners of the adjoining closes, and that, in respect of the close at the end of the lane, A had a mere easement:—Held, a proper direction. *Smith* v. *Howden*, 14 Com. B. Rep. N.S. 398.

### (D) SPURIOUS EASEMENTS: FENCES.

The owners and occupiers of an ancient copyhold inclosure, and they alone, had from time to time repaired the fence belonging to the inclosure between it and the common waste land of the manor:—Held, that the proper inference for a jury to draw was that at the time the lord granted the exclusive possession of the land, he granted it subject to the obligation on the part of the grantee to keep it fenced as against the cattle of the lord and the other copyholders turned out on the wastes of the manor, and that the owner or occupier was therefore bound to keep up the fence as against adjoining occupiers after the wastes of the manor were inclosed under a modern Inclosure Act. *Barber* v. *Whiteley*, 34 Law J. Rep. (N.S.) Q.B. 212.

### (E) EASEMENTS ACCESSORY TO RIGHTS OF PROPERTY: SUPPORT TO LAND.

G, the owner of certain land, sold it in lots, subject to conditions, by which, *inter alia*, the purchaser of lot 6. was required to covenant to build according to a certain elevation. The plaintiff, who was the purchaser of the adjoining lot 7, altered, with G's consent, an old building standing on such lot, by raising its wall several feet on the next side to lot 6. The defendant, who was the purchaser of lot 6, excavated the land as required to build according to the said conditions, and in consequence of this the plaintiff's building fell:—Held, that as the excavations were authorized by the conditions of sale, and were made therefore with the licence of G, the vendor, the plaintiff could not sue for the injury he had sustained by his building being so deprived of the lateral support of the land in lot 6. *Murchie* v. *Black*, 34 Law J. Rep. (N.S.) C.P. 337 ; 19 Com. B. Rep. N.S. 190.

*Semble*—That the plaintiff, assuming he had the right to such support, lost it by raising the old wall and so increasing the superincumbent weight. Ibid.

The owner of freehold lands and his lessee will be restrained from working mines under a watercourse otherwise than in a manner not likely to prevent the plaintiff from enjoying an uninterrupted flow of water to his works. *Elwell* v. *Crowther*, 31 Law J. Rep. (N.S.) Chanc. 763; 31 Beav. 163.

But upon the freeholder and his lessee undertaking not to work the mines so as to interfere with the flow of water to the plaintiff's works or to diminish the supply, further proceedings were stayed, with liberty to apply. Ibid.

### (F) EXTINGUISHMENT OF EASEMENTS.

#### (*a*) *Alterations.*

The plaintiff was owner of a building two stories high, with a range of windows in each story. Those on the ground floor were ancient unaltered windows; those on the second floor had, within twenty years, been altered, not in number, but in size, by additions on one side and the top of each window. The plaintiff's building was at a distance of ten feet from

the edge of his land. After the alteration in the plaintiff's windows the defendant built a shop close to the edge of his own land, but without any intention of obstructing any of the plaintiff's windows. The jury found that the effect of the defendant's building was to obstruct the lower windows, but the question as to the right of the plaintiff to complain of the obstruction was reserved to the Court on the above facts and a model of the premises, which was found to be correct:—Held, per *Erle, C.J.*, and *Williams, J.*, that the plaintiff's right to the light of the lower windows was not lost by reason of the opening of the upper windows; and that, if the defendant intended to justify his obstruction of the lower windows, on the ground that he had built with the intention of obstructing the upper windows, and could not obstruct the upper without also obstructing the lower, it was necessary for him to have raised that defence and proved it at the trial, and that he could not rely on the mere fact that the result of his obstruction was to do that which, if he had so intended it, might have been lawfully done by him.—Held, per *Byles, J.*, that the right of the servient owner to block up ancient lights, when new ones are opened, is not absolute, but conditional on the existence of an inability to block up the new without blocking up the old; and as the servient owner in this case had not yet exercised his right of blocking up the new windows, he was liable to the owner of the dominant tenement for blocking up the old.—Held, per *Keating, J.*, that the question turned upon whether or not the alteration of the upper windows by the dominant owner was so material as that the right to the easement, as it formerly existed, was thereby gone. And that if that were so, and the jury had found that the unprivileged light could not be obstructed, without also obstructing the privileged light, the defendant would not be liable for the latter obstruction; but that in this case this defence was not established. *Binckes* v. *Pash*, 31 Law J. Rep. (N.S.) C.P. 121; 11 Com. B. Rep. N.S. 324.

The plaintiff, being the owner of a house abutting upon a back yard in the occupation of the defendants, possessed two ancient lights overlooking such yard, which for the greater acquirement of light and air he modernized by removing the old casements and substituting new ones of a lighter construction, but not extending the aperture occupied by their frames. The defendants then proceeded to erect and glaze with opaque glass a framework close to these improved windows. A bill was filed for an injunction to restrain such proceedings:—Held, that a party possessed of ancient lights has a right to acquire an increased access of light and air if he can do so without altering the aperture, and this does not create a new easement; that the owner of an ancient light is entitled to use it in any manner he pleases, by obstructing, opening or protecting it, or by taking away old window-frames and substituting new ones of a much less size and thickness, so that he does not extend the aperture itself, and that the intrusion upon a neighbour's privacy is not a ground for interference either at law or in equity. *Turner* v. *Spooner*, 30 Law J. Rep. (N.S.) Chanc. 801; 1 Dr. & S. 467.

If the owner of a tenement has windows looking upon the premises of another, he cannot increase their size or number, or claim more extensive rights. *Cooper* v. *Hubbuck*, 31 Law J. Rep. (N.S.) Chanc. 123; 30 Beav. 160.

Whether the materiality or immateriality of an easement usurped over the land of another, will be considered, upon an application for an injunction, if the owner of the land over which it is claimed considers it a trespass or nuisance, and requires its abatement—*quære.* Ibid.

If ancient windows which look over the land or upon the premises of another are enlarged and are complained of, the Court upon their being restored to their original dimensions will restrain the owner of the adjoining property from obscuring such restored windows. Ibid.

Where a house is erected on the site of an old house which has been burnt down, the windows of which were ancient lights, the question whether the character of ancient lights attaches to the new windows, depends on the question whether the servitude they would impose on the servient tenement is substantially the same as that which previously existed; and where the windows of a new house so erected, although somewhat differing in form from the windows of the old house, were of about the same area and very nearly in the same positions, the Court held that the servitude imposed on the servient tenement not being a more onerous nor a different servitude, the characters of ancient windows attached to the new windows. *The Curriers Co.* v. *Corbett*, 2 Dr. & S. 355 (on appeal, this case was reversed upon a different ground).

Where the owner of a house sells a piece of adjoining land, the purchaser may build on it as he pleases, and the vendor cannot prevent his doing so, even although the buildings erected on it may interfere with his ancient lights. Ibid.

If an adjoining owner knowingly permits a messuage and premises to be rebuilt of an increased size and height, with the alteration of ancient lights, and the opening new lights upon an additional floor, he cannot object to them after they are complete, or assert a right to raise a party-wall, and build upon his own property so high as to render the new buildings less accessible to light and air than they were at the completion of the work. *Cotching* v. *Basset*, 32 Law J. Rep. (N.S) Chanc. 286; 32 Beav. 101.

### (b) *Encroachments.*

A was the owner and occupier of a house of three stories which had an ancient window on each floor. He altered the windows in the two lower floors, leaving the window in the third floor unaltered. He also built two new stories to his house, with windows intended to be permanent. A did not intend by making these alterations to abandon any privilege of his ancient windows. B, the owner of adjoining premises, could not obstruct the new windows in the upper floors without also obstructing the old windows, and he built on his own land a wall which had the effect of obstructing all A's windows. A afterwards blocked up his new windows, and sued B for continuing the obstruction of the wall, which the defendant refused to remove:—Held, *per totam Curiam*, that, though one or more of the old windows were left in their original condition, still the defendant was justified in obstructing both the old and new windows, it being impossible to obstruct the new without also obstructing the old.—Held, by *Keating, J.*, that the

effect of the plaintiff's act, in enlarging his old windows and throwing out new ones, was to cause an abandonment of the easement as it previously existed; and that the plaintiff had not preserved his easement by objecting to the wall being built by the defendant.—Held, by *Byles, J.*, that the plaintiff having indicated, by the mode in which he proceeded, that he intended permanently to alter the condition of his windows, and the defendant having exercised his right of obstruction also in a permanent manner, the plaintiff did not, by restoring his own premises to the *status quo* before these alterations took place, acquire the right to call upon the defendant to do the same.—Held, by *Erle, C.J.* and *Williams, J.*, that the throwing out new windows and enlarging old ones was not an abandonment of the prior easement; and that though it conferred a right on the defendant, the servient owner, to obstruct the new lights, and, if necessary in so doing, to obstruct the old also, yet that on the plaintiff's restoring his premises to their original condition, it was incumbent on the defendant to remove his obstruction, and that the permanent nature of this obstruction did not justify him in continuing it. [See *Jones* v. *Tapling*, 31 Law J. Rep. (N.S.) C.P. 111; 11 Com. B. Rep. N.S. 283.]—Held, by the majority of the Court of Exchequer Chamber [see 31 Law J. Rep. (N.S.) C.P. 342; 12 Com. B. Rep. N.S. 826], that the action lay; by *Wightman, J.* and *Crompton, J.* that assuming that the defendant had a right to maintain the obstruction to the plaintiff's old lights so long as that course was necessary for the purpose of blocking up the new windows, this right of the defendant ceased when the plaintiff closed up the new windows; by *Bramwell, B.* and *Blackburn, J.*, that it was no excuse at any time for the defendant that he obstructed the plaintiff's old windows for the purpose of blocking out the new windows, and that the new windows could not have been otherwise prevented from becoming privileged in twenty years' time, and that *Renshaw* v. *Bean* was bad law; and by *Pollock, C.B.* and *Martin, B.*, that *Renshaw* v. *Bean* was well decided; that the defendant was justified in erecting the wall to block the new lights; and also that he was not liable to an action for not taking it down when the plaintiff removed the new windows. And held, by the House of Lords, that B had not at any time the right to build a wall which would have the effect of obstructing the ancient lights in A's house, although the new windows could not otherwise have been obstructed. *Tapling* v. *Jones* (House of Lords), 34 Law J. Rep. (N.S.) C.P. 342.

Held, also, that the right to an ancient light since the Prescription Act depends upon the statute, and does not rest on any presumption of a grant or a fiction of a licence having been obtained from the adjoining proprietor. Ibid.

*Renshaw* v. *Bean* and *Hutchinson* v. *Copestake* overruled. Ibid.

### (c) *Acquiescence.*

To an action for obstructing the light and air from entering the plaintiff's dwelling-house, for raising buildings above the level of the said house, and thereby preventing the smoke from being carried off from it by the chimneys of such house, and for pulling down certain adjoining buildings of the defendant by which the house of the plaintiff was deprived of the support to which it was entitled, the defendant pleaded for a defence upon equitable grounds that the grievances complained of were occasioned by the defendant pulling down a messuage of his and erecting another messuage in lieu of it, and that the defendant so pulled down the one messuage and erected the other, and expended thereby large sums of money, with the knowledge, acquiescence and consent of the plaintiff, and on the faith that the plaintiff so knew of, and acquiesced in, and consented to the defendant so pulling down the one messuage and erecting the other, and so spending such sums of money. The defendant being under terms not to rely on such plea as amounting to a common law plea of leave and licence, the plaintiff replied thereto, upon equitable grounds, that the plaintiff acquiesced and consented as in that plea mentioned upon the faith of false representations made to him by the defendant, viz. that the grievances complained of would not result from the pulling down of the one and erecting the other messuage, and expending of the money as in the plea mentioned:—Held, that the plea was good as an equitable defence, but that the same was well answered by the replication. *Davies* v. *Marshall*, 31 Law J. Rep. (N.S.) C.P. 61; 10 Com. B. Rep. N.S. 697.

### (G) EXTENT OF OBSTRUCTION NECESSARY TO SUPPORT AN ACTION AND FOR AN INJUNCTION.

The warehouse of the plaintiffs, which had ancient windows, having been burnt down, was rebuilt by them. In the new warehouse the windows were placed in different situations, were of different sizes, and altogether occupied more space than the windows of the old building. Some parts of some of the new windows coincided with some parts of the old; but the greater portion did not coincide. The defendants, who had premises on the other side of the street, raised their own house, and so obstructed the access of light to the new windows. They could not have obstructed the passage of light to such portions of the windows as were new, without at the same time obstructing its passage to such portions as were in the sites of the old windows:—Held, that the plaintiffs, under these circumstances, could not maintain an action against the defendants for obstructing the passage of light to their warehouse windows, as no one of the existing windows substantially corresponded with any of the ancient lights; and (per *Channell, B.* and *Blackburn, J.*) that it was not necessary in the present case to decide whether there is a right to block up a new window, if it cannot be done without also blocking up an ancient unaltered one. *Hutchinson* v. *Copestake* (Ex. Ch.), 31 Law J. Rep. (N.S.) C.P. 19; 9 Com. B. Rep. N.S. 863.

The plaintiff being owner of a house in which there were ancient lights, rebuilt it, and in so doing altered the position of some of the ancient windows, and also opened new windows. The defendant proposed to build so as to obstruct both the new and ancient windows:—Held, that as the defendant could not possibly obstruct the new windows without at the same time obstructing the ancient lights, the plaintiff was not entitled to an injunction as prayed. The decision in *Renshaw* v. *Bean* approved. [See, however, *Tapling* v. *Jones*, *ante*, (F) (*h*).]

*Weatherly* v. *Ross*, 32 Law J. Rep. (N.S.) Chanc. 128; 1 Hem. & M. 349.

Held, also that the plaintiff, on undertaking to close up the new windows and to restore the ancient lights to their original position, would be entitled to an injunction; but that as this was new relief, he must pay the costs of the suit. Ibid.

Where a landlord who had granted a lease of certain premises, including ancient lights and appurtenances to A, in consideration of certain improvements which had been made by A in the premises leased (which improvements included new lights), granted a lease of the adjoining premises to B, and B was building so as to block up the lights of A. Upon bill by A for injunction, held, that the landlord could not have blocked up such lights, and that his lessee, B, could stand in no better position, and the Court granted an injunction as against B. *Davies* v. *Marshall*, 1 Dr. & S. 557.

If a person having ancient lights which he is entitled to have protected, puts in new lights on the same side of the building, he has no right to any protection in respect of such new lights, and the owner of the contiguous premises may build up any structure obstructing the new lights, even though in so doing he necessarily interferes with the old lights. Ibid.

## ECCLESIASTICAL LAW.

[See BURIAL—CHURCH—RATE.]

An act to prevent the future grant by copy of court roll and certain leases of lands and hereditaments in England belonging to ecclesiastical benefices (24 & 25 Vict. c. 105).—The act (14 & 15 Vict. c. 104.) concerning the management of episcopal and capitular estates in England continued, and certain acts relating to the Ecclesiastical Commissioners for England amended by 24 & 25 Vict. c. 131.—The act 24 & 25 Vict. c. 105. for preventing the future grant by copy of court roll and certain leases of lands and hereditaments in England belonging to ecclesiastical benefices amended by 25 & 26 Vict. c. 52.—An act for the augmentation of certain benefices, the right of presentation to which is vested in the Lord Chancellor (26 & 27 Vict. c. 120).—The Ecclesiastical Leasing Act, 1858, amended by 28 & 29 Vict. c. 57.]

(A) REFUSAL TO INSTITUTE TO A LIVING FOR WANT OF TESTIMONIAL.

(B) FEES.

### (A) REFUSAL TO INSTITUTE TO A LIVING FOR WANT OF TESTIMONIAL.

R, a clerk in holy orders, who had lately held a benefice and cure of souls in the diocese of M, was presented to a vacant living in the diocese of E. R, not having been ordained by the Bishop of E, and being wholly unknown to him, was required by the latter, before institution, to produce a testimonial from the Bishop of M as to his, R's, "honest conversation, ability and conformity to the ecclesiastical laws of England." R having failed to procure such testimonial within due time, the Bishop of E collated his own clerk by lapse:—Held, that the Bishop of E had no right to refuse to institute R on the ground that he had not produced such testimonial from the Bishop of M. *Marshall* v. *the Bishop of Exeter* (Ex. Ch.), 31 Law J. Rep. (N.S.) C.P. 262; 13 Com. B. Rep. N.S. 820.

The 48th Canon, A.D. 1603, has no application to the institution of clerks to livings, but only to the service of cures, and in churches and chapels by curates and ministers who are not incumbents. Ibid.

### (B) FEES.

The office of registrar of the Court of an archdeacon is one to which fees may be annexed by immemorial usage. Such fees need not necessarily be of a fixed and ascertained, but may be of a reasonable, amount. *Shepherd* v. *Payne*, 31 Law J. Rep. (N.S.) C.P. 297; 12 Com. B. Rep. N.S. 414.

The defendants P and Q were churchwardens of T, in the archdeaconry of C, which consists of 200 parishes; and which is divided into eighteen rural deaneries. It is also divided into four "calls"; and two visitations, one at Michaelmas and one at Easter, are held yearly at the principal town in each call, for all the parishes in that call. At the Easter visitation the churchwardens are cited to appear, and the registrar delivers to them their printed declarations of office, under the 5 & 6 Will. 4. c. 62. s. 9, which they sign. They also pay the procurations and synodals due to the archdeacon, and the churchwardens deliver to the archdeacon in his court a presentment of the state of their church and their declarations of office. The Michaelmas visitation is held chiefly for the purpose of ascertaining that the orders made at the Easter visitation have been complied with, and the business is frequently transacted by means of letters sent through the post, without the personal appearance of the churchwardens. The defendants were, in the year 1857, cited to the Easter visitation, when the defendant P attended; the other defendant did not appear. In respect of this visitation, the sum of 7*s*. 6*d*. was claimed by the plaintiffs, and payment refused by the defendants. At the Michaelmas visitation, the defendants were also cited, when the defendant Q sent a presentment through the post, in respect of which visitation a fee of 4*s*. 6*d*. was claimed by the plaintiffs, and refused by the defendants. Similar claims were made, and refused, at subsequent visitations, at which the churchwardens were not present:—Held, that though the fees were claimed in some respects for services not actually performed, yet that, as it appeared that it was the invariable practice to pay the fees when the churchwardens were absent, the claim was not invalidated on that ground. Held, also, that it was no objection to the recovery of these fees that the visitation was not held in each parish individually; for that practice had been sanctioned by custom; nor was it any objection that certain canons of 1603 had not been complied with; for even if the provisions of those canons related to fees of this description (as to which *quære*) still they could not take away the customary right. Ibid.

By a private act of parliament establishing a cemetery company it was enacted, that upon the interment of every person within the cemetery the company should pay to the incumbent for the time being of the church or chapel of the parish, or other ecclesiastical division of the parish, from which such

person should be removed for the purpose of interment, certain fees. The district chapelry of J was carved out of the larger district parish of M after the passing of the act, and never had any burial-ground of its own:—Held, that the incumbent of J, and not of M, was entitled to the fees payable by the cemetery company for the interment of persons removed from the district of J, and this, notwithstanding the district of J had been constituted since the passing of the Cemetery Company's Act. *Vaughan* v. *the South Metropolitan Cemetery Co.*, 30 Law J. Rep. (N.S.) Chanc. 265; 1 Jo. & H. 256.

## EJECTMENT.

[See LANDLORD AND TENANT—LEASE.]

(A) WHEN MAINTAINABLE.
- (*a*) *Satisfied Term.*
- (*b*) *Estoppel.*

(B) PRACTICE.
- (*a*) *Time for Proceeding after Appearance.*
- (*b*) *Interrogatories.*

### (A) WHEN MAINTAINABLE.

#### (*a*) *Satisfied Term.*

By a marriage settlement made in 1738, real estate was settled to the use of T T for life, and then to the use of trustees for the term of five hundred years, in trust for raising 200*l.* for the portions of the younger children of T T, with remainder to the sons of T T in tail. In 1783, in consideration of 200*l.* paid to the younger children of T T, and of the further sum of 240*l.* paid to R T, the eldest son of T T, the representatives of the trustees of the term by the direction of the younger children, and also R T, assigned the term by way of mortgage to H. In January 1784, R T, by a post-nuptial settlement, conveyed in fee to W C and G C, in trust for the use of R T for life, remainder to his wife for life, remainder to their son T for life, remainder to the lawful children of T in such shares as T should appoint, and in default of appointment, to them equally, and in default of issue, over to E, and her issue; and covenant by R T against incumbrances, except the term of 500 years in H for securing 440*l.*, which term was thereby agreed to be assigned in trust to attend the inheritance. In July 1784, H assigned the term to O in trust for W C and G C, for the uses and trusts limited by the settlement of January 1784, to the intent that it might be preserved and kept on foot to attend the inheritance to protect it from incumbrances. In 1841, by mortgage deed (made after the death of R T and his wife) T and his three children demised the property to W for a term of 2,000 years, and the deed contained a declaration that O should stand possessed of the term of 500 years in trust for W, for better securing the mortgage money, and subject thereto in trust to attend the inheritance. In 1843, T, in exercise of the power of appointment under the settlement of January 1784, appointed the property in fee to his three children as tenants in common, subject to the mortgage of 1841; and it was declared that such mortgage debt should thenceforth become the proper debt of the three children. In 1844, W transferred the mortgage and term of 2,000 years, in trust for M; and the representative of O assigned the term of 500 years, also in trust for M, to secure the mortgage money, and then in trust for the three children of T, and subject to those trusts to attend the inheritance:—Held, that the term of 500 years was a satisfied term within the meaning of the statute 8 & 9 Vict. c. 112, and could not be set up against parties claiming the inheritance under E on default of lawful issue of T; the dealings with the term in 1841 and subsequently being invalid for want of such lawful issue. *Plant* v. *Taylor*, 31 Law J. Rep. (N.S.) Exch. 289; 7 Hurls. & N. 211.

In ejectment the plaintiffs, as above stated, claimed through E under the settlement of January 1784, alleging that T, who was dead, had no lawful children, his three children being the issue of a second wife, whom it was proved T had married during the life of his first wife. The defendants claimed under the same settlement as being the three lawful children of T, and they impugned the validity of the marriage of T with his first wife on the ground that such first wife was then a married woman; and they proposed to give in evidence declarations of T made to his son respecting T's marriage with his first wife:—Held, that such declarations were inadmissible. Ibid.

#### (*b*) *Estoppel.*

The plaintiff, in an action of ejectment, brought in 1862, had executed a mortgage in fee of the premises in 1844, in the lifetime of his mother, who was then in possession, to one J; and the defendant, who had purchased under a power of sale contained in this mortgage, for four years preceding the issue of the writ had been in the receipt of the rents. The plaintiff in 1861 took out letters of administration to his mother, who died in 1848, and claimed title, as administrator, to the residue of an unexpired term of years determinable on lives existing at the date of the issue of the writ. At the trial, the plaintiff gave evidence that the premises were in the possession of his mother in her lifetime; and in order to cut down the legal presumption of a seisin in fee, gave parol evidence to shew the interest his mother took was less than the fee, by giving evidence of search for and probable loss of and secondary evidence of the contents of a deed of assignment of the premises for the remainder of a term of ninety-nine years, subject to lives, under which the mother was alleged to have been in possession, and under which he now claimed:—Held, first, that there was evidence for the jury of the existence of such a term, and that it might be presumed that the possession of the mother was with reference to that term; and, secondly, that for the purposes of this action, the plaintiff was a stranger and suing as administrator to his mother in a different right from that in which he had executed the mortgage in his mother's lifetime, and that the fact of his having a beneficial interest in the premises, as one of his mother's next-of-kin, did not make him the less a stranger; and that he was, therefore, not estopped by the mortgage from relying on his title to the term as administrator. *Metters* v. *Brown*, 32 Law J. Rep. (N.S.) Exch. 138; 1 Hurls. & C. 686.

F, being possessed of a cottage and land, put Q into occupation of them in 1837, and in the same year mortgaged them for a term of years, and paid the interest down to 1848, when he conveyed the

equity of redemption to H. Q held possession from 1837 until January 1862, without payment of rent to any one, and then executed a conveyance in fee to the plaintiff, and remained in occupation as the plaintiff's tenant; but in April 1862 Q gave up possession to H, who subsequently joined the mortgagee's representative in a conveyance to the defendants. Ejectment having been brought by the plaintiff in 1863,—Held, first, that the twenty-five years' possession by Q and conveyance to the plaintiff did not give the latter a title as against the mortgagee or those claiming under him; and, secondly, that there was no estoppel. *Ford* v. *Ager*, 32 Law J. Rep. (N.S.) Exch. 269; 2 Hurls. & C. 279.

The defendants, in an action of ejectment, were lessees to the plaintiff of the premises, and paid the rent reserved under their lease, which contained in the *habendum* the following proviso: "Subject, nevertheless, to a certain indenture of lease bearing date, &c., and made between G D of the first part, J D, E D and R B D of the second part, and W K of the third part, whereby the said premises were demised to the said W K, his executors, administrators and assigns, for a term of twenty-one years from &c., subject to the covenants and agreements therein mentioned." At the time of ejectment brought, which was for breaches of covenants contained in the defendants' lease, the term demised in the previous lease was still outstanding in the said W K:—Held, that the defendants were not entitled to set up this outstanding term as a defence to the ejectment. *Duke* v. *Ashby*, 31 Law J. Rep. (N.S.) Exch. 168; 7 Hurls. & N. 600.

(B) PRACTICE.

(*a*) *Time for Proceeding after Appearance.*

A plaintiff in ejectment is not to be deemed out of court if he do not proceed within a year after the date of appearance entered. Section 58. of 15 & 16 Vict. c. 76. does not apply to actions of ejectment. *Scrope* v. *Paddison*, 30 Law J. Rep. (N.S.) Exch. 244; 6 Hurls. & N. 641.

(*b*) *Interrogatories.*

An order, requiring a plaintiff in ejectment to answer interrogatories as to the nature of his title, will not be made under sect. 51. of the Common Law Procedure Act, 1854, on an affidavit merely satisfying the requirements of section 52. Such order will only be made where there is an affidavit shewing special circumstances to justify it. *Pearson* v. *Turner*, 33 Law J. Rep. (N.S.) C.P. 224; 16 Com. B. Rep. N.S. 157.

In the exercise of the powers conferred by section 51. of the Common Law Procedure Act, 1854, in allowing a party to deliver interrogatories to the opposite party, this Court will take as a guide the rules and principles acted upon in the courts of equity as to bills of discovery, although it will not consider itself to be fettered by those rules. And in an action of ejectment the Court will not compel the defendant to answer interrogatories where the answer would tend to shew that he had incurred a forfeiture of his lease by reason of his having underlet the premises. *Pye* v. *Butterfield*, 34 Law J. Rep. (N.S.) Q.B. 17; 5 Best & S. 829.

## ELECTION.

A testator was seised of the entirety of two freehold houses situate at A and B respectively, and of two-thirds of a freehold house and eighteen cottages situate at B; and his wife was seised of the other third of the last-mentioned house and of the cottages. By his will, he devised "all his freehold messuages or tenements, cottages, &c., at A and B, or elsewhere," to his wife for life, with remainder over. He also gave his personal estate to his wife. Upon a bill for the administration of his estate,—Held, that the wife and those claiming under her must elect between her one-third and the benefits given to her by the will. *Miller* v. *Thurgood*, 33 Law J. Rep. (N.S.) Chanc. 511; 33 Beav. 496.

The doctrine of election is not properly a rule of positive law, but a rule of practice in equity. The knowledge of it is not therefore to be imputed as a matter of legal obligation. Where a case of election arises, the person who ought to make it must be shewn to have known of his duty to do so, and must be proved to have done such acts as amounted to an election. *Spread* v. *Morgan*, 11 H.L. Cas. 588.

Remaining in possession of two estates, held under titles not consistent with each other, affords no decisive proof of that kind. The rule is, "that if a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference, cannot be an election to take the one, and reject the other."—*Padbury* v. *Clark* (2 Mac. & G. 298) confirmed. Ibid.

*Semble*, per *Lord Chelmsford*—A party having an equity to compel an election, does not forfeit that equity by delay in enforcing it. And, per *Lord Chelmsford*—An election gives a right to compensation. Assuming such compensation to be in the nature of a simple contract debt, the Statute of Limitations can only begin to run against it when the election has been made. Ibid.

The Appeal Committee cannot decide what documents are, and what are not, necessary to be printed in the appendix to a case. A question on this point, though known by the parties to exist, was not made the subject of discussion during the argument on the appeal. The House would not afterwards hear it discussed, and refused to make any order as to the costs of the appendix. Ibid.

The decision below being reversed, and the cause remitted, the Court below was left to deal with the general question of costs. Ibid.

## EMBEZZLEMENT.

[See LARCENY—NAVAL STORES.]

(A) FRAUDULENT APPROPRIATION OF MONEY.

It was the duty of the prisoner, who was assistant overseer, to collect the poor-rates on behalf of the overseers, and to enter the sums received from time to time in a book which he was bound to keep, and to pay the money in to the overseers' account at their bankers'. The prisoner received certain sums for the rates and duly entered them as received, but instead of paying them in to the bankers, as he told the overseers he had done, he fraudulently appropriated the money to his own use, and obtained from the overseers receipts, on the faith of his statement, in order to deceive the Poor-Law Auditor:—Held, that he was guilty of embezzlement, notwithstanding that he had charged himself in his book with the receipt of the money. *R.* v. *Guelder*, 30 Law J. Rep. (N.S.) M.C. 34; Bell, C.C. 284.

(B) CLERK OR SERVANT.

(*a*) *County Court Bailiff.*

A bailiff of a county court who has fraudulently appropriated the proceeds of levies made under the process of the county court, cannot for this misconduct be convicted on an indictment charging him as servant of the high-bailiff with having embezzled the moneys of the high-bailiff his master. *R.* v. *Glover*, 33 Law J. Rep. (N.S.) M.C. 169; 1 L. & C. 466.

(*b*) *Sharer in Profits.*

The prisoner, the cashier and collector of a manufacturing firm, had, in addition to a fixed yearly salary, a per-centage on the profits made by the firm, but was not to be liable for its losses. He had no control over the management of the business:—Held, that he might be indicted as a servant for embezzling the moneys of the firm. *R.* v. *Macdonald*, 31 Law J. Rep. (N.S.) M.C. 67; 1 L. & C. 35.

(*c*) *Agent allowed Commission on Orders.*

The prisoner was employed to obtain orders for the sale of iron, manufactured by the prosecutors in a different county. He was to receive a certain commission on the orders he got. It was his duty to account to the prosecutors for any money he might receive; but it was not expressly found to be his duty to receive money. He received money for them, which he fraudulently appropriated to his own use:—Held, by the Court, that the prisoner could not be convicted of embezzlement, as he was not shewn to be a clerk or servant to the prosecutors, or a person employed in the capacity of a clerk or servant. *R.* v. *May*, 30 Law J. Rep. (N.S.) M.C. 81; 1 L. & C. 13.

(*d*) *Commercial Traveller.*

The prisoner, a commercial traveller paid by commission, employed by the prosecutor to obtain orders and receive payments, fraudulently appropriated a sum he received for the prosecutor:—Held, that he was liable to be indicted for embezzlement as the servant of the prosecutor, although he was at liberty to receive orders for other persons also. *R.* v. *Tite*, 30 Law J. Rep. (N.S.) M.C. 142; 1 L. & C. 29.

(*e*) *Secretary to Money Club or Building Society.*

The prisoner was secretary to a money club, a voluntary association. By the rules he was to make out the promissory notes to be signed by the members and their sureties, to whom money was advanced. He was a member of the committee, whose duty it was to inquire into the sufficiency of persons proposed as sureties. He was also to summon special meetings, and to counter-sign all cheques on the treasurer. The members paid their instalments on club nights to the stewards, who handed the sums over to the treasurer. In consequence of doubts of the solvency of the makers of a particular promissory note, it was, by the direction of the club, handed over to the prisoner by the payee, the trustee of the club, with directions to the prisoner to sue upon it or to get better security for the money advanced. The prisoner employed an attorney, sued on the note in his own name, and received payment from one of the makers. He appropriated the money to his own use, and for a long time denied the receipt of it, and returned the note to the trustee as being unpaid:—Held (*Crompton, J. dubitante*), that the duties of the prisoner as secretary were sufficiently cognate to that of the receipt of money for the club to make his employment to receive money in this particular instance an employment of him as clerk or servant; and that, notwithstanding he had recourse to an action in his own name to get in the money, he still received it for and on account of his employers. *R.* v. *Tongue*, 30 Law J. Rep. (N.S.) M.C. 49; Bell, C.C. 289.

A secretary of a benefit building society, according to the certified rules, had nothing to do with the receipt of money when paid off by the mortgagees, but the rules were not strictly followed, and the secretary was in the habit of receiving such moneys. The secretary embezzled a sum so paid to him. It was held, that he might be convicted of embezzlement under the 7 & 8 Geo. 4. c. 29. s. 47, as the course of business was evidence that, in addition to his duties as secretary, he was employed by the trustees as their servant to receive such moneys on their behalf. *R.* v. *Hastie*, 32 Law J. Rep. (N.S.) M.C. 63; 1 L. & C. 269.

(*f*) *Trading Company.*

On an indictment against the prisoner, as servant to A and others, for embezzlement, proof was given that the prisoner was servant to a trading company, calling itself the R Coal Company, "Limited"; that this name was over the office-door of the company; that there were eighty shareholders, of whom A was one; that its affairs were managed by directors; that its shares were transferable by certificate, without the consent of the other shareholders; and that a minute-book of resolutions was kept. No certificate of incorporation was put in evidence:—Held (*Blackburn, J. dubitante*), that there was no evidence for the jury that the company was incorporated, and that on the evidence the prisoner was properly alleged in the indictment to be the servant of A and others. *R.* v. *Frankland*, 32 Law J. Rep. (N.S.) M.C. 69; 1 L. & C. 276.

(*g*) *Member of Friendly Society.*

The prisoner was a member of a duly certified friendly society. He was also paid secretary to the society. His duty, among other things, was to keep correct accounts of the receipts and expenditure of the society, to receive the moneys weekly from

members, and to pay what was due from the society, and weekly to place the balance in the society's box which was left in the lodge-room. He appropriated to his own use certain sums paid in by members, and omitted to enter them as received in the society's books:—Held, that he might be convicted of embezzling the money. *R.* v. *Proud*, 31 Law J. Rep. (N.S.) M.C. 71; 1 L. & C. 97.

A committee formed of the members of two friendly societies for the purpose of conducting a railway excursion, appointed certain persons to sell the excursion tickets to the members of the societies. The money received from the sale of the tickets was to be paid over to a specified person, and was to belong to the two societies in certain proportions. The prisoner, who was a member of the committee, was one of those nominated to sell tickets, and a certain number of tickets were entrusted to him by the committee to sell. Of these he sold some, but instead of paying over the sum received for the sale, he fraudulently appropriated it to his own use. He received no remuneration for his services:—Held, that the prisoner was not liable to be convicted on an indictment charging him as servant to the other members of the committee with embezzling their moneys. *R.* v. *Bren*, 33 Law J. Rep. (N.S.) M.C. 59; 1 L. & C. 346.

## EQUITABLE PLEADING.

[See PLEADING, AT LAW.]

## ERROR.

[See PRACTICE, AT LAW.]

## ESTOPPEL.

[See LANDLORD AND TENANT.]

(A) JUDGMENT RECOVERED.
(B) JUDGMENT BY DEFAULT.
(C) BY RECORD.
(D) RES JUDICATA.
(E) BY DEED.
(F) BY UNTRUE ACCOUNTS AND FALSE REPRESENTATIONS.
(G) BY CONDUCT.

### (A) JUDGMENT RECOVERED.

To a declaration on a marine policy of insurance, alleging a loss by a peril insured against, the defendant pleaded, by way of estoppel, a judgment, by a foreign Court, of condemnation of the ship and cargo, in which it was found, as a ground of condemnation, that the ship was laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea; and that she was not truly destined to the port of Matamoras, but to some other port, and in aid and for the use of persons then at war with the United States, and in violation of the law of nations; and that the ship's papers were simulated and false as to her real destination:—Held, that this judgment did not conclusively find that the ship had not sailed for Matamoras, or that she had deviated from her voyage, but only that the ultimate destination of the ship, or goods, or both, was some other port than Matamoras, and that upon this interpretation of the judgment the facts conclusively found were insufficient. *Hobbs* v. *Henning*, 34 Law J. Rep. (N.S.) C.P. 117.

Held, also, per *Erle, C.J.* and *Byles, J.*, that such a judgment could not be pleaded as an estoppel. Ibid.

It is competent to the Court of Chancery, notwithstanding the provisions in the Chancery Amendment and Regulation Acts of 1858 and 1862 (21 & 22 Vict. c. 27. and 25 & 26 Vict. c. 42), in refusing an injunction, to reserve to the plaintiff the right of proceeding at law. *Langmead* v. *Maple*, 18 Com. B. Rep. N.S. 255.

To a declaration for an injury to the plaintiff's reversion, by building upon and against certain walls of the plaintiff, the defendant pleaded that the plaintiff ought not to be permitted to implead him in respect of those causes of action, because, after their accrual, and after the passing of the Chancery Regulation Act, 1862, the plaintiff commenced his suit and filed his bill in Chancery against him, and impleaded him therein for the same rights, claims, and causes of action, as in the declaration alleged; and that such proceedings were thereupon had that the Court of Chancery determined the same alleged causes of action in favour of the defendant and gave judgment and decreed in respect thereof in favour of the defendant; and that the said judgment and decree still remained in force:—Held, a good plea by way of estoppel. The plaintiff replied that he ought to be permitted to implead the defendant in respect of the causes of action in the declaration alleged, because he said that the Court of Chancery, in dismissing his bill, reserved to him the right of proceeding at law for the causes of action in the declaration alleged, and ordered his bill to be dismissed without prejudice to such right:—Held, a good replication. Ibid.

### (B) JUDGMENT BY DEFAULT.

A defendant, by allowing judgment to go against him by default in an action to which he has a good defence, is not estopped from pleading such defence in a subsequent action against him by the same plaintiff, if such defence be not inconsistent with any traversable averment in the declaration in the former action. Therefore where, in the first action, in which judgment by default was so obtained, the declaration was for non-payment of rent which had accrued due under an agreement to grant a lease, and the plaintiff, in a subsequent action, sued the same defendant for further rent under the same agreement, the defendant was held not to be estopped from pleading in such last action that a yearly tenancy had, by agreement between the parties, been substituted for the defendant's interest under the agreement declared on, and that such yearly tenancy had been duly put an end to before the accruing of the plaintiff's cause of action. *Howlett* v. *Tarte*, 31 Law J. Rep. (N.S.) C.P. 146; 11 Com. B. Rep. N.S. 634.

### (C) BY RECORD.

In an action of trespass for breaking and entering the plaintiff's land, and building thereon a *wall and cornice*, a verdict was found for the defendant on the

pleas of *liberum tenementum*. In a subsequent action, by the devisees of the former defendant against the former plaintiff and his wife, for injury to the reversion by the wife breaking and entering the land and pulling down the *cornice*, the defendants were held (*dubitante Martin, B.*) to be estopped, by the record in the former action, from giving evidence to shew that the land under the *cornice* had not then been in dispute. *Whittaker* v. *Jackson*, 33 Law J. Rep. (N.S.) Exch. 181; 2 Hurls. & C. 926.

### (D) RES JUDICATA.

To a declaration for the infringement of a patent the defendant pleaded that the plaintiff was not the first inventor; that the plaintiff did not file a sufficient specification within six months; that the invention in the specification was not the invention for which the letters patent were granted; that the invention was not new; and that the invention was not one for which letters patent could be granted. To these pleas the plaintiff replied that he had filed a bill in Chancery against the defendant for another infringement of the same patent; that the matter was referred to arbitration; that the defendant contended before the arbitrator that the letters patent were illegal and void on the several grounds respectively set out in the pleas, and also contended generally that the patent was illegal and void, and that the arbitrator awarded that the letters patent were not illegal nor void:—Held, that there was no estoppel, and the replications were therefore bad. *Newall* v. *Elliot*, 32 Law J. Rep. (N.S.) Exch. 120; 1 Hurls. & C. 797.

To a declaration for negligently running down the plaintiffs' vessel, the defendants pleaded that the plaintiffs had taken proceedings in the Court of Admiralty against the ship and freight, and had arrested the ship and caused her to be sold, and that the money arising from the sale and the amount of the freight was paid into that court to abide the decision, and that the same had been ordered to be paid out to the plaintiffs by that Court:—Held, that this was a bad plea, and that the proceedings in the Court of Admiralty were no bar to the subsequent proceedings in this Court. *Nelson* v. *Couch*, 33 Law J. Rep. (N.S.) C.P. 46; 15 Com. B. Rep. N.S. 99.

### (E) BY DEED.

By a deed between a railway company and contractors, claims by the latter (specified in a schedule), under the contract, for alleged losses by reason of delay in obtaining possession of the land, were referred to arbitration. The deed recited that, with the exception of the claims contained in the schedule, the company and the contractors had "settled, adjusted and mutually satisfied every other account, claim or demand which the parties had against each other arising out of the said contract, or any other account, matter or thing whatsoever, as the company and the contractors thereby admitted and acknowledged":—Held, that this recital was not an estoppel to an action by the company on a bond entered into by the contractors, conditioned for the performance of their original contract, alleging as a breach the non-execution and completion of tunnels according to the contract. *The South-Eastern Rail. Co.* v. *Warton*, 31 Law J. Rep. (N.S.) Exch. 515; 6 Hurls. & N. 520.

Upon the dissolution of partnership between the plaintiffs and the defendant, the defendant assigned to the plaintiffs all his interest in a patent, which formed part of the assets:—Held, that the defendant could not afterwards set up the invalidity of the patent as against the plaintiffs. *Chambers* v. *Crichley*, 33 Beav. 374.

### (F) BY UNTRUE ACCOUNTS AND FALSE REPRESENTATIONS.

The plaintiff, the surveyor to the trustees of turnpike roads, rendered to the trustees yearly accounts purporting to be the whole amount of the moneys expended in the maintenance of the roads, it being his duty to make all contracts and give orders and pay the sums due in respect thereof, he being permitted to draw cheques on the treasurer to a certain amount, and the balance alleged to be due to him at the end of each year being carried on to the next. From the accounts so rendered, the clerk to the trustees, pursuant to statute 3 Geo. 4. c. 126, made out and transmitted to the clerk of the peace a statement of the revenue and expenditure of the trust, and these statements were duly published as required by law, and the trustees, with the moneys in hand, paid off debts of the trust. The plaintiff subsequently claimed a larger sum as due to him in respect of payments in these years, the whole amount of which ought to have been paid for and brought into the previous accounts, but was knowingly omitted by the plaintiff, but without any intention on his part to receive more than was due to him:—Held, *Bramwell, B.* dissenting, that the plaintiff was estopped from recovering the excess from the trustees, they having acted upon the faith of the statements in the accounts originally rendered. *Cave* v. *Mills*, 31 Law J. Rep. (N.S.) Exch. 265; 7 Hurls. & N. 913.

The plaintiff, wishing to sell certain shares of which he was the owner, was induced by his broker to execute a transfer, leaving a blank for the broker to insert the numbers and description of the shares. The broker fraudulently filled up the blank with the numbers and description of other shares belonging to the plaintiff, but in a different company, namely, that of the defendants, and passed the transfer as a genuine transfer to a purchaser. By the rules of the defendant's company it was necessary to produce certificates of the shares before a purchaser's name could be entered on the register as the holder of the shares. The certificates of the shares in question were kept by the plaintiff in a box in the broker's custody. The box was locked, and the plaintiff kept the key. The broker, however, managed to get a duplicate key and stole the certificates, and produced them with the transfer, and the name of the purchaser was registered. In an action by the plaintiff, claiming damages and a mandamus to have his name restored to the register in respect of the shares,—Held (*dissentiente Keating, J.*), that the plaintiff had been guilty of no false representation or culpable negligence such as estopped him from charging that the transfer deed was a forgery. *Swan* v. *the North British Australasian Co.* (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 273; 2 Hurls. & C. 175.

By a deed of settlement a farm tenement was conveyed, subject to a term for 1,000 years, to A for life, with power of leasing for three lives, and with a

remainder over, which ultimately became vested in the defendants as tenants in tail. The term for 1,000 years had been created for securing a sum of money, and was, at the time of such settlement, vested in two trustees, one of whom was A, the tenant for life under the settlement. A, in exercise of the said power of leasing, made a lease of the farm for three lives, under which lease the plaintiff became tenant, subject to the rent which was thereby reserved, and which rent he paid to the defendants or their attorneys, R & D, upon the defendants' coming into possession of the property. Afterwards R & D, acting as the defendants' attorneys, wrote a letter to the plaintiff, representing to him that the legal estate was in C under the said term for 1,000 years, and directing the plaintiff, as tenant, to pay the rent to C. In consequence of such letter the plaintiff allowed C to recover judgment against him for rent under the lease. The defendants having afterwards distrained for rent,—Held, in an action of replevin, that as the term for 1,000 years had merged as to one moiety in A, and the defendants had therefore a right to distrain for a moiety of the rent, the effect of the representation by R & D would not estop the defendants from recovering rent which the plaintiff had not paid in consequence of such representation, or had not thereby made himself liable to pay under the judgment obtained against him by C. *Greenish* v. *White*, 31 Law J. Rep. (N.S.) C.P. 93; 11 Com. B. Rep. N.S. 209.

*Quære*—Whether the representation by R & D was binding as an estoppel on the defendants; the defendants being married women, and therefore not capable of appointing attorneys. Ibid.

### (G) By Conduct.

Where a vendor has recognized the right of his vendee to dispose of goods remaining in the actual possession of the vendor, he cannot defeat the right of a person claiming under the vendee, on the ground that no property passed to the latter by reason of the want of a specific appropriation of the goods. *Woodley* v. *Coventry*, 32 Law J. Rep. (N.S.) Exch. 185; 2 Hurls. & C. 164.

The defendants, corn-factors, sold 350 barrels of flour to C, who sold them to the plaintiffs, and gave them a delivery-order on the defendants. The plaintiffs sent the delivery-order to the defendants' warehouse, where the flour remained. The warehouseman said, "It is all right," and gave samples of the flour, and the plaintiffs thereupon advanced money to C. In point of fact, no appropriation had been made of 350 barrels from a larger number in the plaintiffs' warehouse. C became bankrupt, and the price remained unpaid to the defendants. The plaintiffs having brought trover for the flour,—Held, that the defendants were estopped by their conduct from saying that the property in the flour did not pass to the plaintiffs. Ibid.

C, who had been managing clerk to B, a deceased merchant, sold a part of B's personal estate to the defendant, with the consent of A, who claimed an interest therein; and by an agreement between A, C, and the defendant, C, in the name of B, drew a bill of exchange for the price on the defendant, and in the like name indorsed it to A, who retained it till his death. The defendant accepted the bill after it had been so indorsed. After A's death, A's executor put the bill in suit against the defendant, declaring on it as on a bill drawn and indorsed by B. The plea denied the indorsement by B:—Held, that under the circumstances, the defendant was by his own agreement estopped from denying that the bill was indorsed as alleged. *Aspitel* v. *Bryan* (Ex. Ch.), 33 Law J. Rep. (N.S.) Q.B. 328; 5 Best & S. 723.

*Semble*—That the bill was evidence of an account stated. Ibid.

Annual stipends payable to the incumbents of five parishes were charged upon certain real estate in 1603; the stipends were paid by the owners of part of the property up to 1853, when payment was discontinued. In 1858 these owners sold their property, and in the particulars of sale, which were seen by the legal advisers of the incumbents and approved as conveying sufficient notice of their claims, the payments were mentioned, but it was stated that they had been discontinued, and were believed not to be legally recoverable:—Held, that the incumbents were estopped from demanding arrears previous to the filing of the bill. *The Attorney General* v. *Naylor*, 33 Law J. Rep. (N.S.) Chanc. 151; 1 Hem. & M. 809.

A patentee brought an action for damages for infringement against a certain firm who gave judgment by consent before declaration filed, and immediately took a licence to use the patent for a term. On a bill being filed by the patentee, after the expiration of the licence, to restrain an alleged further infringement of his patent, by the defendants in the action and certain other persons who had joined the firm after the date of the judgment at law,—Held, upon motion for decree, that the defendants in the suit were not estopped either by the licence or by the judgment at law from denying the validity of the plaintiff's patent. *Goucher* v. *Clayton*, 34 Law J. Rep. (N.S.) Chanc. 239.

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## EVIDENCE.

[Relief given to persons unwilling, from alleged conscientious motives, to be sworn in Criminal Proceedings by 24 & 25 Vict. c. 66.—The Law of Evidence and Practice on Criminal Trials amended by 28 Vict. c. 18.]

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## (A) Particular Cases relating to the Admissibility and Effect of Evidence.

### (a) *Where Written Document inadmissible for Want of a Stamp.*

D having a contract to erect buildings for the defendant, and being indebted to B in 23*l.*, at the request of the agent of the latter, verbally promised to give B an order on the defendant, and accordingly sent B the following document addressed to the defendant:—"Please to pay 23*l.* to B and charge the same to my account, J D." The defendant, on seeing this order, signed the following document, and delivered it to B:—"I agree to pay you cash 23*l.*, as per order of D, if I have so much cash left on hand on completion of his contract"; and the defendant subsequently paid the 23*l.* to B. In an action by the assignees of D, who had become bankrupt, against the defendant, for work done under the building contract,—Held, that the order being inadmissible in evidence for want of a stamp as a bill of exchange, there was no evidence of an assignment of the debt so as to entitle the defendant to credit for 23*l.* which he had paid to B after the bankruptcy. *Pott* v. *Lomas*, 30 Law J. Rep. (N.S.) Exch. 210; 6 Hurls. & N. 529.

### (b) *Evidence irrelevant to the Issue.*

The plaintiff brought an action of contract to recover the expenses of raising a boat which had been sunk in a collision with a vessel of the defendants, when the latter was being navigated by the plaintiff, a pilot employed by the defendants for that purpose. The defendants denied such contract, on which issue was joined, and at the trial they tendered evidence to shew that the collision was occasioned by the plaintiff's fault:—Held, that such evidence was inadmissible. *Speeding* v. *Young*, 33 Law J. Rep. (N.S.) C.P. 286; 16 Com. B. Rep. N.S. 824, 827.

Held, also, that the plaintiff, after verdict in his favour, was not entitled, on the taxation of costs, to the costs of evidence tending to shew that the collision was not occasioned by his negligence. Ibid.

### (c) *Evidence to contradict or discredit Witness.*

In order that a party producing a witness may be allowed to give in evidence, under the 22nd section of the Common Law Procedure Act, 1854, a previous statement of the witness as being inconsistent with his present testimony, it is not necessary that the two statements should be directly or absolutely at variance. *Jackson* v. *Thomason*, 31 Law J. Rep. (N.S.) Q.B. 11; 1 Best & S. 745.

*Quære*—Whether, independently of the Common Law Procedure Act, when an attesting witness, called to prove a will, gives evidence invalidating the will, the party calling him may give evidence to discredit him. Ibid.

Where a party to the cause gave evidence himself in support of his case, it was held, by *Willes, J.* and *Keating, J.* (*Byles, J.* dissenting), that he might be asked, on cross-examination, with a view of testing his credit, whether an action had not been brought against him by another person in the County Court, in respect of a similar claim, upon which he had given evidence and had had notwithstanding a verdict of the jury against him; and that he might be so examined without production and proof of the record of the proceedings in the County Court. *Henman* v. *Lester*, 31 Law J. Rep. (N.S.) C.P. 366; 12 Com. B. Rep. N.S. 776.

Held, also, by *Willes, J.* and *Keating, J.*, that, even if the Judge at the trial ruled wrongly in allowing such questions to be put and answered, the Court would not on that account grant a new trial, unless it could see that injustice had been occasioned by such mistaken ruling. Ibid.

### (d) *Uncorroborated Evidence of Interested Witness.*

The testimony of a claimant alone cannot be acted on, unless there be some corroborative evidence. *Parish* v. *Parish*, 32 Beav. 207.

The plaintiff asserted that he had contracted to purchase some shares from the defendant, but the contract was not in writing, the fact was contested, and it was proved by the plaintiff alone. There was, however, proof that the plaintiff had paid the defendant money, but on what account did not appear, and that the defendant had admitted, in writing, that the shares belonged to the plaintiff, though they had not been transferred for fourteen years:—Held, that the contract was sufficiently proved. Ibid.

The evidence of a father claiming an estate for life as tenant by the curtesy will be considered sufficient proof that his child was born alive, when it was acquiesced in and acted upon by the father of the wife, who was residing in the house. *Jones* v. *Ricketts*, 31 Law J. Rep. (N.S.) Chanc. 753; 31 Beav. 130.

A purchased sixty-four shares in the name of B, but had the certificates of them delivered to himself. On A's death the certificates of fifty of the above shares were in his possession. In a suit by A's executrix, for the purpose of obtaining a declaration that B was a trustee for her of the fifty shares, the certificates of which were in A's possession at his death, B swore that after the purchase all the above sixty-four shares were given to him by A, but that on the occasion of such gift he took the certificates of fourteen only of such shares, and left the certificates of the remaining shares in A's possession. There was no other evidence than that of B in support of the alleged gift:—Held, that the unsupported evidence of B was insufficient to establish that the fifty shares were given to B. *Forrest* v. *Forrest*, 34 Law J. Rep. (N.S.) Chanc. 428.

The evidence of an auctioneer is admissible to prove what took place at the auction. *Swaisland* v. *Dearsley*, 30 Law J. Rep. (N.S.) Chanc. 652; 29 Beav. 430.

*(e) Evidence of Belief only.*

Evidence of belief only is admissible on interlocutory application, though not at the hearing of a cause, and the grounds of such belief are properly stated in the affidavit, even in the case where such grounds consist in great part of conversations with third persons, who might be but are not produced, and where the deponent swears that he disbelieves the statements made to him by such persons. *Bird* v. *Lake*, 1 Hem. & M. 111.

In an action for a fraudulent misrepresentation as to the trustworthiness of a third person, the defendant may call witnesses to testify their belief as to such trustworthiness at the time of the representation. Therefore, where in such an action as to the trustworthiness of W, a tradesman, the plaintiff proved that he had given credit to W on the faith of a letter written by the defendant on the 24th of October 1860, and to establish the *scienter* evidence was given that the defendant had bought goods from him below their value,—Held (*Bramwell, B. dissentiente*), that the defendant was entitled to ask tradesmen living in the same town with W, "Was W on the 24th of October 1860 trustworthy to your belief?" *Sheen* v. *Bumpstead*, 32 Law J. Rep. (N.S.) Exch. 124; 1 Hurls. & C. 358.

*(f) Evidence to Character (Individual Opinion).*

If a prisoner on his trial gives evidence that his character is good, it is open for the prosecution, by way of reply, to prove that the prisoner's character is bad—*Martin, B. dubitante. The Queen* v. *Rowton*, 34 Law J. Rep. (N.S.) M.C. 57; 1 L. & C. 520.

Evidence of character must not be evidence of particular facts, but (by all the Court, except *Erle, C.J.* and *Willes, J.*) must be evidence of general reputation only, having reference to the nature of the charge. And per *Erle, C.J.* and *Willes, J.*, a witness's individual opinion respecting the general character and disposition of the prisoner with reference to the charge is admissible, though such witness knows nothing of the prisoner's general reputation. Ibid.

On a trial for an indecent assault, where the defendant had given evidence of his good character, a witness called by the prosecution to rebut such evidence was asked, "What is the defendant's general character for decency and morality of conduct?" The witness said, "I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality":—Held, by the majority of the Judges, that this answer was not admissible in evidence. Ibid.

*(g) Evidence of Birth.*

In the absence of clear evidence of respiration by a child after its separation from the *funis*, clear evidence of pulsation or of animal motion after such separation will be taken as proof that the child was born alive. *Brock* v. *Kellock*, 30 Law J. Rep. (N.S.) Chanc. 498; 3 Giff. 58.

For the reason above stated, the Vice Chancellor had decided that the child was born alive, and, on appeal, the Lords Justices, on the evidence of the accoucheur who attended the mother in her confinement, and whom they considered a person of competent skill and of integrity, affirmed his Honour's decision. Ibid.

*(h) Reading the Whole of a Document put in.*

The general rule of evidence, that if one side puts in evidence a document for the purpose of using part of it, the other side has a right to have the whole put in, does not apply to merchants' or traders' books of account, containing entries of receipts and payments; and, therefore, if one side puts in such books of account to prove certain items of receipts, that does not entitle the other side to put those books in evidence to prove payments, unless the different items are so mixed up together as clearly to form one transaction. *Reeve* v. *Whitmore*, 2 Dr. & S. 446.

Although an entry of receipt is good evidence of such receipt as against the person making it, an entry of payment is not evidence of such payment in favour of such person. Ibid.

(B) JUDICIAL DOCUMENTS (COUNTY COURT ORDER).

A county court order for giving up possession of premises, made against a person holding under the tenant, under 19 & 20 Vict. c. 108. s. 50, is not conclusive evidence of title in a subsequent action against him for mesne profits. *Campbell* v. *Loader*, 34 Law J. Rep. (N.S.) Exch. 50; 3 Hurls. & C. 520.

The Court refused to go into the question of improper rejection of a document, on the ground that it did not appear by the Judge's notes that the document had been formally tendered in evidence at the trial. Ibid.

(C) PUBLIC DOCUMENTS.

The articles of association provided that a minute signed by any person purporting to be the chairman of any meeting of directors was to be receivable in evidence without any further proof. An entry was made in the minute-book stating the names of parties and the number of shares subscribed for, the name of the chairman, who signed the minute, being set down for 100 shares. The minute was signed, not at the next meeting, but after the proceedings to wind up the company:—Held, that the minute was *prima facie* evidence against all who were present at the meeting, and, in the absence of counter evidence shewing the incorrectness of the minute, that the chairman was liable as a contributory for 100 shares. *Ex parte Sir Cusack P. Roney, in re the Llanharry Hematite Iron Ore Co. (Lim.)*, 33 Law J. Rep. (N.S.) Chanc. 731.

(D) PRIVATE DOCUMENTS.

*(a) Entries of Deceased Persons.*

A letter by a solicitor, since deceased, making an offer on behalf of a *cestui que trust*, will not be admitted as evidence in a suit against the trustees by the *cestui que trust*, where the *cestui que trust* denied that the solicitor was employed by him, or that he acted on his behalf. *Bright* v. *Legerton*, 30 Law J. Rep. (N.S.) Chanc. 338; 29 Beav. 6.

Although the mere entries in a solicitor's books of business alleged to have been done by him, or in a bill of costs and disbursements made out by him in the regular course of business, would not be evidence

against third persons, a solicitor's bill of costs, made out to trustees, introducing the name of the *cestui que trust* as being personally present when the business was transacted, paid by the trustees, and allowed in the settlement of accounts with the *cestui que trust*, are admissible evidence against the *cestui que trust*. Ibid.

(*b*) *Contracts.*

The defendant had entered into a contract with H for the execution, by H, of certain works at a shed belonging to the defendant. In order to induce M to supply H with the castings necessary for the carrying out of this contract, the defendant promised M to pay her the sum of 218*l.* then due to her from H within six months, provided he had work done by H as security for the same:—Held, in an action by the executors of M, to recover the 218*l.* under this agreement, that they were bound to shew that work to that amount had been done for the defendant by H, and that for this purpose it was necessary to produce the contract between H and the defendant under which the work was executed. *Hill* v. *Nuttall*, 33 Law J. Rep. (N.S.) C.P. 303; 17 Com. B. Rep. N.S. 262.

In addition to the above agreement, the defendant also undertook to pay M for such further castings as should be required for his shed and should be supplied by her on account of H. Further castings were supplied by M to H, but as to some of them there was no evidence that they were delivered by H at the shed:—Held, that there was evidence for the jury to find the defendant liable for these castings under the second agreement. Ibid.

(c) *Letters (Res Gestæ).*

In trover, the question between the parties was, whether the plaintiffs had sold the goods to A (through whom the defendant claimed) on his own account, or whether they had agreed to sell them through A to G & Co. who, however, had never authorized the purchase. A, at the time of the contract, gave the name of B as a reference of the responsibility of G & Co., the plaintiffs alleging that it was given in reference to G & Co.'s responsibility as buyers, the defendant alleging that it was given merely in reference to their responsibility as the intended shippers of the goods on A's behalf. After the delivery of the goods into the hands of A, the plaintiffs wrote the following letter to their agents at L, where B resided: "We wish you to call and see B, and inquire as to the trustworthiness of Messrs. G & Co., and also of A, who is making a rather large purchase of goods for the above party, and who refers us to Mr. B. Write by return." An answer was received, but was not given in evidence:—Held, that the letter was admissible as evidence for the plaintiff as part of the *res gestæ*, and that no part could be excluded from the jury. *Milne* v. *Leisler*, 31 Law J. Rep. (N.S.) Exch. 257; 7 Hurls. & N. 786.

(E) SECONDARY EVIDENCE.

To justify the reception of secondary evidence of an agreement, it was proved that A, in whose possession it was, on landing at New York, was arrested on suspicion of being the bearer of secessionist dispatches, and deprived of all his papers (amongst which was the agreement in question, which had reference to shipments in this country of goods intended to run the blockade at Charleston); that all were subsequently restored to him, except the agreement; and that, on his making inquiry for it of the agents of the Federal Government at New York, he was told that it had been sent to Washington:—Held, that it was sufficiently shewn that reasonable efforts had been made to procure the original agreement, and that therefore a copy was properly received in evidence. *Quilter* v. *Jones*, 14 Com. B. Rep. N.S. 747.

(F) PAROL EVIDENCE.

(*a*) *To explain and interpret Written Contracts and other Documents.*

In a contract under seal, by which the plaintiff contracted to build for the defendants a house and premises for a certain sum, it was provided that "no alterations or additions should be admitted unless directed by the defendants' architect by writing under his hand, and a weekly account of the work done thereunder should be delivered to the architect every Monday next ensuing the performance of such work." In an action on the contract,—Held, that parol evidence was admissible to shew that by the usage of the building trade "weekly accounts" meant accounts of the day work only, and did not extend to extra work capable of being measured. And that mere sketches of the manner in which the work was to be done furnished by the architect, but not signed by him, were not directions within the meaning of the contract. *Myers* v. *Sarl*, 30 Law J. Rep. (N.S.) Q.B. 9; 3 E. & E. 306.

Evidence of statements made by a testator when he executed his will, to explain whether a clause in his will referred to a previous want or not, was rejected. *M'Clure* v. *Evans*, 29 Beav. 422.

Where it is sought to import a warranty into a contract of sale contained in letters which are ambiguous in their terms, it is competent to the party sought to be charged to give evidence of all the surrounding facts and circumstances, for the purpose of shewing that a warranty was not contemplated by the parties. *Stucley* v. *Baily*, 31 Law J. Rep. (N.S.) Exch. 483; 1 Hurls. & C. 405.

In an action for the breach of warranty of a yacht sold by the defendant to the plaintiff, the case for the plaintiff consisted of proof that his agent having gone to examine the vessel with a view to buying her, and being unable to ascertain the state of soundness of the masts, where they passed through the decks, told the captain, who was the defendant's agent in the sale, to have them examined by a shipwright and report the result. The captain subsequently wrote, "I have had a good overhaul at the masts, and find they are all as sound as ever." An offer of 3,000*l.* was then made by letter by the plaintiff's agent, who said the plaintiff would have to lay out 500*l.* in repairs. The defendant replied by letter declining to take less than 3,500*l.*, and saying, "You must, I think, be under some very great error in thinking 500*l.* would be required to be spent. Beyond the usual painting, &c., and perhaps a little repair to the copper, I don't really think there are any necessary repairs. . . . Personally I know her sea-going qualities, and how thoroughly sound she is and tight in every part." In a subsequent letter the defendant further said, "her masts have been examined and

found as sound as when put in." After some further correspondence, the plaintiff purchased the vessel for 3,375*l.*, and a transfer or bill of sale was made in accordance with the Merchant Shipping Act, 1854:—Held, that assuming the assertions in the letters amounted to a warranty of the soundness of the masts, it was competent to the defendant to prove all the surrounding circumstances and statements of the parties, as well after as before the letters, to shew that a warranty was not contemplated. Ibid.

*Semble*—That the letters did not amount to a warranty. Ibid.

*Quære*—Whether it was competent to the plaintiff to set up a warranty not referred to or contained in the bill of sale of the vessel registered under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). Ibid.

Family repute admissible to shew that a legatee was the godson of the testator. *In re Gregory's Settlement and Will*, 34 Beav. 600.

A former will of a testator held admissible evidence on a question as to which of two persons was to take as legatees. Ibid.

(*b*) *To contradict or vary Written Contracts and other Documents.*

The declaration stated that the defendant agreed to transfer a farm held by him under Lord S to the plaintiff, upon the terms and conditions under which the same was held by the defendant under Lord S, and to sell the stock at a certain price, and alleged a breach of that agreement. The defendant pleaded *non assumpsit*, and a contemporaneous oral arrangement, that in the event of Lord S not consenting to the transfer, the above agreement was to be null and void, and that Lord S had refused his consent. The principal agreement was in writing, and the plaintiff paid to the defendant 100*l.*, a part of the consideration money, and sold with the defendant's consent a small portion of the stock; but when Lord S refused his consent the defendant tendered back the 100*l.*, which the plaintiff refused to accept:—Held, that evidence of the contemporaneous oral arrangement was rightly received; for that, under the circumstances, the inference of fact was that the oral arrangement was intended to suspend the written agreement and not as a defeasance of it. Held, also, that it was not necessary for the plaintiff to produce or cause to be produced at the trial the lease from Lord S to the defendant referred to in the declaration. *Wallis* v. *Littell*, 31 Law J. Rep. (N.S.) C.P. 100; 11 Com. B. Rep. N.S. 369.

The plaintiff agreed in writing to purchase certain furniture of the defendant, and by that agreement the defendant was authorized to settle an action of *C* v. *L.* In an action, by the plaintiff, against the defendant, for not settling the action, evidence was offered and received of a distinct oral agreement to settle, made on the same occasion as, and immediately before the written agreement. The jury found that such an oral agreement was made:—Held, that the evidence was admissible, and that on the finding of the jury the plaintiff was entitled to a verdict. *Lindley* v. *Lacey*, 34 Law J. Rep. (N.S.) C.P. 7; 17 Com. B. Rep. N.S. 578.

A testator, by his will, gave to two persons the privilege of purchasing his warehouse, &c.; and they, by a joint letter written to the trustees of the will, signified their acceptance of the privilege, but no conveyance was ever executed. The Court held, that it was at liberty to receive evidence of the acts of the purchasers, shewing that they considered themselves entitled as tenants in common. *Harrison* v. *Barton*, 30 Law J. Rep. (N.S.) Chanc. 213; 1 Jo. & H. 287.

Parol evidence of statements of intention is not admissible in such a case. Ibid.

(G) DECLARATIONS OF DECEASED PERSONS.

On the trial of an action for the infringement of a patent, the novelty of which was disputed, the defendant gave evidence that R O, then deceased, had, previous to the date of the plaintiff's patent, used a process identical with the plaintiff's, and had produced and sold a product exactly similar to that produced by the plaintiff's patent. The plaintiff called witnesses in reply, and a witness deposed that R O had, on a sale of the product subsequent to that of which the defendant had given evidence and subsequent to the plaintiff's patent, stated that the article was new and that he wished it to be kept secret:—Held, that the evidence was inadmissible. *Hyde* v. *Palmer*, 32 Law J. Rep. (N.S.) Q.B. 126; 3 Best & S. 657.

Where an issue is raised between the Crown alleging the bastardy of, and parties claiming to be related to, a deceased intestate, the burden of proof is on the parties setting up the relationship. In such a case evidence of declarations made by a deceased person, other than the deceased in the cause, is inadmissible, unless the relationship is proved *aliunde;* but evidence of declarations made by the deceased in the cause is admissible. *In the goods of Emsley*, 2 Swab. & T. 491.

Where a will and codicil (the drafts of which were produced) were proved to have been left by the attorney who drew them with the testator after execution, but were not forthcoming after his death, declarations of the testator to various members of his family down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, were held to be properly admitted, to rebut the presumption that the will and codicil had been destroyed by the testator *animo revocandi*. *Whiteley* v. *King*, 17 Com. B. Rep. N.S. 756.

(H) PRESUMPTIVE EVIDENCE.

[See title PRESUMPTION—Of Survivorship, see *Wing* v. *Angrave*, title WILL.]

The evidence to repel the presumption of legitimacy of a child born during wedlock must be strong, distinct, satisfactory and conclusive, and such as to produce a judicial conviction that the child was not procreated by the husband. *Atchley* v. *Sprigg*, 33 Law J. Rep. (N.S.) Chanc. 345. 10 Jur NS 1144

Where, however, a husband and wife lived together for nine years without having a child, and then separated and never lived together again, and a child was born ten years after the separation, while the wife was in the habit of committing adultery with another man, which child was treated by the paramour as his own, and was called by his surname, and brought up by him, the child, notwithstanding possibility of access on the part of the husband, was held to be illegitimate. Ibid.

A mother's evidence is inadmissible to prove the legitimacy or illegitimacy of her child born during wedlock. Ibid.

The report in *Plowes* v. *Bossey* (31 Law J. Rep. (N.S.) Chanc. 681) corrected. Ibid.

Although the law presumes a person who has not been heard of for seven years to be dead, yet (in the absence of special circumstances) it draws no presumption from that fact as to the particular period when he died and the onus of proving death at any particular period of time within the seven years lies with the party alleging death at such particular time. *Thomas* v. *Thomas*, 2 Dr. & S. 298.

(I) CONFESSIONS.

If one of two persons charged with stealing says to the other (a policeman and W, the owner of the property, being present), "You had better tell Mr. W the truth," and neither the policeman nor W say anything, a confession made by the person addressed is receivable in evidence against him on the trial. *R.* v. *Parker*, 30 Law J. Rep. (N.S.) M.C. 144; 1 L. & C., 42.

(K) DEPOSITIONS.

(*a*) *In Chancery.*

A deposition, taken under the old system (before November, 1852), and used by a party to a suit in Chancery for the purpose of proving particular facts, is admissible as primary evidence of the same facts against the same party in an action by a stranger.—So held by *Cockburn, C.J.* and *Crompton, J.*; *Blackburn, J.* dissenting. *Richards* v. *Morgan*, 33 Law J. Rep. (N.S.) Q.B. 114; 4 Best & S. 641.

By a bill in equity, E sought to set aside the purchase of an estate from him by M, on the ground that M was his solicitor, and had given inadequate value; and M, by his answer, sought to shew that the acreage and value of the estate were but small, and used and read, as part of his evidence, the deposition of H, a former tenant, tending to shew the small value and extent of the estate:—Held (by *Cockburn, C.J.* and *Crompton, J.*; *Blackburn, J.* dissenting), in an action by a stranger against M (in which the question was, whether a large tract of mountain land was included in this very estate, as M contended, or was waste of the manor in which it was situate), that H's deposition was admissible as primary evidence against M. Ibid.

Liberty was given to read the affidavit of a witness, who had been prevented, by illness, from being cross-examined, but the Court intimated that little attention would be paid to such an affidavit. *Braithwaite* v. *Kearns*, 34 Beav. 202.

(*b*) *Before Magistrates.*

There may be incidents to the state of pregnancy which render a woman too ill to travel. It is for the presiding Judge at the trial to decide in his discretion whether the evidence that the witness is too ill to travel is sufficient. *R.* v. *Stephenson*, 31 Law J. Rep. (N.S.) M.C. 147; 1 L. & C. 165.

To render a deposition of a witness absent through illness admissible in evidence on the trial of a prisoner for felony, it must have been taken in the presence of the magistrate as well as of the prisoner. *R.* v. *Watts*, 33 Law J. Rep. (N.S.) M.C. 63; 1 L. & C. 339.

At the hearing of a charge of felony the witnesses were examined and cross-examined by an attorney for the prisoner in the presence of the magistrate, and a note was made of the heads of what they could each prove; the witnesses and the prisoner were then taken into another room, and the witnesses were there, in the absence of the magistrate, examined by a clerk, and their answers taken in writing by him, and their signatures obtained to the paper; after which the witnesses and the prisoner were again brought before the magistrate, and the evidence so taken was read over. The prisoner was then cautioned by the magistrate, and having previously made a statement, signed it, and the magistrate then signed the paper:—Held, that this course of taking the depositions was irregular, and that a deposition so taken was inadmissible in evidence. Ibid.

(L) PRIVILEGED COMMUNICATION.

The refusal of a person to allow another who has acted as his solicitor to give evidence in violation of the confidence of the professional relation, can form no just ground for adverse presumption against the person so refusing, and the doctrine in *Armory* v. *Delamirie* has no application to such a case—per *Lord Chelmsford*. *Wentworth* v. *Lloyd* (House of Lords), 33 Law J. Rep. (N.S.) Chanc. 688; 10 H.L. Cas. 589.

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## EXECUTOR AND ADMINISTRATOR.

(A) GRANT OF ADMINISTRATION.
- (*a*) *Jurisdiction.*
- (*b*) *Droits of the Crown.*
- (*c*) *Generally.*
- (*d*) *To Next-of-Kin or their Nominees.*
- (*e*) *To Guardian.*
- (*f*) *To Guardians of the Poor.*
- (*g*) *To Attorney or Nominee of Person Abroad.*
- (*h*) *To Universal or Residuary Legatee.*
- (*i*) *To Widow.*
- (*k*) *To Creditors or their Surety.*
- (*l*) *To Assignees.*
- (*m*) *In Cases of Uncertainty of Survivorship (Presumption of Death.)*

(B) GRANT OF ADMINISTRATION LIMITED.
- (*a*) *To Part of Effects.*
- (*b*) *To receiving Proceeds of Sale of Effects.*
- (*c*) *To Moneys accruing from Negotiable Instruments.*
- (*d*) *Ad Colligenda Bona.*
- (*e*) *Pendente Lite.*
- (*f*) *To substantiating Proceedings in Chancery.*
- (*g*) *Where Executor or Person entitled to Administration is out of the Jurisdiction.*
- (*h*) *When made to Person entitled to a General Grant.*
- (*i*) *For Use and Benefit of Minors.*
- (*k*) *For Use of Next-of-Kin, a Lunatic.*

(C) ADMINISTRATION BOND.
- (*a*) *Penalty.*
  - (1) *Amount.*
  - (2) *Reducing the Penalty.*

## (A) GRANT OF ADMINISTRATION.

### (*a*) *Jurisdiction.*

The administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. The Court of the domicil is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort—per *Lord Westbury, L.C. Enohin* v. *Wylie*, 31 Law J. Rep. (N.S.) Chanc. 402; 10 H.L. Cas. 1.

The duty of administering personal estate in this country is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicil—per *Lords Cranworth* and *Chelmsford*. Ibid.

A married woman died intestate in France, leaving personal property there, but none in this country. Her husband, who survived her, was by the law of France unable to obtain possession of the deceased's property without first obtaining letters of administration in England:—Held, that as the deceased left no personal property in England, the Court had no jurisdiction to grant to her husband administration limited to the purpose of substantiating in France his title to the property there situate. *In the goods of Tucker*, 34 Law J. Rep. (N.S.) Prob. M. & A. 29; 3 Swab. & T. 585.

### (*b*) *Droits of the Crown.*

The rule of evidence in pedigree cases has not been relaxed of late years. *The Attorney General* v. *Köhler*, 9 H.L. Cas. 654.

The personal estate of an intestate who leaves no next-of-kin belongs absolutely to the Crown as part of the *droits* of the Crown. The fact that these *droits* are now by statute paid into the Treasury, and made to form part of the public revenue, makes no difference in this matter. Ibid.

Money paid to one sovereign in this right cannot, if improperly paid, be recovered from that sovereign's successor. Ibid.

The nominee of the Crown taking out administration to the estate of an intestate is under the same obligation as any other administrator. The 15 Vict. c. 3. only dispenses with the necessity of his giving the usual bond to the Ordinary, but imposes on him all the duties and liabilities of a private administrator. If he improperly pays to the Crown part of the intestate's effects, though such payment is made under authority of a warrant under the Sign Manual, he makes himself personally liable to restore it to parties afterwards proving themselves legally entitled. Upon his death that liability only continues against his personal representatives, and not against his successor in office. But that successor may make himself personally liable for the acts of his predecessor, as by taking out letters of administration *de bonis non* to the same estate. Ibid.

Where the nominee of the Crown had improperly paid money (thus coming to his hands) to the then sovereign, and the succeeding nominee of the Crown had taken out letters of administration *de bonis non* to the same estate, and, in a suit by the next-of-kin against him, had only contested the fact of the claimants being truly the next-of-kin, and denied, if they were so, liability to pay interest on the sum claimed, —Held, that this was in substance an admission of liability to pay the principal to the next-of-kin, and the claimants having satisfactorily established their title to that character, the liability to pay interest followed, as of course, on the liability to pay the principal. Ibid.

A, a defendant, as administrator on the nomination of the Crown, in a suit by the alleged next-of-kin, died; B, his successor in office, took out letters *de bonis non*. A bill to revive the suit was filed, and an order made thereon recited the prayer of the bill thus: "that the said suit and proceedings, which had so become abated as aforesaid, might be revived, and be in the same plight and condition against B, as they were at the time of the death of A, and that the plaintiffs might have the same relief against B as they would have been entitled to and had against A had he still been living," and then added, "which is hereby ordered by the Court as prayed":—Held, that this order did not of itself create any liability in B, but merely put the suit in the same state as it had been in before A's death. No costs were given. Ibid.

### (*c*) *Generally.*

The grant of administration with the will annexed of a married woman, who appoints no executor, follows the interest, and can only be made to the husband on renunciation of the persons interested under the will. *In the goods of Bailey*, 30 Law J. Rep. (N.S.) Prob. M. & A. 190; 2 Swab. & T. 135.

If the husband of a married woman who is entitled to letters of administration refuses to execute the administration bond, or to assist in her obtaining the grant, the Court will grant administration to her, and allow a third person to execute the bond. *In the goods of Sutherland*, 31 Law J. Rep. (N.S.) Prob. M. & A. 126.

In 1807 letters of administration with the will of A annexed were granted by the Prerogative Court of Canterbury to B, as substituted legatee, the grant reciting, "that C, the universal legatee *for life*, had died without taking out letters of administration." In 1862, upon application for a grant of administration *de bonis non*, it was objected in the registry that by the terms of the will C was entitled to the effects of the deceased absolutely, and not merely for life, and therefore that the original grant was incorrect:—Held, that as the grant was not clearly bad, and the objection to its correctness, which turned on a nice question of construction, was not raised by a person interested, the Court would, after such a lapse of time, presume that it was rightly made. *In the goods of Smith*, 31 Law J. Rep. (N.S.) Prob. M. & A. 187; 2 Swab. & T. 371.

A died leaving a will, whereby he appointed his wife sole executrix and universal legatee. She took probate, and afterwards married B, and during her coverture made a will in execution of a power vested in her, and appointed B sole executor. Upon her death B took limited probate of her will, and also administration of the rest of her effects:—Held, that B, as representing the whole of his wife's personal estate, was entitled to administration of the unadministered effects of A. *In the goods of Martin*, 32 Law J. Rep. (N.S.) Prob. M. & A. 5; 3 Swab. & T. 1.

A testator appointed A, B and C his executors. A and B proved the will, power being reserved to C. B survived A, and died in the lifetime of C, having made a will and appointed an executor. It was held, under 21 & 22 Vict. c. 95. s. 16, that upon the death of C the executor of B, the surviving acting executor, became the personal representative of the original testator. *In the goods of Lorimer*, 31 Law J. Rep. (N.S.) Prob. M. & A. 189; 2 Swab. & T. 471.

Where the parties interested under a testamentary paper do not appear to a citation calling upon them to propound it, administration will be granted as in case of intestacy, without proof of the invalidity of the paper, although it is good on the face of it. *Morton* v. *Thorpe*, 32 Law J. Rep. (N.S.) Prob. M. & A. 174.

*Semble*—The Court will not, upon the mere consent of the parties interested when they have not been cited, pronounce against such a testamentary paper without proof of its invalidity. Ibid.

Administration will not be granted when it appears that deceased left no personal property in England. *In the goods of Fittock*, 32 Law J. Rep. (N.S.) Prob. M. & A. 157.

On a proxy of renunciation and consent being filed by the widow, which omitted, however, the usual declaration that she had not intermeddled in the estate of the deceased (she having intermeddled therein through mistake), the Court granted administration to the natural and lawful father of the deceased. *In the goods of Fell*, 2 Swab. & T. 126.

A grant in a chain of executorship, made by a diocesan Court in general terms, and not limited to property within its jurisdiction, is valid under the 87th section of the Probate Act, and entitles the personal representative of an original testator claiming under such grant to the transfer of stock standing in the Bank of England books in the name of the original testator. *Semble*, otherwise, if the diocesan grant were limited in its terms. *In the goods of Tucker*, 2 Swab. & T. 123.

A died leaving B his sole executrix and universal legatee. B died intestate, and administration of her effects was granted to her three children. A representative to A being necessary in order that certain property held by him as a trustee might be transferred, administration with the will annexed of unadministered effects was granted to one of the two surviving administrators of B, the other having been cited but not appearing. *Hancock* v. *Lightfoot*, 33 Law J. Rep. (N.S.) Prob. M. & A. 174; 3 Swab. & T. 557.

If A dies intestate, and B, who is solely entitled to A's personal estate, afterwards dies without taking out administration, the appointment of a representative to B is a condition precedent to a grant of administration of the effects of A. *In the goods of Allen*, 34 Law J. Rep. (N.S.) Prob. M. & A. 1; 3 Swab. & T. 559.

*(d) To Next-of-Kin or their Nominees.*

*Quære*—Whether a husband who, by a deed of separation, has resigned all claim to the property of his wife is thereby excluded upon her death, in his lifetime, from taking any interest as her representative. In such a case the Court will not grant administration to the next-of-kin of the wife unless the husband be cited. *In the goods of Oranmore*, 30 Law J. Rep. (N.S.) Prob. M. & A. 183.

When husband and wife die by the same calamity, and there is no evidence that the one survived the other, administration of their personal estate will be granted to their respective next-of-kin. *In the goods of Wheeler*, 31 Law J. Rep. (N.S.) Prob. M. & A. 40.

The next-of-kin of an intestate has by law the same title to administration as has the widow, though, under ordinary circumstances, the practice is to make the grant to the widow. Therefore, under the 73rd section of 20 & 21 Vict. c. 77, which gives the Court a discretion to grant administration to a person other than the one entitled to the grant, administration cannot be granted to the next-of-kin, passing by the widow. A person who is entitled to administration as next-of-kin, cannot take the grant as a creditor. *In the goods of Corser*, 31 Law J. Rep. (N.S.) Prob. M. & A. 170.

A, a bachelor, who had gone to Australia, had not been heard of for seven years. His father died intestate about two years and five months before the expiration of the seven years. No personal representation had been taken out to the father. It being uncertain whether the deceased died before or after his father, the Court granted administration of his effects to his sister as one of his next-of-kin, under the 73rd section of the Probate Act. *In the goods of Peck*, 2 Swab. & T. 506.

In case of an intestacy, where the persons who are sole next-of-kin and the only persons entitled in distribution renounce their title to administration, the Court will make the grant to a person who would have been next-of-kin if the sole next-of-kin had been out of the way, although such person has no interest. *In the goods of Johnson*, 2 Swab. & T. 595.

For sufficient cause, *e.g.*, the misconduct of the widow in having eloped from her husband and lived in adultery, the Court will grant administration to

the next-of-kin in preference to the widow. *In the goods of Anderson*, 33 Law J. Rep. (N.S.) Prob. M. & A. 149; 3 Swab. & T. 489.

Upon the consent of all the next-of-kin the Court granted administration under the 73rd section of 20 & 21 Vict. c. 77. to a person having no interest in the property of the deceased. *Farrell* v. *Brownbill*, 33 Law J. Rep. (N.S.) Prob. M. & A. 185; 3 Swab. & T. 467.

*(e) To Guardian.*

The guardian of a minor of the whole blood is entitled to a grant of administration in preference to the half blood. *Stratton* v. *Linton*, 31 Law J. Rep. (N.S.) Prob. M. & A. 48.

The testamentary guardian has a right to administration for the use and benefit of minors, in preference to the guardian elected by them. Where a testamentary guardian to minor children had been appointed, and administration had, *per incuriam*, been granted to a guardian elected by the minors for their use and benefit, the Court revoked the grant, and granted administration to the testamentary guardian. *In the goods of Morris*, 31 Law J. Rep. (N.S.) Prob. M. & A. 80; 2 Swab. & T. 360.

Where a married woman obtained a protection order under 20 & 21 Vict. c. 85, and died intestate, leaving her husband and children by him who were minors, and her husband her surviving, the Court, in the lifetime of the father, who was abroad, granted administration, for the use and benefit of the children, to their uncle, who had been duly elected by them as their guardian for that purpose. *In the goods of Weir*, 31 Law J. Rep. (N.S.) Prob. M. & A. 88; 2 Swab. & T. 451.

Where the persons entitled in distribution to the effects of an intestate were minors and their next-of-kin were abroad, the Court, under the 73rd section of 20 & 21 Vict. c. 77, granted administration for their use and benefit to a guardian elected by them without requiring that the next-of-kin should be cited or renounce. *In the goods of Hagger*, 32 Law J. Rep. (N.S.) Prob. M. & A. 96; 3 Swab. & T. 65.

*(f) To Guardians of the Poor.*

A, entitled to administration of the effects of B, was a pauper lunatic, and as such was confined in a county lunatic asylum, and no committee of her person or effects had been appointed. A's next-of-kin having been cited and not having appeared, the Court, under 20 & 21 Vict. c. 77. s. 73, granted administration of the effects of B to the guardians of the poor at whose expense A was maintained, for A's use and benefit, limited to the period of her lunacy. *Southwell* v. *Findlay*, 33 Law J. Rep. (N.S.) Prob. M. & A. 21.

*(g) To Attorney or Nominee of Person Abroad.*

By an ordinance of British Guiana, the Administrator General is empowered to administer to the estate and effects of every person who shall die intestate, and whose heir *ab intestato* shall be unknown, or if known, shall be absent without having an attorney or agent in the colony to represent him. A died in the colony a bachelor and intestate, and having there no known relation. By virtue of the said ordinance the Administrator General took possession of the estate of the deceased in the colony, and appointed A his attorney to take out administration to the estate in England. Upon motion for a grant of administration to A the Court directed that the next-of-kin should be cited, and that the usual notice to the Queen's Proctor should be given; and afterwards, upon one of the next-of-kin appearing to the citation and consenting, the grant was made as prayed. *In the goods of O'Brien*, 31 Law J. Rep. (N.S.) Prob. M. & A. 194; 2 Swab. & T. 604.

B, having acquired a domicil in British Guiana, died a bachelor and intestate, without any known relations there. Under an ordinance of that colony, the Administrator General took possession of B's property in that colony, and appointed Messrs. P, F and P, of Liverpool, to be his attorneys, and in his name to take out letters of administration to the personal estate of the deceased in this country. The Court, after the usual notice to the Queen's Proctor, and citations of next-of-kin, made the grant accordingly. *In the goods of O'Brien*, 2 Swab. & T. 604.

Administration will not be granted to a nominee of the person entitled to the grant, if the latter is in this country. *In the goods of Burch*, 30 Law J. Rep. (N.S.) Prob. M. & A. 171; 2 Swab. & T. 139.

*(h) To Universal or Residuary Legatee.*

The universal legatee under a will which does not appoint an executor is, by the invariable practice of the registry, entitled to administration with the will annexed, and not to probate as executor according to the tenor. *Semble*—The 29th section of the 20 & 21 Vict. c. 77, which directs that, generally, "the practice of the Court of Probate shall be according to the practice of the Prerogative Court," applies only to procedure. And *semble*, that in the case of foreign wills which do not appoint an executor, the practice is to grant probate to an universal heir, and administration with the will annexed to an universal legatee. *In the goods of Oliphant*, 30 Law J. Rep. (N.S.) Prob. M. & A. 82.

A testator on his deathbed gave instructions for a will to a person who was unknown to him, and who, in preparing the will, omitted his surname and also introduced the name and description of an executor who was totally unknown to the testator or any of his friends or relations, and who could not, therefore, be identified. With the consent of all the parties interested, the Court granted administration with the will annexed, to one of the residuary legatees, under the 73rd section of the Probate Act, 1857. *In the goods of Sawtell*, 31 Law J. Rep. (N.S.) Prob. M. & A. 65; 5 Swab. & T. 448.

*(i) To Widow.*

Under the 21 Hen. 8. c. 5. s. 3. a person who is not next-of-kin of an intestate cannot be joined in a grant of administration to the widow. *In the goods of Browning*, 31 Law J. Rep. (N.S.) Prob. M. & A. 161; 2 Swab. & T. 634.

Where the estate was large, and required the management of a person conversant with business, and all persons interested consented to a joint grant of administration being made to the widow, and a person entitled in distribution, but not next-of-kin, the Court refused to make such a grant under the 73rd section of 20 & 21 Vict. c. 77. Ibid.

A testator, by his will, appointed an executor, and bequeathed the residue of his personal estate to A. The testator and A were lost in the same ship, and there was nothing to shew which of them was the survivor. The executor renounced :—Held, that as the bequest to A did not take effect, and therefore was not transmissible to his personal representative, the widow of the testator was entitled to administration with the will annexed. *In the goods of Carmichael*, 32 Law J. Rep. (N.S.) Prob. M. & A. 70.

(*k*) *To Creditors or their Surety.*

On an application for a grant of administration to a creditor it must appear upon affidavit when the debt due to the creditor was incurred. *Rawlinson* v. *Burrell*, 33 Law J. Rep. (N.S.) Prob. M. & A. 123; 3 Swab. & T. 479.

A surety who after the death of the principal pays off the debt is, in case of intestacy, entitled to administration as a creditor. *Williams* v. *Jukes*, 34 Law J. Rep. (N.S.) Prob. M. & A. 60.

The Court will not make a grant of administration under the 73rd section of the Probate Act to a party entitled to a grant in another character. *In the goods of Fairweather*, 2 Swab. & T. 588.

The Court declined to make a grant *de bonis non* with the will annexed under the 73rd section to a creditor without citing residuary legatees named in the will, who were resident in Australia. Ibid.

Where an application is made for a grant of administration to the secretary of an association, on the ground that the deceased was indebted to the association, the Court ought to have such information of the constitution of the association as would shew that the secretary can be treated as a creditor. Ibid.

(*l*) *To Assignees.*

After the death of A, who died domiciled in France intestate, his estate was, by a decree of a French Court, declared bankrupt, and B was appointed syndic, or assignee, and authorized to dispose of the debts due to the deceased. Pursuant to this decree, the debts, including one due from a person in England, were sold to C. By the law of France, C could sue in his own name for the debts without obtaining letters of administration to A, and without any other judicial act. The persons entitled in distribution to the deceased's effects having been cited and not appearing, application was made for a grant of administration to C, limited to the debt due in England :—Held, that as C derived his title from the syndic as a purchaser, and not as representing the deceased, he was not entitled to a grant of administration. *Dépit* v. *Delevieleuse*, 30 Law J. Rep. (N.S.) Prob. M. & A. 86; 2 Swab. & T. 131.

*Semble*—C could sue for the debt in this country in his own name. Ibid.

*Semble*—That the assignee of a debt due from a person who dies intestate is not entitled to a grant of administration as a creditor. *Day* v. *Thompson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 183.

A died leaving a will whereof he appointed B executor and residuary legatee. B proved the will and afterwards became bankrupt, and subsequently died intestate, leaving part of the estate of A unadministered. At the time of his bankruptcy B was a creditor of A. The Court granted administration with the will annexed of the unadministered estate of the effects of A to the assignee in bankruptcy of B, in the character of assignee of a residuary legatee. *Semble*—that the assignee would also have been entitled to the grant as assignee in bankruptcy of a creditor of A. *Downward* v. *Dickinson*, 34 Law J. Rep. (N.S.) Prob. M. & A. 4; 3 Swab. & T. 564.

(*m*) *In Cases of Uncertainty of Survivorship (Presumption of Death).*

Where the presumption of A's death arose from the fact that he had not been heard of for seven years, and there was no evidence that he was ever married or had left a will, and his father died before the expiration of the seven years, the Court, on account of the impossibility of ascertaining whether or not A had survived his father, under section 73. of the 20 & 21 Vict. c. 77, granted administration to the next-of-kin of A, without requiring administration to be taken out to his father. *In the goods of Astell*, 31 Law J. Rep. (N.S.) Prob. M. & A. 38.

In August 1858 A died a bachelor and intestate. In July 1861 the presumption arose that A's father, who had not been heard of for more than seven years, was dead, but there was no evidence as to the date of his death. The Court, under the 73rd section of 20 & 21 Vict. c. 77, granted administration of the effects of A to his mother, without requiring that administration to his father should be taken out. *In the goods of Smith*, 31 Law J. Rep. (N.S.) Prob. M. & A. 182; 2 Swab. & T. 508.

(B) GRANT OF ADMINISTRATION LIMITED.

(*a*) *To Part of Effects.*

The will of A, by which he exercised a power of appointment and also disposed of his own personal estate, having been, as to his own estate, revoked by his subsequent marriage, the Court granted letters of administration of his effects, save as to such of them as he was entitled to appoint by will. *In the goods of Mason*, 30 Law J. Rep. (N.S.) Prob. M. & A. 168.

(*b*) *To receiving Proceeds of Sale of Effects.*

A died intestate, leaving B, a private soldier, stationed in the East Indies, the sole person entitled to his personal estate. Upon A's death certain of his personal property was sold by auction, the proceeds of the sale remaining in the hands of the auctioneers. B wrote to C, stating that he should not return to England for three years, and directing C to take the necessary steps for lodging the proceeds of the sale in the Bank of England, with the exception of 10*l*., which he wished to be transmitted to him. The Court, under the 73rd section of the Probate Act, granted administration to C, for the benefit of B, limited to receiving the proceeds of the sale, and paying it, with the exception of the 10*l*., into the Bank of England. *In the goods of Drinkwater*, 31 Law J. Rep. (N.S.) Prob. M. & A. 93; 2 Swab. & T. 611.

(*c*) *To Moneys accruing from Negotiable Instruments.*

A, who was indebted to B, and who, as a security for the debt, held certain negotiable instruments in trust for B, died intestate, and no administration was

granted. In 1862, the official assignee of the estate of B, who had become bankrupt in the lifetime of A, assigned to C the outstanding debts due to B's estate, and C assigned them to D. Moneys being due in respect of some of the negotiable instruments for which the personal representative of A could alone give a discharge, the Court upon the next-of-kin of A being cited, and not appearing, granted to C administration of the effects of A limited to moneys due, or to become due, in respect of the said negotiable instruments, but refused to make such a grant to D. *Macnin* v. *Coles*, 33 Law J. Rep. (N.S.) Prob. M. & A. 175.

Administration of an intestate's estate will not be granted to a person who, after the death of the intestate, buys up a debt due from him. Ibid.

(*d*) *Ad Colligenda Bona.*

A, a foreigner, died on his voyage to England. At the time of his death he had in his possession (*inter alia*) bills of exchange drawn upon merchants in England, and there was also a debt owing to him by a person in England. No testamentary paper was found in the deceased's possession, and he had no relative or agent in England. His relatives were resident in one of the Southern States of North America; but in consequence of a war between those States and the Northern States, and the blockade of the Southern ports, communication with them was difficult and uncertain. The Court, under the 73rd section of 20 & 21 Vict. c. 77, granted administration limited *ad colligendum* to a part owner of the ship on board which A died, and who had taken charge of his effects. *In the goods of Wyckoff*, 32 Law J. Rep. (N.S.) Prob. M. & A. 214; 3 Swab. & T. 20.

*Semble*—That when a foreigner dies under such circumstances, the Crown is entitled to the custody of his effects. Ibid.

The Court, under special circumstances, made a grant to a creditor *ad colligenda bona*, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises which would expire before a general grant could be made. *In the goods of Clarkington*, 2 Swab. & T. 380.

(*e*) *Pendente Lite.*

It has hitherto been the practice of the Court to refuse to appoint an administrator *pendente lite*, except a case of necessity is made out, *e.g.* that the estate is in jeopardy. In future the Court will appoint an administrator *pendente lite* in all cases in which it is the practice of the Court of Chancery to appoint a receiver. *Bellew* v. *Bellew*, 34 Law J. Rep. (N.S.) Prob. M. & A. 125; 4 Swab. & T. 58.

In an interest suit between the Queen's Proctor and a defendant, asserting himself to be the lawful nephew of a deceased intestate, the Court appointed A B, who had been made a receiver in respect of the same estates in proceedings in Chancery, to be administrator *pendente lite*, on his affidavit that the estates in certain particulars would be benefited by being dealt with by a person clothed with such authority, and on consent of the parties to the suit. *Her Majesty's Procurator General* v. *Williams*, 2 Swab. & T. 353.

(*f*) *To substantiating Proceedings in Chancery.*

D, as sole executor and universal legatory, obtained confirmation in Scotland of the will of E. H, one of the next-of-kin of E, afterwards instituted a suit in the Court of Probate against D, in which the validity of the will and the rights of D to have the seal affixed to the confirmation was contested. This suit was compromised on certain terms. Disputes as to the meaning and effect of this arrangement having arisen, H, with others, instituted in Chancery an administration suit against D, which was held not to be maintainable for want of a legal personal representative of E. D refusing to ask that the seal of the Court of Probate should be affixed to the confirmation, H applied for administration with the will of E annexed, limited to substantiating the proceedings in equity. The application was resisted, on the grounds, first, that H was not entitled to administration unless by the terms of the compromise she was, in equity, made assignee of D, and therefore that a decree as to the effect of the arrangement should be first obtained, which might be done without the grant of administration; secondly, that by a sequestration granted under the Scotch Bankruptcy Act, all the property of the deceased had vested in a trustee appointed by the Scotch Court:—Held, notwithstanding that, administration limited to substantiating the proceedings in equity should be granted to a nominee of H. *Hawarden* v. *Dunlop*, 31 Law J. Rep. (N.S.) Prob. M. & A. 180; 2 Swab. & T. 614.

In December 1846, A, who was then abroad, was last heard of. In September 1854, B died, and A if then alive would have become entitled to a share of her residuary personal estate, and such share was paid by B's executors into the account of the Accountant General of the Court of Chancery. A had no other personal property in England. Upon application by the next-of-kin of A for general administration,—Held, that as A never acquired a vested interest in B's residuary estate, (the presumption of his death having arisen at the end of seven years from the time when he was last heard of, and consequently prior to September 1854,) and had no other personal property in England, the Court had no jurisdiction to grant general administration, but that administration limited to attend and substantiate proceedings in Chancery might be granted. *In the goods of Turner*, 33 Law J. Rep. (N.S.) Prob. M. & A. 180; 3 Swab. & T. 476.

(*g*) *Where Executor or Person entitled to Administration is out of the Jurisdiction.*

The Court granted limited administration to the personal representative of a legatee, the executor being out of the jurisdiction. *In the goods of Collier*, 31 Law J. Rep. (N.S.) Prob. M. & A. 63; 2 Swab. & T. 444.

Where the persons entitled to administration were resident in one of the Southern States of America, and communication between that State and England was cut off by reason of the civil war between the Southern and Northern States, and the estate was not perishable, but consisted chiefly of money in the funds and in a savings bank, the Court refused to grant administration under section 73. of the 20 & 21 Vict. c. 77. to a nephew of the deceased for the use and benefit of the persons entitled. *In the goods of*

*White*, 31 Law J. Rep. (N.S.) Prob. M. & A. 161; 2 Swab. & T. 457.

(*h*) *When made to Person entitled to a General Grant.*

The Court may, if it think fit, depart from the usual practice of not granting limited administration to a person entitled to a general grant. The district Registrars are, by the rules, bound to adhere to such practice. *Patteson* v. *Hunter*, 30 Law J. Rep. (N.S.) Prob. M. & A. 272.

A, a creditor, insured the life of his debtor, but the policy having by mistake been made payable to the representatives of the deceased, the Court granted administration to A limited to the policy. Ibid.

(*i*) *For Use and Benefit of Minors.*

A died intestate, leaving four children, of whom one was of age, but was abroad, and the other three were minors. An immediate grant of administration being necessary, the Court, under section 73. of 20 & 21 Vict. c. 77, granted administration to the duly-elected guardian of the minors for their use and benefit, limited until one of the children should apply for a grant. *In the goods of Burgess*, 32 Law J. Rep. (N.S.) Prob. M. & A. 158.

The 50th rule of the Rules for the Principal Registry in Non-contentious Business, which directs that "No person who renounces probate of a will or letters of administration, &c., in one character, is to be allowed to take a representation to the deceased in another character," is not absolutely binding on the Court. *In the goods of Loftus*, 33 Law J. Rep. (N.S.) Prob. M. & A. 59; 3 Swab. & T. 307.

It is contrary to the practice of the Court to extend a grant for the use and benefit of minors beyond the time when the eldest of them attains his majority. Ibid.

A testator by his will appointed A and B executors and residuary legatees in trust, and also guardians of his children after the death or second marriage of his widow, and bequeathed the residue of his personal estate to his widow for life, and after her death to his children. A and B renounced probate, and also their right, as residuary legatees in trust, to administration with the will annexed, and such administration was granted to the widow. Upon the death of the widow the Court granted administration with the will annexed *de bonis non* to A and B, as guardians of the children, but refused to extend the grant until the eldest child should attain his majority and should apply for administration. Ibid.

(*k*) *For Use of Next-of-Kin, a Lunatic.*

An intestate whose property was under 1,000*l.* in value left no known relation except a sister, who was of unsound mind, but had not been so found by inquisition, and who had no property of her own. The Court refused to grant administration under the 73rd section of 20 & 21 Vict. c. 77. for the use and benefit of the lunatic to a stranger in blood until the applicant should obtain an order from the Court of Chancery under the 12th section of "The Lunacy Regulation Act, 1862," (25 & 26 Vict. c. 86), rendering the property of the lunatic available for her maintenance and benefit. *In the goods of Slumbers*, 34 Law J. Rep. (N.S.) Prob. M. & A. 93; 4 Swab. & T. 32.

## (C) ADMINISTRATION BOND.

### (*a*) *Penalty.*

#### (1) *Amount.*

Where letters of administration were granted merely to enable a personal representative of the deceased to execute a formal release to the trustee under a marriage settlement, the Court allowed the property to be sworn under 20*l.* *In the goods of Stacpoole*, 30 Law J. Rep. (N.S.) Prob. M. & A. 191; 2 Swab. & T. 316.

A grant of administration with the will annexed to a legatee upon the death of the original executor, and the renunciation of an executor substituted in the event of his death, is a cessate grant, and not a grant *de bonis non*, and the administrator is therefore bound to give security to the amount of double the value of the estate at testator's death, according to the ordinary practice. But where it appeared that the whole of the estate had been distributed with the exception of the legacy to the proposed administrator, the Court, under section 82. of the Probate and Administration Act, made the grant upon security being given to the amount of double the value of the property remaining unadministered. *In the goods of Fozard*, 32 Law J. Rep. (N.S.) Prob. M. & A. 160; 3 Swab. & T. 173.

Where under a misapprehension as to the value of the personal estate of an intestate, the penalty of an administration bond was too large, the Court upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the registry, in order that it might be cancelled. *In the goods of Goold*, 34 Law J. Rep. (N.S.) Prob. M. & A. 105; 4 Swab. & T. 20.

#### (2) *Reducing the Penalty.*

A died intestate, leaving personalty sworn under the value of 6,000*l.* A's father, who was his only next-of-kin and the only person entitled in distribution, being unable to procure sureties to a bond in a penalty for double the amount of the estate, the Court accepted two sureties in the sum of 1,000*l.* each. *In the goods of M'Donald*, 32 Law J. Rep. (N.S.) Prob. M. & A. 132.

A died intestate, leaving B his only next-of-kin and solely entitled in distribution. His personal estate was of the value of about 55*l.*, and it seemed that he had no debts. B being unable through poverty to obtain sureties to the amount of 200*l.*, the penalty of the requisite bond, the Court under section 82. of 20 & 21 Vict. c. 77, reduced the penalty to 60*l.* *In the goods of Harrigan*, 32 Law J. Rep. (N.S.) Prob. M. & A. 204.

### (*b*) *Sureties.*

Where, the chain of representation being broken, the unadministered estate of a testator had been transferred into the name of the Accountant General of the Court of Chancery, the Court of Probate made a grant *de bonis non* to the residuary legatee for life without requiring sureties to the administration bond. *In the goods of Cleverly*, 31 Law J. Rep. (N.S.) Prob. M. & A. 53; 2 Swab. & T. 335.

The Court of Probate has nothing to do with the amount under which an estate is to be sworn. Ibid.

The executors of a will being resident abroad,

they appointed persons resident in Scotland as their attorneys to take out administration with the will annexed. The attorneys being unable to procure sureties to the bond resident in England, the Court accepted sureties resident in Scotland. *In the goods of Ballingall*, 32 Law J. Rep. (N.S.) Prob. M. & A. 138.

The Court will not allow residents in Scotland to be sureties to an administration bond. The case *In the goods of Ballingall* overruled. *Herbert* v. *Shiell*, 33 Law J. Rep. (N.S.) Prob. M. & A. 142; 3 Swab. & T. 479.

In order to obtain payment of a sum of money standing in the name of the Accountant General of the Court of Chancery, to which A was beneficially entitled, it was requisite that he should take out letters of administration *de bonis non* with the will annexed; but in consequence of his poverty and want of friends he was unable to procure sureties to the usual administration bond. The fund in Chancery, being the only property to the possession of which the deceased would become entitled under the grant, the Court, under section 81. of 20 & 21 Vict. c. 77, dispensed with sureties to the bond. *In the goods of De la Farque*, 31 Law J. Rep. (N.S.) Prob. M. & A. 199; 2 Swab. & T. 631.

(c) *Cannot be dispensed with.*

The Court has no power under any circumstances to dispense with an administration bond. *In the goods of Powis*, 34 Law J. Rep. (N.S.) Prob. M. & A. 55.

Where security had already been given by the applicant as committee in lunacy, the Court required a bond for one-fourth of the property, with two sureties, each in one-half the amount. Ibid.

(d) *Assignment of.*

Upon affidavits shewing a breach of the condition of an administration bond, the Court, under 20 & 21 Vict. c. 77. s. 83, allowed a citation to issue, calling upon one of the sureties to shew cause why it should not be assigned, in order that it might be put in suit against him. *Marshman* v. *Brookes*, 32 Law J. Rep. (N.S.) Prob. M. & A. 25.

An administration bond under the Probate Act (20 & 21 Vict. c. 77), s. 81, in the form given by the rules, when assigned to a creditor under section 83, can only be enforced by him for the benefit of all parties interested in the deceased's estate, and not to recover the creditor's individual debt, although he allege that there has been a devastavit; the statute not having altered the old law as to administration bonds, except so far as enabling the Court of Probate to order them to be assigned. *Sandrey* v. *Michell*, 32 Law J. Rep. (N.S.) Q.B. 100; 3 Best & S. 405.

The proper mode of proceeding to obtain the assignment of an administration bond under section 83. of the 20 & 21 Vict. c. 77, in order that it may be put in suit, is to move, upon affidavits shewing a breach of the condition of the bond, for a rule *nisi* calling upon the sureties to shew cause why the Court should not order that the bond be assigned to some person named in the rule. It is not necessary that the sureties be cited. *In the goods of Jones*, 32 Law J. Rep. (N.S.) Prob. M. & A. 26; 3 Swab. & T. 28.

(e) *Action on.*

An administration bond, forfeited before the bankruptcy of the administrator, is not proveable under "The Bankrupt Law Consolidation Act, 1849," and consequently a certificate under that act is no bar to an action on the bond. *Marshman* v. *Brookes*, 3 Hurls. & C. 908.

(D) RIGHTS AND DUTIES.

(a) *Undisposed of Estate.*

A testator gave legacies to his executors, and followed the gift by a bequest to them of the whole of his estate charged with the payment of divers legacies, and he directed that all the costs and expenses they incurred should be borne by any money they might have from any part of his estate; upon a bill by the next-of-kin for an administration of the estate:—Held, by the Master of the Rolls, and affirmed on appeal (one of the Lords Justices agreeing with his Honour), that the executors were not entitled to the residue beneficially, but as trustees; and that after payment of the legacies and their costs, &c., the next-of-kin of the testator were entitled to the residue. *Saltmarsh* v. *Barrett*, 30 Law J. Rep. (N.S.) Chanc. 853; 3 De Gex, F. & J. 279.

A testator, by his will, said "I make my nephew, H C J, my whole and sole executor of all the various properties I may be possessed of at my death." The will contained no gift or bequest. Upon demurrer to a bill by the next-of-kin,—Held, that the executor was not entitled to any beneficial interest in the personal property, that he was a trustee for the next-of-kin, and that, under the 11 Geo. 4. & 1 Will. 4. c. 40, no implication could be raised, but that he was bound to shew, from the will itself, that he was to take beneficially. *Juler* v. *Juler*, 30 Law J. Rep. (N.S.) Chanc. 142; 29 Beav. 34.

A testator bequeathed an annuity to his wife to be paid out of his effects, the executors of his will to give security for the same. He then made bequests to three of his nine children, and stated why he did not provide for three others; he then appointed certain strangers to be trustees and his three remaining children to be executors. The will contained no gift of residue:—Held, that there was sufficient on the face of the will to shew that the executors were intended to take beneficially. *Harrison* v. *Harrison*, 33 Law J. Rep. (N.S.) Chanc. 647; 2 Hem. & M. 237.

(b) *Debts due from the Estate.*

Where executors had confessed judgment in an action brought against them to recover a debt barred by lapse of time and had paid the debt, it was held, in an administration suit, that they were entitled to be allowed such payment. *In re Freer's Estate; Hunter* v. *Baxter*, 31 Law J. Rep. (N.S.) Chanc. 432; 3 Giff. 214.

After an administration decree, an executor has no right, as against the parties interested in the estate, to give an acknowledgment to take out of the operation of the statute a debt barred by the Statute of Limitations. *Phillips* v. *Beal*, 32 Beav. 26.

(c) *Debts due to the Estate.*

If a legatee in reversion has involved dealings with a stranger who is indebted to the estate of the testa-

tor, from which the legacy proceeds, a promissory note given by the legatee to the executors as a collateral security for the amount of the stranger's debt will not enable them to retain the legacy, if a creditor of the legatee having a *bona fide* charge upon the legacy requires it to be invested. *Smee* v. *Baines*, 31 Law J. Rep. (N.S.) Chanc. 63; 29 Beav. 661.

One of several executors, contrary to the wishes of the others, compromised a debt of their testator, from which a benefit might result to himself. Upon a bill by his co-executors,—Held, that it was not binding on the estate of the testator, and that it must be set aside. *Stott* v. *Lord*, 31 Law J. Rep. (N.S.) Chanc. 391.

(*d*) *Carrying on Testator's Domestic Establishment.*

Executors must be allowed a reasonable time for breaking up a testator's domestic establishment, and discharging his servants. Two months held not to be an unreasonable delay having regard to circumstances. *Field* v. *Peckett* (No. 3), 29 Beav. 576.

(*e*) *Selling and Pledging Estate.*

The concurrence of executors having under a will an implied power of sale for payment of debts, is not necessary to a conveyance by a devisee in trust for sale under the same will. *Hodkinson* v. *Quinn*, 30 Law J. Rep. (N.S.) Chanc. 118; 1 Jo. & H. 303.

The Master of the Rolls having held, that a power to sell real estate will not be implied upon a mere direction by a testator that his executrix shall pay his debts, though the estate was devised to her that she should receive the rents and benefits for life, and if insufficient for her, then that she might mortgage the estate so far as needful for her maintenance, the Lords Justices, on appeal, affirmed the decision, holding that the executrix could not make a good title to a purchaser of the fee-simple of part of the estate. *Cook* v. *Dawson*, 30 Law J. Rep. (N.S.) Chanc. 359; 3 De Gex, F. & J. 127.

Although executors can make an assignment and give a receipt for purchase-money, which was binding, yet a purchaser is not bound to pay the purchase-money till probate, because till the evidence of title exists the executors cannot give a complete indemnity. *Newton* v. *the Metropolitan Rail. Co.*, 1 Dr. & S. 583.

An executor, who was also a legatee, borrowed 500*l.* and gave the lender a memorandum reciting that the money was borrowed for purposes of the will, and agreeing to charge the trust estate, so far as he could and lawfully might, and his legacy and a policy, which was part of the assets, with the repayment, and to execute a mortgage. Afterwards the executor borrowed from the same person 400*l.*, and by a deed reciting the will and stating certain sums to be due from the estate to the executor and that the executor owed the lender 900*l.* The executor assigned to the lender all sums mentioned to be due from the estate to the executor by way of security for the 900*l.*, with interest:—Held, that the lender had by this deed given up such claim, if any, against the testator's estate as he had under the memorandum, and could only establish a security upon the executor's beneficial interest. *In re Brettle*, *Brettle* v. *Burdett*, 2 De Gex, Jo. & S. 244.

A testator, "in case his personal estate should be insufficient for the payment of his debts," charged them upon his real estate:—Held, that the executor had an implied power to sell and give valid receipt for the purchase-money without shewing the insufficiency of the personal estate. *Greetham* v. *Colton*, 34 Beav. 615.

Held, also, that the lapse of thirteen years between the death and the sale did not affect the executor's power. Ibid.

(*f*) *Legacy to Executor.*

One of two executors, to whom a legacy was bequeathed, renounced in 1853, but afterwards, in 1859, he retracted and proved the will. An administration suit was subsequently instituted against him as executor, and, it appearing that the estate had not been administered when the executor proved, he was held entitled to his legacy, but with interest only from the time of proving. *Angermann* v. *Ford*, 29 Beav. 349.

An executor who is incapacitated by illness from acting, and dies without acting, is not entitled to a legacy given to him for his trouble. *In re Hawkins*, 34 Law J. Rep. (N.S.) Chanc. 80; 33 Beav. 570.

(*g*) *Indemnity.*

Executors bringing facts plainly before the Court and distributing the assets under its direction are absolutely protected against any future claims, and the only remedy of a creditor on covenant or otherwise, is against the legatees. *Bennett* v. *Lytton*, 2 Jo. & H. 155.

Where part of the estate had consisted of leaseholds held at a profit rent, the estate was ordered to be distributed without retaining assets to indemnify the executors against liability on the covenants. Ibid.

The order of the Court, made in an administration suit, directing distribution of a testator's estate, is a complete indemnity to executors against claims by third parties; and the Court, in requiring funds to be set apart or undertakings given, has in view, not the protection of the executor, but the possible rights of third parties. *Williams* v. *Headland*, 34 Law J. Rep. (N.S.) Chanc. 20; 4 Giff. 505.

Proceeds of sale of the testator's residuary estate ordered to be paid to the residuary legatees upon their personal undertaking to make good any claim that might arise in respect of shares in a joint-stock company sold by the executors, but not transferred into the purchaser's name. Ibid.

(E) LIABILITIES.

(*a*) *For Sums improperly dealt with.*

An executrix allowed 190*l.* (part of the estate) to remain at the bankers' in her name as executrix. A loss occurred by their bankruptcy a year after the testator's death:—Held, that she was not personally liable for the loss. *Swinfen* v. *Swinfen* (No. 5), 29 Beav. 211.

Executors were made personally liable for a loss arising from placing trust moneys with bankers on a deposit account, which was not authorized by the will, and this notwithstanding a clause indemnifying the trustees against losses by a banker of moneys deposited for safe custody. *Rehden* v. *Wesley*, 29 Beav. 213.

A testator died in August, 1861, and his executors remitted to their solicitor 80*l.* to obtain probate, and 25*l.* to pay legacy duty. The solicitor became bank-

rupt in November, 1861, and the money was lost. The Court allowed the executors the 80*l.*, but not the 25*l.*, the latter advance being premature, the legacies not having yet (1863) been paid. *Castle* v. *Warland*, 32 Beav. 660.

A promissory note given to a creditor by one of the executors in the name of the testator's firm while the executor was carrying on the business pursuant to directions in the will, but was ignorant that the estate was insolvent,—Held, personally binding on the executors. *Lucas* v. *Williams*, 3 Giff. 150.

An administrator having advanced a sum consisting partly of the intestate's and partly of his own moneys on a security which it was apprehended would prove deficient,—Held, that the deficiency, if any, must be borne by his own share of the moneys advanced in exoneration of the intestate's estate. *Lambe* v. *Orton*, 33 Law J. Rep. (N.S.) Chanc. 81.

An executor who allows his testator's estate to become insolvent, by keeping an account at a banker's at compound interest, will not be allowed the accumulated interest in passing his accounts. *Bate* v. *Robins*, 32 Beav. 73.

A testator, by his will, made A and B his executors. B died, and a suit was instituted to administer his estate. After decree and report made in this suit, but before B's assets had been distributed, a residuary legatee of the original testator filed a bill against A and the personal representative of B, seeking to fix A and the estate of B with liability in respect of balances improperly retained by A and B as executors:—Held, that notwithstanding the pendency of the former suit, a decree in the latter suit directing accounts as against A and B's personal representative, was properly made. *Birks* v. *Micklethwait*, 34 Law J. Rep. (N.S.) Chanc. 362.

### (*b*) *Legacies and Charges on Legacies.*

A trustee or executor, when he receives notice that a legatee has charged his legacy, is bound to withhold all further payments to that legatee. All right of set-off and adjustment of equities between the legatee and the executor, existing at the date of the notice, have priority over the charge, but the trustees can create no new charges or rights of set-off after that time. *Stephens* v. *Venables*, 30 Beav. 625.

Executors granted a lease of part of the testator's property to a legatee, who afterwards incumbered his legacy. Notice of the charge having been given to the executors,—Held, that they had, as against the mortgagee, a right to set off the rent due from the legatee at the date of the notice, but not subsequent rents. Ibid.

A legatee charged the share to which he was entitled, under his father's will, to A B, who gave notice to the executor. The executor indorsed on the notice that he had no objection to pay the money "that might become due" to the legatee "on the final distribution of his father's property." There was at this time a prior charge, of which the executor had notice, but he did not disclose it to A B. The executor on a subsequent occasion also represented that the legatee's share would certainly be as much as 1,500*l.*, which estimate turned out to be erroneous:—Held, that the executor was not liable for the suppression of the existence of the first charge or bound to make good the representation as to the value of the share. *Stephens* v. *Venables*, 31 Beav. 124.

A testator authorized his executor to advance any part, not exceeding one half, of the presumptive share of his children towards their maintenance and advancement. The estate being very small, the executor advanced more than the whole. The estate being insufficient to repay the amount to the executor, the Court in a suit by a child for administration gave priority to the costs of the suit, but gave the surplus to the executor in part payment of his advances. *Robison* v. *Killey*, 30 Beav. 520.

By a will legacies were given, some immediate and others to be paid to persons in succession. All trust moneys were directed to be invested in the public funds or on real securities. The executors, twelve months after the death, paid all the immediate legacies, and invested the remainder of the trust funds in a neighbouring bank. Two months afterwards the bank stopped payment, and a loss was sustained by which the trust funds became insufficient to pay the deferred legacies. The executors filed a bill to have accounts taken, and that the loss might be apportioned among the deferred legatees. One of the Vice Chancellors having decided that the loss must fall on the executor, and that he must pay the costs of the suit, on appeal, the Lords Justices held that, as there was no imputation on the good faith of the executor, and as he could not obtain a settlement of his accounts with the legatees, he was justified in filing the bill, and that the loss must fall upon the deferred legatees, who must bear among themselves rateably the loss of the failure of the bank, and not throw any part of the loss on the satisfied legatees. As to costs, those arising from the failure of the bank must be refused to the executor, and as to the general administration he could only be allowed those out of pocket. *Fenwick* v. *Clarke*, 31 Law J. Rep. (N.S.) Chanc. 728.

### (*c*) *Interest.*

If an executor pays a sum of money under an erroneous impression of the law, he will not, when ordered to replace it, be required to pay interest. *Saltmarsh* v. *Barrett*, 31 Law J. Rep. (N.S.) Chanc. 783; 31 Beav. 349.

Executors having retained in their hands large balances arising from the estate without investing them, an inquiry was directed as to the propriety of their conduct, and they were charged with interest at 4*l.* per cent. upon a portion of such balances:—Held, that, in pursuance of the general principle, the executors could not be allowed the costs occasioned by the inquiry. *Colyer* v. *Colyer*, 32 Law J. Rep. (N.S.) Chanc. 101.

An administrator who had, without reason, sold out stock specifically bequeathed to an infant and retained the produce after an order for payment, was charged with compound interest. *Walrond* v. *Walrond*, 29 Beav. 586.

### (*d*) *Costs.*

To an administration suit the executors put in their answer, alleging that the suit was vexatious, and that nothing was due, and resisted the demand for an account; but an account being decreed they claimed first 400*l.* and subsequently 60*l.*, but the chief clerk having certified that 220*l.* was due from

them, the Court ordered them to pay the costs of the suit. *Eglin* v. *Sanderson*, 3 Giff. 434.

After decree in a creditors' suit against the executors of a deceased testator a bill was filed by a residuary legatee seeking to charge the executors in respect of balances improperly retained, and under a decree made in the latter suit (adopting the accounts in the creditors' suit, but giving leave to surcharge and falsify) large balances were found due from the executors:—Held, that the executors ought not, even upon the condition of making good the balances, to be allowed any costs in the latter suit. *Birks* v. *Micklethwait*, 34 Law J. Rep. (N.S.) Chanc. 362.

Profit costs were disallowed to an executor who had acted as his own solicitor, upon an objection taken by a creditor who was a party to the suit. *Pollard* v. *Doyle*, 1 Dr. & S. 319.

### (F) RENUNCIATION.

The Court of Probate will not recognize an agreement by an executor to renounce. *Hargreaves* v. *Wood*, 32 Law J. Rep. (N.S.) Prob. M. & A. 8; 2 Swab. & T. 602.

Therefore, where at the trial at the assizes of issues in a testamentary suit the suit was compromised on certain terms, *inter alia*, that two of the executors named in the will should renounce, and that the agreement should be made a rule of court, and these terms were embodied in an order of Nisi Prius, the Court refused to make the order a rule of court. Ibid.

An executor cannot renounce after he has taken probate. An executor under the will of a testator domiciled in Portugal accepted the executorship in that country, and also obtained probate in England. Becoming afterwards, through age and infirmity, incapable of acting, a competent Portuguese tribunal permitted him to renounce the executorship and appointed A to act as executor in his stead. Upon application for a grant to A of administration *de bonis non* with the will annexed,—Held, that the renunciation of the executor, though sanctioned by the law of Portugal, could not be recognized in this country, and that A therefore was not entitled to the grant prayed. *In the goods of Veiga*, 32 Law J. Rep. (N.S.) Prob. M. & A. 9; 3 Swab. & T. 13.

A testator appointed A, who was resident abroad, his executor; A, by letter, renounced probate. The Court treated this as a valid renunciation, though not under seal, but ordered the letter to be recorded. *In the goods of Boyle*, 33 Law J. Rep. (N.S.) Prob. M. & A. 109; 3 Swab. & T. 426.

A, resident abroad, being entitled to administration, executed a power of attorney, expressly authorizing B to execute, on his behalf, a renunciation and consent. The Court acted on a renunciation and consent executed by B under such power. *In the goods of Rosser*, 33 Law J. Rep. (N.S.) Prob. M. & A. 155; 3 Swab. & T. 490.

B appointed C and D executors and residuary legatees in trust, his widow residuary legatee for life or widowhood, and C, D, E, F and G substituted residuary legatees. C and D renounced probate and administration as executors and residuary legatees in trust, and letters of administration with the will annexed were granted to the widow; she died, leaving part of the estate unadministered. The Court refused to allow C to retract his renunciation as residuary legatee in trust, but granted him administration *de bonis non* as substituted residuary legatee. *In the goods of Morrison*, 2 Swab. & T. 129.

### (G) ACTIONS AND SUITS.

In an administration suit an inquiry as to wilful default will not be directed upon a mere general allegation of neglect. Some particular instance must be alleged and proved, so as to raise at all events a case of suspicion in the mind of the Court. *Massey* v. *Massey*, 32 Law J. Rep. (N.S.) Chanc. 13; 2 Jo. & H. 728.

In a suit by B, the personal representative of a residuary legatee under A's will, for the administration of A's estate, an order was made by the Master of the Rolls for the payment by C, the survivor of the two executors of A's will, of the balance due from both executors on their joint account with interest to be certified. The order gave liberty to B to prove in a suit, pending before *Stuart, V.C.*, for the administration of the estate of A's deceased executor, as a creditor on the estate of the latter for the balance due on joint account, and interest thereon; but B was directed by the order to pay what he should receive on his proof to the credit of his own suit, to a special account. C then paid a large part of the debt due to A's estate on the joint account. Subsequently to such payment B was admitted by an order in the suit before *Stuart, V.C.* as a creditor for the amount stated in a certificate (also made subsequently to the payment by C) by the chief clerk of the Master of the Rolls to be due under the order made by the Master of the Rolls; and a motion to discharge this order after the remainder of the debt due from A's executors had been paid by C was refused by *Stuart, V.C.*, with costs. On appeal, both the orders made by the Vice Chancellor were discharged with costs. *Micklethwait* v. *Winstanley*, 34 Law J. Rep. (N.S.) Chanc. 281.

Per *Turner, L.J.*—The effect of the payment into court by the survivor of two executors of a debt due by them jointly to their testator's estate, is to discharge also the estate of the deceased executor; and an order giving liberty to the person entitled to the testator's estate to prove for that debt in a suit for the administration of the deceased executor's estate, cannot after such payment be acted upon. Ibid.

In an interest suit, instituted by the Queen's Proctor, who alleged that M E, the deceased, died a widow, without lawful issue, intestate, and a bastard, the defendant, who claimed as nephew of the deceased, pleaded that M E was not a bastard; that she was the legitimate child of S W and Mary his wife; that S W and Mary, his wife, had one other lawful child, of whom the defendant was the lawful child:—Held, that the plea was sufficient, and that it was not necessary that the time and place of the birth of the deceased's parents should be alleged. *Her Majesty's Procurator General* v. *Williams*, 31 Law J. Rep. (N.S.) Prob. M. & A. 90; 2 Swab. & T. 465.

In a suit for administration, instituted on behalf of the Crown by the Queen's Proctor, who alleges that the deceased died a bastard, &c., a defendant, who claims to be next-of-kin of the deceased, must, in his plea, set out his pedigree, but in doing so, particulars as to the time and place of a marriage

and the date of a birth need not be alleged. *Her Majesty's Procurator General* v. *Wallis*, 31 Law J. Rep. (N.S.) Prob. M. & A. 97; 2 Swab. & T. 466.

The defeodant, in setting out his pedigree, alleged *inter alia* that "the deceased was the legitimate daughter of Francis Godman Capell by his lawful wife." On motion for an order that the plea should be amended by setting out when, where and to whom F G C was married, and the date of the deceased's birth,—Held, that the plea was sufficient. Ibid.

### (H) Costs.

A next-of-kin, after making inquiries for a will and waiting for five months to see whether a will was forthcoming, took out administration. The person of whom he had made inquiries then produced a will and propounded it as a legatee, and the administrator put him upon proof in solemn form. The Court revoked the administration and pronounced for the will, but allowed the next-of-kin's costs of obtaining administration and of the suit out of the estate, no explanation being given of the delay in producing the will. *Smith* v. *Smith*, 34 Law J. Rep. (N.S.) Prob. M. & A. 57; 4 Swab. & T. 3.

### (I) Practice.

#### (a) *Affidavits.*

An affidavit sworn before a notary abroad, will not be admitted unless it appears on affidavit that there was not at the place where it was sworn a British consul or other officer empowered by 18 & 19 Vict. c. 42. to take affidavits, and that a notary had by the law of such place authority to take affidavits. *In the goods of Bernard*, 31 Law J. Rep. (N.S.) Prob. M. & A. 89; 2 Swab. & T. 489.

An affidavit in which the addition or place of abode of a deponent is not inserted will not be admitted. Ibid.

An executrix in the oath for executors was described as "the lawful widow and relict of the deceased": this was held a sufficient description of her as a widow. *In the goods of Morgan*, 32 Law J. Rep. (N.S.) Prob. M. & A. 139.

The administrator's oath and affidavit for Commissioners of Inland Revenue were prepared in England and sent to New Zealand to be sworn by the widow of a deceased. When they reached New Zealand she had gone to reside at Hobart Town, whence they were returned to England duly sworn, but in them were interlineations, which had been inserted in consequence of the widow's change of residence, and against which the Judge before whom they were sworn had not set his initials. The Court under Rule 58. of the New Rules in Non-Contentious Business, allowed the oath and affidavit to be filed. The deponent in an affidavit was described as "the lawful widow and relict of the said deceased":—Held, that it was a sufficient description of her as widow. *In the goods of King*, 32 Law J. Rep. (N.S.) Prob. M. & A. 14; 2 Swab. & T. 621.

#### (b) *Citation.*

A citation ought to be served upon a married woman in the presence of her husband. *Herbert* v. *Shiell*, 33 Law J. Rep. (N.S.) Prob. M. & A. 142; 3 Swab. & T. 479.

Where a citation, calling on a married woman to accept or refuse administration, had not been so served, but a renunciation had been duly executed by her and by her husband, the Court made a grant without requiring fresh service. Ibid.

Service of a citation by a party to a suit is insufficient. *Glyde* v. *Davie*, 33 Law J. Rep. (N.S.) Prob. M. & A. 184.

In order to obtain administration of the effects of a married woman who dies intestate after obtaining a protection order from the Court of Divorce, it is not necessary that the husband should be cited. *In the goods of Farraday* distinguished. *In the goods of Brighton*, 34 Law J. Rep. (N.S.) Prob. M. & A. 55.

When the estate of the deceased, who died without any known relation, was barely sufficient to pay his liabilities, and a citation had been issued and served on behalf of a creditor upon the Queen's Proctor and by advertisement, but had been lost or destroyed by his solicitor's clerk, who had absconded for embezzlement, the Court dispensed with the rule requiring the citation to be returned into the registry, and made the grant of administration to the creditor. *In the goods of Robinson*, 4 Swab. & T. 43.

#### (c) *Isle of Man Grant.*

In the Isle of Man officers called "Sumners" are appointed in each parish by the bishop of the diocese, whose duty it is (*inter alia*) to take upon themselves grants of administration with the wills annexed, in the event of executors refusing to act, or being unable to give security to the Ecclesiastical Court of the diocese. A died in the Isle of Man, leaving a will, whereof he appointed executors. The executors being unable to give security to the Ecclesiastical Court of the diocese, administration with the will annexed was then granted to B, Sumner for the parish in which A died. The executors having been cited, and not appearing, the Court, upon an affidavit as to the circumstances under which the grant was made to B, and upon B's consent being filed in the registry, granted administration with the will annexed to the residuary legatee. *Cubbon* v. *Steele, in the goods of Whiston*, 30 Law J. Rep. (N.S.) Prob. M. & A. 192; 2 Swab. & T. 318.

#### (d) *Re-sealing.*

A died in Ireland, possessed of personal property in England, and the Irish Court of Probate granted administration of his effects to B, no will having been found. Afterwards C propounded in this court a will of the deceased; B opposed it, and obtained a verdict upon issues raised by him. Upon the application of B the Court ordered the Irish grant of administration to be delivered out of the registry in order that it might be re-sealed by this Court under the 20 & 21 Vict. c. 79. s. 95. *Divenny* v. *Corcoran*, 32 Law J. Rep. (N.S.) Prob. M. & A. 26.

#### (e) *Power of Attorney.*

It is not necessary that a power of attorney to take out administration should be under seal. *In the goods of Morley*, 33 Law J. Rep. (N.S.) Prob. M. & A. 108; 3 Swab. & T. 425.

#### (f) *Justifying Security.*

Where justifying security had been ordered, and it appeared that though the estate had been sworn under 2,000*l.*, its actual value was only 800*l.*, the

Court allowed the sureties to justify for double the amount of the actual value, instead of double the amount under which the estate was sworn. *England* v. *Wall*, 31 Law J. Rep. (N.S.) Prob. M. & A. 16.

Where the beneficial residuary legatees were minors, and the value of the residue was about 8,000*l.*, subject to a mortgage of 3,900*l.*, the Court granted administration with the will annexed *de bonis non* to a contingent legatee, and reduced the amount for which the sureties would have had to justify to 1,000*l.* each; it appearing that justifying security to a greater amount could not be given, that the grant was for the interest of the minors, and that their guardians did not oppose. *In the goods of Fraser*, 33 Law J. Rep. (N.S.) Prob. M. & A. 57.

(*g*) *Attachment.*

An administrator in custody under an attachment, obtained by the persons entitled in distribution, for not filing an inventory, is not entitled to be discharged from custody upon his filing such inventory, except upon payment of costs. *Marshman* v. *Brookes*, 31 Law J. Rep. (N.S.) Prob. M. & A. 95.

An attachment will be granted against a married woman for non-compliance with a citation, calling upon her to file an inventory in the registry of an estate of which she is administratrix. *Baker* v. *Baker*, 2 Swab. & T. 380.

As a general rule an attachment for disobeying an order of the Court will not be granted unless the order has been personally served. *Williams* v. *Davies*, 33 Law J. Rep. (N.S.) Prob. M. & A. 127; 3 Swab. & T. 437.

An order that a defendant, "as administratrix of the effects of the deceased," do pay the plaintiff's costs of a suit, is tantamount to an order that such costs should be paid out of the estate, and does not render the plaintiff personally liable. Where, therefore, such an order was made, and there were no assets, the Court refused an attachment for non-payment of the plaintiff's costs. Ibid.

Money deposited in a bank by a husband, in the joint names of himself and his wife, as a provision for her in case of his death, upon his death becomes the absolute property of the wife. Ibid.

## EXTRADITION TREATY.

Convention between Her Majesty and the King of Denmark for the mutual surrender of criminals. 25 & 26 Vict. c. 70.

*Piracy.*

By the 1st section of 6 & 7 Vict. c. 76, (an act passed for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders) it is enacted, that in case requisition shall at any time be made by the authority of the United States, in pursuance of and according to the said treaty, for the delivery of any person charged with the crime of murder, or with the crime of piracy, &c., committed within the jurisdiction of the United States of America, who shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State, &c., by warrant under his hand and seal, to signify that such requisition has been so made, and to require all Justices, &c. to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol, for the purpose of being delivered up to justice, &c.—Held (*dissentiente Cockburn, C.J.*), that the term "piracy" means such an offence as by the municipal laws of the United States is constituted piracy, and is within the exclusive jurisdiction of the United States. Therefore, where a requisition had been made by the authority of the United States for the extradition of certain persons in England who were charged "with the crime of piracy on the high seas," and it appeared that such persons had, supposing they had committed the crime of piracy at all, committed such a crime as would amount to piracy by the law of nations,—Held, that this country ought not to give them up; and that having been apprehended and detained in custody under the warrant of a Justice in England, they were entitled to be discharged. *In re Ternan*, 33 Law J. Rep. (N.S.) M.C. 201; 5 Best & S. 645.

Held, also, that such a warrant was sufficient if made in the form given by the 8 & 9 Vict. c. 120. Ibid.

*Forgery.*

By section 1. of 6 & 7 Vict. c. 76, provision is made for the committal in this country, with a view to being delivered up to justice in the United States of America, of persons charged with the crime of murder, forgery, &c. By a statute of the State of New York, "Every person who, with intent to defraud, shall make any false entry . . . . in any book of account kept by any monied corporation within this State . . . . shall, upon conviction, be adjudged guilty of forgery in the third degree." A requisition was made by the Government of the United States for the extradition from this country of a person who was charged with committing the offence of forgery under the above statute:—Held, that inasmuch as the offence committed did not amount to forgery by the law of England and of the United States (the two contracting parties to the Treaty of Extradition referred to in the 6 & 7 Vict. c. 76. s. 1), the person charged was not liable to be given up by this country. *In re Windsor*, 34 Law J. Rep. (N.S.) M.C. 163; 6 Best & S. 522.

## FACTORS' ACT.

(A) "Goods" within the Act.
(B) Agent intrusted with the Possession of Goods.
(C) Transactions protected by the Act.

(A) "Goods" within the Act.

Certificates of railway stock are not "goods" within the meaning of the Factors' Act, 5 & 6 Vict. c. 39. *Freeman* v. *Appleyard*, 32 Law J. Rep. (N.S.) Exch. 175.

(B) Agent intrusted with the Possession of Goods.

By 6 Geo. 4. c. 94. s. 4, it shall be lawful to and for any person "to contract with any agent or agents,

intrusted with any goods, wares and merchandise, or to whom the same may be consigned, for the purchase of any such goods, wares or merchandise, and to receive the same of and pay for the same to such agent or agents; and such contract and payment shall be binding upon and good against the owner of such goods, wares and merchandise, notwithstanding such person shall have notice that the person or persons making and entering into such contract, or on whose behalf such contract is made or entered into, is an agent or agents. Provided such contract and payment be made in the usual and ordinary course of business, and that such person shall not when such contract is entered into, or payment made, have notice that such agent or agents is or are not authorized to sell the said goods, wares and merchandise, or to receive the said purchase-money." The plaintiffs, who were cloth-manufacturers, were informed by E, who was a factor and commission agent, that he could get them a customer for some of their goods, giving the name of Sykes as that of the intended purchaser. It is a common practice for manufacturers to send their goods to agents, who warehouse them, and sell them in their own names. The plaintiffs, believing the representations of E, sent parcels of goods from time to time to his warehouse, where he was to see them "perched," and was then to transmit them to Sykes. The statements made by E with reference to Sykes were untrue, and he sold the goods to the defendants, who purchased them *bona fide:*—Held, by *Wightman, J.* and *Crompton, J.*, that E was an agent intrusted with the goods within the meaning of the above section, and that therefore the purchase by the defendants was protected. Held, by *Blackburn, J.*, that at any rate the question ought to be left to the jury to say whether or not the facts shewed that he was such an agent, and whether it was in the ordinary course of business that the sale had taken place. *Baines* v. *Swainson*, 32 Law J. Rep. (N.S.) Q.B. 281; 4 Best & S. 270.

A, who transacted business on commission, but whose ordinary business was not to sell on commission, was intrusted by the defendant with some pictures. Either at that time or afterwards the defendant directed A to sell the pictures. Subsequently A, in fraud of the defendant, pledged the pictures with the plaintiff:—Held, that the plaintiff was entitled to retain the pictures as against the defendant till his advance was repaid, for that A was an "agent intrusted with the possession of goods" within the meaning of the Factors' Act (5 & 6 Vict. c. 39), s. 1. *Hayman* v. *Flewker*, 32 Law J. Rep. (N.S.) C.P. 132; 13 Com. B. Rep. N.S. 519.

(C) TRANSACTIONS PROTECTED BY THE ACT.

The defendants, bankers, having at the request of J L made advances to S L, and having a lien on certain goods in their possession in respect thereof, it was agreed between the bankers and J L that in consideration of the delivery of those goods to J L the latter should deliver to the bankers certain other goods intrusted to J L by the plaintiff, his principal, to be held as a lien by the defendants in place of the other goods, and also in respect of any future advances to be made to S L, and which J L then requested the bankers to make, and which agreement was carried out, and further advances made to S L in pursuance of such request:—Held, that the bankers having no notice of the plaintiff's title, the transaction was protected by the Factors' Act, 5 & 6 Vict. c. 39. *Sheppard* v. *the Union Bank of London*, 31 Law J. Rep. (N.S.) Exch. 154; 7 Hurls. & N. 661.

To a plea setting up the above facts in answer to an action of detinue by the owner of the goods against the bankers, the plaintiff replied—First, that he was induced to intrust J L with the possession of the goods by the fraud of J L. Secondly, that the agreement by J L to deliver the goods by way of pledge was not made, nor were the goods delivered to the defendants in the usual and ordinary course of business. Thirdly, that the goods first deposited with the defendants were not J L's goods, nor had the defendants any lien thereon from J L:—Held, that the facts disclosed by the plea constituted an answer to the action under the Factors' Act, and that neither replication avoided that plea. Ibid.

## FACTORY.

[The employment of women and children during the night in bleaching by the open-air process prevented by 25 Vict. c. 8.—The employment of women and children in lace factories placed under the regulations of the Factories Acts by 24 & 25 Vict. c. 117.—The Act for placing the Employment of Women and Children in Bleaching Works and Dyeing Works under the Regulations of the Factories Acts amended by 26 & 27 Vict. c. 38.—The provisions of the Bleaching and Dyeing Works Act, 1860, extended by 27 & 28 Vict. c. 98.—The Factory Acts extended by 27 & 28 Vict. c. 48.]

(A) WHAT MANUFACTORIES ARE WITHIN THE FACTORY ACT.
(B) EMPLOYMENT OF CHILDREN.
(C) REGISTER OF YOUNG PERSONS.

(A) WHAT MANUFACTORIES ARE WITHIN THE FACTORY ACT.

[See *post*, (C).]

A mill belonging to the respondents, situate at Manchester, was used for the manufacture of cotton-waste and other similar materials into a substance known as "half-stuff." This substance is frequently made up into wadding and cotton goods, but in this case it was invariably transferred to another mill belonging to the respondents, situate in Hertfordshire, and then made up into paper:—Held, that the mill at Manchester was not subject to the provisions of the 7 Vict. c. 15, which, by section 73, excepts from its operation any factory used solely for the manufacture of paper. *Coles* v. *Dickinson*, 33 Law J. Rep. (N.S.) M.C. 235; 16 Com. B. Rep. N.S. 604.

The premises of a manufacturer of crinoline skirts, in which steam-power is used to work machinery which by the interlacing or plaiting of cotton threads together around and over every part of the strips of steel, which are afterwards placed in the crinoline skirts, effects a covering for such strips, are a factory within the meaning of the Factory Acts. *Whymper* v. *Harney*, 34 Law J. Rep. (N.S.) M.C. 113; 18 Com. B. Rep. N.S. 243.

(B) Employment of Children.

The appellant was the occupier of a factory within the meaning of the Factory Act, 7 & 8 Vict. c. 15, in which he manufactured cotton and wool into a material termed "webbing." The appellant manufactured also braces and girths in rooms which were part of the factory, using for the purpose both the webbing manufactured by himself and other webbing purchased by him. He was convicted, under the Factory Act, for employing a child in the factory after the hour of one o'clock. The child was engaged in labour for the appellant in the manufacture of braces and girths, and the only process in which he was employed was the preparation of pieces of leather for being stitched to the webbing, but no part of the webbing itself, nor any machinery, was in the room in which he was so employed. The 73rd section of the Factory Act states, that the act is not to extend "to any part of such factory used solely for the manufacture of goods made entirely of any other material than those enumerated" (amongst which "leather" is not included):—Held, that the room in which the child was employed was not within such exception, as it was not shewn to be a room used solely for the manufacture of goods made entirely of any other material than those enumerated in the act, and that therefore the appellant was rightly convicted. *Taylor* v. *Hickes*, 31 Law J. Rep. (N.S.) M.C. 242; 12 Com. B. Rep. N.S. 152.

A child employed in "finishing" goods in a shed, in which finishing alone is carried on, but which communicates internally with other buildings in which "printing" is carried on, is "employed in a print work" within the meaning of the 8 & 9 Vict. c. 29. s. 2, whether the particular finishing be incidental to the process of printing or not; and a surgeon's certificate of its health is therefore necessary under section 20. *Hardcastle* v. *Jones*, 32 Law J. Rep. (N.S.) Q.B. 44; 3 Best & S. 153.

(C) Register of Young Persons.

T was the owner of premises in M, in which he carried on the manufacture of cotton sewing thread; he also had premises in L, to which he was in the habit of sending the thread in hanks, and where it was wound by machinery moved by steam-power, firstly on to cops, and secondly on to spools. No other process except this particular winding was carried on at L:—Held, that these latter premises were a mill or factory within the meaning of the 3 & 4 Will. 4. c. 103. s. 1, which prohibits the employment of young persons in the night, and also within the meaning of the 7 & 8 Vict. c. 15. ss. 27, 73, by which the occupiers of factories are ordered to keep registers of all young persons employed by them in their factories, and that T was liable to the penalty imposed by the latter act for the offence of not keeping such a register. *Haydon* v. *Taylor*, 33 Law J. Rep. (N.S.) M.C. 33; 4 Best & S. 519.

## FALSE IMPRISONMENT.

In justifying giving a person into custody on a charge of felony, it is sufficient to prove such facts as constitute a reasonable and probable cause for the charge, although the defendant may have acted not merely on those facts which are proved, but also on others, the truth of which, although alleged in the plea, are either not proved, or are disproved. *Hailes* v. *Marks*, 30 Law J. Rep. (N.S.) Exch. 389; 7 Hurls. & N. 56.

A plea of justification may be amended, either by striking out so much as is not proved, or by correcting the averments in the plea, in accordance with the evidence. Ibid.

The question of reasonable and probable cause on a plea of justification, in an action for false imprisonment, is one of law and not of fact. Ibid.

To an action for false imprisonment, and giving the plaintiff into custody of a police constable, the defendant, a printseller, pleaded that prints had been stolen from him, and he suspected the plaintiff upon these grounds: the plaintiff had at the time of the loss been making frames for the defendant, and frequently went to his place of business, and on many occasions sent the defendant's boy out for things on some errand or excuse; on which occasions he was in the room where the goods were kept, and whence they were stolen, and had the opportunity of stealing them; and although during that time he was in pecuniary difficulties, and paying off a county court judgment at 6*s.* a month, he was dealing largely in prints of the same sort, and had frequently left large bundles of such prints at a public-house; and, according to the statement of one B, had sold to him during that time 300*l.* worth of prints, wherefore &c. At the trial the defendant failed to prove either that the plaintiff left bundles of prints at a public-house, or the statement of B; and although the defendant proved the county court judgment, it appeared he was not aware of it at the time he gave the plaintiff into custody:—Held, that proof of the residue of the plea constituted an answer to the action. Ibid.

## FALSE PRETENCES.

(A) Cases within the Statute.
(B) Venue.
(C) Indictment.
(D) Variance.
(E) Evidence.

(A) Cases within the Statute.

The prisoner, falsely representing that he was the agent of a certain loan society, and that on payment of 5*s.* 6*d.* he would obtain a loan for the prosecutor, induced the prosecutor to tell the prisoner to go to his wife for the money. The prisoner went and obtained the 5*s.* 6*d.* from the prosecutor's wife, stating that he was come for the money as the person from the loan society was waiting for it. On an indictment, charging him with obtaining the money by false pretences from the prosecutor,—Held, that the conviction was good, although, in fact, the money was actually paid by the wife apart from her husband. *R.* v. *Moseley*, 31 Law J. Rep. (N.S.) M.C. 24; 1 L. & C. 92.

Where a married man induced a woman to give him a sum of money by representing himself to be unmarried, and by promising that with the money he would furnish a house and return and marry her, he was held indictable for obtaining money by false

pretences. *R.* v. *Jennison*, 31 Law J. Rep. (N.S.) M.C. 146; 1 L. & C. 157.

The prisoner and two other persons entered into articles of partnership, by the terms of which the profits were to be divided equally among them. By a subsequent verbal arrangement the prisoner was to act as agent for the sale of the partnership goods, and was to receive a commission on all orders obtained by him, which commission was to be paid out of the partnership funds before any division of profits was made. The prisoner by falsely pretending that he had obtained some orders, got his fellow partners to pay him a sum for commission:—Held, that he was not indictable for obtaining money by false pretences, as his charges were payable out of the partnership funds, and his false statement was a misrepresentation respecting a partnership matter, and would have to be investigated, and the sum paid duly considered in taking the partnership accounts, in order to ascertain the profits.—Per *Pollock, C.B.*, the statute rendering indictable persons who obtain money by false pretences is not intended to apply to those who, by fraudulent and knavish statements, obtain money in the course of a real commercial transaction. *R.* v. *Evans*, 32 Law J. Rep. (N.S.) M.C. 38; 1 L. & C. 252.

K represented to B that he had a large quantity of good tobacco to sell, and induced B to agree to buy some. P was with K at the time, and it was arranged that P was to deliver the tobacco to B, and that B was to pay P for K. P accordingly, a few days afterwards, fraudulently delivered to B two bales purporting to be tobacco, as in pursuance of the contract, and received payment from B. The bales contained little else but rubbish; K and P were parties to the fraud:—Held, that K was liable, on these facts, to be convicted on an indictment charging him with obtaining money from B, by falsely pretending that he was possessed of a quantity of good tobacco. *R.* v. *Kerrigan*, 33 Law J. Rep. (N.S.) M.C. 71; 1 L. & C. 383.

It was the duty of the prisoner, a servant, to ascertain daily the amount of dock dues payable by his master, and, having ascertained it, to apply to his master's cashier for the amount, and then to pay it in discharge of the dues. On one occasion, by representing falsely to the cashier that the amount was larger than it really was, as he well knew, the prisoner obtained from the cashier the sum he stated it to be, and then paid the real amount due, and appropriated the difference:—Held, that his offence was not larceny, but obtaining money by false pretences. *R.* v. *Thompson*, 32 Law J. Rep. (N.S.) M.C. 57; 1 L. & C. 233.

In order to sustain an indictment for obtaining money by false pretences, there must be a false pretence of some existing fact. Where the prisoner obtained money by pretending that he had got to pay his rent, while in fact he had no intention of paying it, but meaning to appropriate the money to his own purposes, it was held that there was no false pretence within the meaning of the 24 & 25 Vict. c. 96. s. 88. *R.* v. *Lewis Lee*, 1 L. & C. 309.

An indictment for attempting to obtain money by false pretences, alleged that the prisoner falsely pretended to H P, who lived at one Madame T's, that the said H P was to give the prisoner 10s., and that Madame T was going to allow him 10s. a week:—Held, by the Court (*Blackburn, J.* and *Pigott, B. dubitantibus*), that the indictment did not allege with sufficient certainty any false pretence respecting any existing fact. *R.* v. *Henshaw*, 33 Law J. Rep. (N.S.) M.C. 132; 1 L. & C. 444.

An indictment, charging the prisoner with obtaining moneys from a wife, whose husband had run away, by falsely pretending to her that she, the prisoner, had power to bring him back, is good, and sufficiently states an indictable offence. *R.* v. *Giles*, 34 Law J. Rep. (N.S.) M.C. 50; 1 L. & C. 502.

Though before she obtained the money from the wife the prisoner used only promissory words that she would bring the husband back, yet if the whole tenor of her conversation and conduct shews that she all along intended the wife to believe that she had the power of bringing the husband back, there is evidence for the jury in support of the indictment. Ibid.

### (B) VENUE.

One, who obtains goods by false pretences in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offence in the latter county, but must be indicted in the county where the goods were obtained. *R.* v. *Stanbury*, 31 Law J. Rep. (N.S.) M.C. 88; 1 L. & C. 128.

### (C) INDICTMENT.

An indictment for false pretences alleged, that the prisoner falsely pretended to G S that a certain person, who lived in a large house down the street, and who had had a daughter married some time back, had been at him about some carpets, and had asked him to procure a piece (about twelve yards) of woollen carpet. The evidence was, that the prisoner went to G S's shop, in the village of S, and said that he wanted some carpeting for a family living in a large house in that village, who had had a daughter lately married. On this, G S gave the prisoner about twenty yards of carpet, which the prisoner afterwards sold to different persons at a higher price than G S would have charged for it. The only evidence to negative the pretence was that of a lady who lived in the village, and whose daughter had been married about a year ago, and who stated that she had not sent the prisoner for the carpet:—Held, that the indictment was sufficient, and that on the evidence stated the jury were warranted in finding the prisoner guilty. *R.* v. *Burnsides*, 30 Law J. Rep. (N.S.) M.C. 42; Bell, C.C. 282.

If a prisoner committed for obtaining a chattel by false pretences be indicted in one count for so obtaining the chattel, and in another count for obtaining another chattel by false pretences, without any authority of a Judge, or otherwise, under the statute 22 & 23 Vict. c. 17, to prefer such second charge, the proper course is for the Judge at the trial to direct the second count to be quashed, and not to put the prisoner to plead to it. If, however, the two counts are allowed to go to the jury, and evidence is given respecting each charge, and the jury convict on each count, the conviction cannot be supported on either—not on the second, because it ought to have been quashed; nor on the first, because improper evidence has been received; the evidence as to the second charge being inadmissible in law on

the trial of the first. *R.* v. *Fuidge*, 33 Law J. Rep. (N.S.) M.C. 74; 1 L. & C. 390.

The prisoners, having a cart-load of soot to deliver, took the cart to be weighed with a quantity of heavy rubbish under the soot. The attendant at the public weighing-machine gave them a ticket describing the weight of the load in the cart. The prisoners, after removing the rubbish, delivered the soot to the prosecutor, pretending that the soot was more in quantity than it really was, and that it was of the weight described in the weighing-ticket, and they produced the ticket to the prosecutor to vouch for the correctness of the alleged weight; and they thereby obtained from the prosecutor the price for the supposed quantity of soot:—Held, that an indictment, charging that the prisoners obtained money of the prosecutor by falsely pretending to him that the soot was of such a weight, whereas, in fact, it was not of that weight, but of a less weight, as the prisoners well knew, was supported by proof of the above facts, and that it was not necessary in the indictment to allude to the ticket, as what passed respecting the ticket was merely matter of evidence. *R.* v. *Lee*, 33 Law J. Rep. (N.S.) M.C. 129; 1 L. & C. 418.

### (D) Variance.

On the trial of an indictment, charging that the prisoner obtained a horse of the prosecutor by falsely representing himself to be the servant of Hardman, of Stickley, the evidence was that the prisoner at first represented himself as a servant of Hardman, of Stickley Farm, but that afterwards learning that the prosecutor had mistakingly supposed that he had said he was the servant of Harding, late of Benwell Lodge, he adopted that view, and virtually said that he was the servant of Harding, late of Benwell Lodge, and now of Stickley Farm. It was proved that the prosecutor parted with his horse in the belief that the prisoner was the servant of Harding:—Held, that the conviction could not be supported, as the real pretence that operated on the prosecutor's mind was not alleged in the indictment. *R.* v. *Bulmer*, 33 Law J. Rep. (N.S.) M.C. 171; 1 L. & C. 476.

### (E) Evidence.

The prisoner, a commercial traveller, employed by the prosecutor to take orders, but who was forbidden to receive moneys, obtained a sum of money from a customer of the prosecutor by the false pretence that he had authority to receive it:—Held, that evidence was not admissible to shew that the prisoner within a week from the time of the offence charged obtained another sum of money from another customer by a like false pretence. *R.* v. *Holt*, 30 Law J. Rep. (N.S.) M.C. 11; Bell, C.C. 280.

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## FELON.

(A) Forfeiture of Estate.
(B) Dealings with Property before Conviction.

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### (A) Forfeiture of Estate.

In 1833 A B was convicted of felony and transported. At this time his wife was entitled to a fund, contingently on her surviving her mother. In 1846 A B obtained a conditional pardon, available in all places except the United Kingdom. The mother died in 1836 and the wife in 1852. On a petition by the Crown for payment, the Court, without deciding the right, merely ordered payment to the administrator of his wife. *In re Harrington's Trusts*, 29 Beav. 24.

### (B) Dealings with Property before Conviction.

After the commission of a felony and before conviction, a felon may assign his property for valuable consideration; and a debt existing at the time of the commission of the crime is a sufficient consideration, if made *bona fide*. *Chowne* v. *Baylis*, 31 Law J. Rep. (N.S.) Chanc. 757; 31 Beav. 351.

A clerk in a banking company robbed his employers of a large sum of money, and before conviction he deposited the deeds of some real estates with the company, and directed a transfer of certain policies of assurance on his life to be made to them as a security so far as they would extend for the money taken. The company afterwards prosecuted him for the felony to conviction; and upon a suit to realize the securities,—Held, that the money taken was a debt due from the felon to the company, and a good consideration for the securities given by the felon to the company. Ibid.

In November and December 1860, A committed acts, in respect of which he was, on the 8th of June, 1861, taken into custody, and, on the 21st of the same month, convicted of felony. Prior to his apprehension, viz., on the 23rd of May, 1861, he executed a voluntary settlement of personal estate belonging to him upon his wife and children:—Held, that such settlement was fraudulent and void as against the Crown. *In re Saunders's Estate, Saunders* v. *Warton*, 32 Law J. Rep. (N.S.) Chanc. 179; 4 Giff. 179.

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## FERRY.

*Proximity constituting an Evasion.*

The plaintiffs sued the defendants for carrying in the line of their ferry, and also for carrying near thereto for the purpose of evading it. The ferry claimed was from the Isle of Dogs (an area of about one square mile) to Greenwich. On this island there was formerly but one highway, from Poplar on the north to Potter's Ferry Stairs on the south, but since the year 1800 the spot had become thickly inhabited, and several new roads had been made, some of which communicated with the old highway before mentioned. The ferry complained of had been established by the defendants at a point distant 1,280 yards from Potter's Ferry, which was the only place where the plaintiffs had ever kept men and boats for the purposes of the ferry. In a deed of conveyance, dated in the year 1676, the ferry is called "Potter's Ferry," and is described as "all that ferry extending itself from a place or marsh called the Isle of Dogs over the Thames unto the town of Greenwich." And it is said to be granted "in as ample a manner as the same hath heretofore been used, occupied, or enjoyed":—Held, that the limits of the ferry must be ascertained from user, and that by user the

ferry was limited to the line from Potter's Ferry Stairs to the town of Greenwich, and did not extend to all parts of the Isle of Dogs; and that, therefore, the defendants had not carried in the line of the ferry of the plaintiffs. *Newton* v. *Cubitt*, 31 Law J. Rep. (N.S.) C.P. 246; 12 Com. B. Rep. N.S. 32.

In ascertaining whether the defendants, though they had not carried in the line of the ferry of the plaintiffs, had carried near to it for the purposes of evading it, the change of circumstances which had taken place since the original grant of the ferry, might be considered, and that in the present case the defendants had not carried so near to the ferry of the plaintiffs as to have infringed any right of the plaintiffs. Ibid.

A grant of ferry from all parts of a certain area to a place or vill is in itself anomalous; it is, ordinarily, from the point where a highway reaches the water's edge to a point in the opposite bank, or to a vill. Ibid.

## FINE AND RECOVERY.

[See DISENTAILING ASSURANCE.]

(A) VALIDITY OF.
(B) ACKNOWLEDGMENT BY MARRIED WOMEN.
(*a*) *Trust Deed.*
(*b*) *Dispensing with Husband's Concurrence.*
(*c*) *Affidavit.*
(*d*) *Duty of Commissioner in taking the Acknowledgment.*

### (A) VALIDITY OF.

A disposition is made *to* a purchaser for value, within the meaning of the proviso in the 38th section of the Abolition of Fines and Recoveries Act, although the disentailing deed, conveying a fee to the tenant in tail to such uses as he shall direct, be the only deed enrolled: provided that deed and the other deeds declaring the uses in favour of the purchaser form part of one and the same transaction. *Crocker* v. *Waine*, 33 Law J. Rep. (N.S.) Q.B. 316; 5 Best & S. 697.

A was tenant by the curtesy, with remainder to his eldest son B in tail, with remainder to C. B sold and conveyed the property to A, and levied a fine in which A was counsel:—Held, that there was no discontinuance, that the remainder was not barred, and that the title was bad. *Anderson* v. *Anderson*, 30 Beav. 209.

### (B) ACKNOWLEDGMENT BY MARRIED WOMEN.

#### (*a*) *Trust Deed.*

Where a provision in lieu of the estate given up by the married woman, is made by an investment in the funds in the names of trustees, the deeds declaring the trusts thereof must not only be produced to the Commissioners, at the time of taking the acknowledgment under the Fines and Recoveries Act, but must have been previously executed by the trustees; and it is not sufficient that the Commissioners are satisfied that such provision has been made by such investment for the benefit of the married woman. *In re Dallas*, 30 Law J. Rep. (N.S.) C.P. 282; 10 Com. B. Rep. N.S. 346.

#### (*b*) *Dispensing with Husband's Concurrence.*

The Court will not make an order enabling a married woman to convey, under 3 & 4 Will. 4. c. 74. s. 91, unless there has been a sale of the property which she is desirous of having the power to convey. *In re Graham*, 34 Law J. Rep. (N.S.) C.P. 321; 19 Com. B. Rep. N.S. 370.

The Court will not permit a married woman to execute a conveyance under the 3 & 4 Will. 4. c. 74. s. 91, without the concurrence of her husband (he having refused to concur) upon an affidavit merely stating that the wife had left her husband in consequence of his violence, and was living apart from him. *In re Price*, 13 Com. B. Rep. N.S. 286.

The Court will not allow the wife of a lunatic to convey her separate estate under the 3 & 4 Will. 4. c. 74. s. 91, without some explanation as to the nature of the lunatic's property, and whether it contributes to the wife's support. *In re Cloud*, 15 Com. B. Rep. N.S. 833.

#### (*c*) *Affidavit.*

The affidavit accompanying the acknowledgment by a married woman of a deed executed by her, made abroad, may be sworn before a notary public, having authority by the laws of his country to administer an oath. *In re Cooper*, 34 Law J. Rep. (N.S.) C.P. 145; 18 Com. B. Rep. N.S. 220.

The Court refused to allow a certificate of acknowledgment taken in Ontario, under the 3 & 4 Will. 4. c. 74, to be filed, where the affidavit of verification purported to be sworn before "J S, an attorney of the supreme court." The affidavit must be sworn before a magistrate, and his authority to administer oaths certified by a notary public. *In re Woodman*, 11 Com. B. Rep. N.S. 630.

The rule of Michaelmas Term, 1862, as to the form of affidavits on acknowledgments taken under the statute 3 & 4 Will. 4. c. 74, is directory only. *In re Hall*, 19 Com. B. Rep. N.S. 369.

#### (*d*) *Duty of Commissioner in taking the Acknowledgment.*

[See *ante*, (*a*).]

Where the consideration-money for a married woman giving up her interest in the estate in respect of which the acknowledgment is taken, under 3 & 4 Will. 4. c. 74, is to be paid into her own hands, the Commissioners should distinctly ascertain from her that she wishes to pass her property without any provision being made for her. *In re Dorning*, 34 Law J. Rep. (N.S.) C.P. 173; *nom. In re Dowling*, 18 Com. B. Rep. N.S. 223.

## FIRE BRIGADE.

[Fire Brigade established within the Metropolis by 28 & 29 Vict. c. 90.]

## FIREWORKS.

[See GUNPOWDER.]

## FISH AND FISHERY.

[The laws relating to Fisheries of Salmon in England amended by 24 & 25 Vict. c. 109.—The Exportation of Salmon prohibited at certain times by 26 Vict. c. 10.—"The Salmon Fishery Act, 1861" amended by "The Salmon Fishery Act, 1865," 28 & 29 Vict. c. 121.]

(A) RIGHT OF.
(B) CONSERVANCY.
(C) RIGHT TO ANCHORAGE TOLL.
(D) SALMON FISHERY.
(*a*) *Fixed Engines.*
(*b*) *Fishing Mill-Dam.*

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### (A) RIGHT OF.

The soil of navigable tidal rivers, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery therein is *prima facie* in the public. But the right to exclude the public therefrom, and to create a several fishery, existed in the Crown, and might, lawfully, have been exercised by the Crown before Magna Charta, and the several fishery could, lawfully, be afterwards made the subject of grant by the Crown, to a private individual. *Malcomson* v. *O'Dea*, 10 H.L. Cas. 593.

Where a grant of a several fishery had been made by the Crown to a corporation, and rent received by the Crown in respect thereof for a long period of time, the earliest grants describing it as "an ancient inheritance of the Crown," it was held that the lawfulness of the origin of the several fishery might be presumed. Ibid.

There was a dispute as to the limits of the fishery. In an action against alleged trespassers, the plaintiff, the lessee of the corporation, tendered in evidence the bill and answer in Chancery in a suit instituted a great many years before by another grantee of the Crown against the corporation, and in which the limits of the alleged fishery were described:—Held, that as part of the history of the fishery and of the claims made to it, the bill and answer were admissible in evidence. Ibid.

The plaintiff also tendered in evidence an "Assembly Book," belonging to the corporation, dated in 1676, and containing entries of the rents due to the corporation from its various tenants, among which were entries of rents paid in respect of this fishery:—Held, that the book was admissible as an ancient document shewing the exercise of acts of ownership. Ibid.

The plaintiff also tendered in evidence, for the purpose of shewing the meaning of a particular phrase in the grants, a letter of licence from the Crown, in 1676, to one of its grantees, to alien the subject-matter of the grant:—Held, that the licence was admissible for that purpose. Ibid.

By a deed of feoffment, H aliened, bargained, sold, enfeoffed, and confirmed to G M, his heirs and assigns, for ever, "all that part of his fishery in Ulleswater Head, situate and being," &c., "yielding and paying therefor yearly and every year unto E H" (the lord of the manor of P) "a yearly free rent of 4*d.*" Livery of seisin was duly made upon this deed. Ulleswater Head was in the manor of P. By the court rolls of the manor of P it appeared that J M (a descendant of G M) was included among the freeholders of the manor, and was chargeable with the rent of 4*d.*, among other rents, and it appeared to have been duly rendered by him. He subsequently conveyed the fishery to the plaintiff. The defendants erected a pier upon that part of the lake of Ulleswater which was comprehended in the fishery, and used the pier for the purpose of embarking and disembarking passengers thereon:—Held, by *Wightman, J.* and *Mellor, J.*, that the fishery must have been a several fishery, and must be presumed to have included the soil of the lake, and, therefore, that the plaintiff was entitled to maintain an action against the defendants. So held, also, by *Cockburn, C. J.*, but solely in deference to the authorities. *Marshall* v. *the Ulleswater Company*, 32 Law J. Rep. (N.S.) Q.B. 139; 3 Best & S. 732.

Upon the hearing of an information against the defendant for fishing with a net in a tidal river in which the prosecutor claimed a private right of fishing, evidence was given to shew that he had such right by reason of his being lord of the manor and otherwise. The defendant denied his right to the fishing, and contended that himself and the public had a right of fishing in the river, and called witnesses to shew that they had fished it for many years without interruption. No prosecution had been instituted against any one for doing so. The Justices were called upon to hold their hands, and not to adjudicate upon the question raised. They nevertheless convicted the defendant:—Held, that they ought not to have done so, as there was reasonable evidence to shew that the question of title raised by the defendant was *bona fide*, and that, therefore, their jurisdiction was at an end. *R.* v. *Stimpson*, *R.* v. *Peek*, 32 Law J. Rep. (N.S.) M.C. 208; 4 Best & S. 301.

Rights in gross are not within the Prescription Act, 2 & 3 Will. 4. c. 71. *Shuttleworth* v. *Le Fleming*, 34 Law J. Rep. (N.S.) C.P. 309; 19 Com. B. Rep. N.S. 687.

### (B) CONSERVANCY.

The 52nd section of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.),—which transfers to a new corporation, called "The Conservators of the River Thames," all the former powers of the Mayor of London, relating to the conservancy, preservation, and regulation of the River Thames,—empowers the conservators to appoint assistants to the water-bailiff, with authority, under the 30 Geo. 2. c. 21. s. 5, to enter fishing-boats and seize brood of fish found there, although the late act had not apparently the fisheries in contemplation. *Turnidge* v. *Shaw*, 30 Law J. Rep. (N.S.) M.C. 113; 3 E. & E. 588.

The penalties imposed by section 6. of the earlier act on persons obstructing the water-bailiff or his assistants in the execution of that act, are not extended to persons obstructing those officers when appointed under the Conservancy Act; but penalties may be recovered under section 76. of the later act from a person resisting the water-bailiff or his assistants, as persons employed in the execution of that act. Ibid.

### (C) RIGHT TO ANCHORAGE TOLL.

A right to the soil of the sea in an oyster fishery below low-water mark, and to take anchorage toll

from a ship which without necessity drops anchor within the limits of the fishery, may have been lawfully granted by the Crown to a subject before the time of legal memory; therefore such an immemorial right to take anchorage toll may be sustained. *Free Fishers of Whitstable* v. *Gann* (Ex. Ch.), 32 Law J. Rep. (N.S.) C.P. 194; 13 Com. B. Rep. N.S. 853: affirming the judgment below, 31 Law J. Rep. (N.S.) C.P. 372; 11 Com. B. Rep. N.S. 287.—[This decision is reversed by the House of Lords, see 35 Law J. Rep. (N.S.) C.P. 29; 11 H.L. Cas. 192.]

Where the right to take such toll was shewn to have belonged to a manor, an exemption from such toll cannot be claimed by a charter of Edw. 4; as the manor, and therefore the right to take the toll must have been created prior to the charter in question, and it is not in the power of the Crown to derogate from its own prior grant. Ibid.

Such toll is in respect of the use of the soil; and where such soil is a portion of a manor, the right to take the toll goes with the soil, and is, therefore, not destroyed by a division of the manor. Ibid.

### (D) Salmon Fishery.

#### (*a*) *Fixed Engines.*

The Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), prohibits the catching of salmon by any means within fifty yards below any dam, except by rod and line, unless the dam has a fish-pass attached thereto; and therefore any ancient right or mode of fishing by means of a fixed engine or otherwise, by virtue of any grant or charter or immemorial usage, although reserved by the act in certain cases, does not override such prohibition or exempt the possessor of such right of fishing from the penalties imposed by the act. *Moulton* v. *Willby*, 32 Law J. Rep. (N.S.) M.C. 164; 2 Hurls. & C. 25.

The Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 11, enacts that "no fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; and any engine placed or used in contravention of this section may be taken possession of or destroyed":—Held, that the right to take possession of or destroy such engines extends to all persons, and is not confined to conservators or overseers appointed under section 33. for the preservation of salmon and enforcing the provisions of the act. *Williams* v. *Blackwall*, 32 Law J. Rep. (N.S.) Exch. 174; 2 Hurls. & C. 33.

#### (*b*) *Fishing Mill-Dam.*

The appellant was the occupier of a fishing mill-dam with a fish lock through it. At the head of the lock was a sliding door or hatch which moved in grooves, and when it was down no salmon could pass. Within three feet of this door, down stream, was a frame in which the up-stream hecks of the fish lock were placed before the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), when the lock was used for taking salmon. Since that act the appellant took out the hecks, but left down the hatch, by which the water was prevented from passing through the lock or box within the said fishing mill-dam. The hatch was necessary for the fishery as much as for the mill, but the milling power of the appellant's mill would be injuriously, though not ruinously, affected by lifting up or removing the hatch:—Held, that the fishing-dam was a fishery within the Salmon Fishery Act, 1861, and that the appellant might be convicted under section 20. of that act for not removing the hatch during the close season, although such removal would interfere with the milling power of his mill. *Hodgson* v. *Little*, 33 Law J. Rep. (N.S.) M.C. 229; 16 Com. B. Rep. N.S. 198.

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## FIXTURES.

[See Landlord and Tenant.]

(A) Machinery.
(B) Right to remove.
(C) Taking in Execution.

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### (A) Machinery.

The mortgage of a silk-mill was stated to include "all those the steam-engine or steam-engines, boilers, steam-pipes, main shafting, mill-gearing, millwrights' work and other machinery and fixtures whatsoever then erected or set up, or standing, or being, or which should at any time thereafter be erected or set up, or stand, or be in or upon the said lands, mill and premises, or any part thereof":—Held (reversing the decision of the Master of the Rolls, who confined these words to the machinery necessary to give motive power to the mill), that all the machinery and fixtures used in the manufacturing of silk within the mill were included. *Haley* v. *Hammersley*, 30 Law J. Rep. (N.S.) Chanc. 771; 3 De Gex, F. & J. 587.

Where a lease contained a covenant by the lessee to yield up certain specified fixtures and all other additions, improvements, fixtures and things which then were or at any time during the term should be fixed upon the premises, it was held that the lessee's title to fixtures not *ejusdem generis* with those specified was too doubtful to be forced on a purchaser. *Wilson* v. *Whateley*, 30 Law J. Rep. (N.S.) Chanc. 673; 1 Jo. & H. 436.

### (B) Right to remove.

By a lease of land intended to be used for salt-works, the lessees covenanted that they would erect certain buildings and works, and that they would at the determination of the term "leave at the disposal of the lessors all the fixed materials of what nature or kind soever that should be in or about the said intended wychhouses or salt-works, or any ways relating thereto, save and except all the salt-pans and other movable articles made use of at all or at any of the said wychhouses or salt-works," which they the lessees were to take away for their own use and benefit. The interest of the lessees became afterwards vested in the defendants, who took upon themselves the performance of the above covenant, and also covenanted that they would yield up possession of the premises, with all erections, buildings and improvements, together with the cisterns, doors, &c., and "also all other fixtures and appurtenances of what kind or nature soever which should be used in or about the buildings," "but as to the salt-pans and other articles made use of at all or any of the said wychhouses, &c., and belonging to the defendants and their assigns, they should be at liberty to take and carry away from off the said premises, upon making good all such injury or damage as the said

wychhouses, &c. might sustain in consequence of such removal," with an option to the lessors of purchasing any part of the salt-pans or other movable articles. The defendants sunk a brine-shaft and erected an apparatus for working it. They underlet the premises on the 13th of December, 1861. The plaintiffs, on the 23rd of June, 1862, wrote a letter demanding possession, as the underletting gave them a right of re-entry on the land; and an action of ejectment was brought on the 7th of July, 1862. Between the 18th of January and the 17th of March, 1863, the defendants sold and removed a number of fixtures, &c., and on the last-mentioned day they confessed judgment in the action of ejectment:—Held, that under the above covenants, the defendants had a right to take away such fixtures as could properly be called tenant's fixtures; and that they were entitled to a reasonable time after the receipt of the letter of the 23rd of June, 1862, within which they might remove them. *Sumner* v. *Bromilow*, 34 Law J. Rep. (N.S.) Q.B. 130.

### (C) Taking in Execution.

By an agreement for a lease, it was provided that the tenant should at all times during the term keep sufficient and suitable fixtures and effects on the premises for the purposes desired, and that none of the movable furniture and effects should be removed therefrom, except for the purposes of repair or of being replaced by others; and also that in case the term should be determined by effluxion of time, but in no other case, it should be lawful for the tenant, within twenty-one days after the expiration of the term, but not during any other period, to remove such fixtures, if any, as he might have affixed to the premises, unless the landlord should elect to purchase the same, which it should be lawful for him to do at a price to be settled by arbitration. It was further agreed, that in case the tenant became bankrupt or insolvent, "or if any distress or writ of extent or execution shall be lawfully levied or executed by seizure on the said premises," &c., then in any of the said cases the landlord might re-enter and put out the tenant, "and also seize and retain for her own use, and as her own, all fixtures whatsoever, whether tenant's or trade fixtures," &c. After this agreement had been entered into, the tenant put up some fixtures on the premises, which were tenant's fixtures. These fixtures and the tenant's goods were seized by the sheriff, under a *fi. fa.* on a judgment against the tenant, at the suit of a creditor. The landlord thereupon put in a claim to the fixtures:—Held, by the Exchequer Chamber, reversing the judgment of the Court of Exchequer, that by the agreement the tenant had renounced the ordinary tenant's right of removing fixtures during the term, and consequently that the sheriff had no right to take the tenant's fixtures in execution. *Dumergue* v. *Rumsey* (Ex. Ch.), 33 Law J. Rep. (N.S.) Exch. 88; 2 Hurls. & C. 777.

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## FOREIGN LAW.

[Facilities for the better Ascertainment of the Law of Foreign Countries when pleaded in Courts within Her Majesty's Dominions afforded by 24 Vict. c. 11.—Meaning of "British colony" in 6 & 7 Vict. c. 94. (the Foreign Jurisdiction Act), explained by 28 & 29 Vict. c. 116.]

(A) Foreign Attachment.
(B) Foreign Enlistment Act.
(C) Construction of Foreign Documents.
(D) Foreign Judgments.

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### (A) Foreign Attachment.

A creditor who obtains a foreign attachment gains no priority over the simple contract creditors when the debtor's assets are administered in this court. *Redhead* v. *Welton*, 30 Law J. Rep. (N.S.) Chanc. 577; 29 Beav. 521.

A foreign attachment will not affect any moneys in the hands of a garnishee, unless the debtor could have maintained an action to recover them at the time of the attachment or at any time between the issuing of the attachment and the time when the pleas were entered by the garnishee. Where, therefore, two attachments were issued, it was held, that the first could not reach the balance in the hands of the garnishee, as it arose after plea, and that the second could not reach it, as it was issued after the garnishee had notice of its assignment. *Webster* v. *Webster*, 31 Law J. Rep. (N.S.) Chanc. 655; 31 Beav. 393.

An attachment of the produce of the sale of a commission in the army in the hands of the army agents, was held ineffectual as against the lien and right of set-off of such agents, and as against a prior equitable assignment. Ibid.

In an action brought in one of the superior courts of law, W obtained a verdict against N for 600*l.*, and on the same day assigned the sum recovered to E, who immediately gave notice of the assignment to N. N was afterwards served with attachment papers, issuing out of the Lord Mayor's Court of the City of London in an action of *B* v. *W*, attaching all the moneys of W in the hands of N. N thereupon applied to E to know what course he should take with reference to the proceedings in the Lord Mayor's Court, but E declined to give any directions or to assume any responsibility; and ultimately judgment was recovered against N as garnishee. N then filed a bill of interpleader against B, W and E stating the above facts, and that the judgment was duly recovered against him as garnishee in the Lord Mayor's Court. W and E demurred:—Held, that it was not open to them, upon the argument of the demurrer, to contend, upon the other allegations in the bill, that the money recovered in a superior court of law was not attachable by process out of the Lord Mayor's Court. *Nelson* v. *Barter*, 33 Law J. Rep. (N.S.) Chanc. 705; 2 Hem. & M. 334.

Proceedings by foreign attachment in the Lord Mayor's Court of the city of London, commenced after the death of the creditor of the garnishee, whose debt is attached, are null and void. *Matthey* v. *Wiseman*, 34 Law J. Rep. (N.S.) C.P. 216; 18 Com. B. Rep. N.S. 657.

In an action by an administratrix for a debt due to M, the intestate, the defendants pleaded to the further maintenance that the debt sued for had been attached in the Lord Mayor's Court, in a suit instituted by K against the intestate, that a regular

judgment had been obtained by K in such court, and that execution had issued thereon against the garnishees, and that after the commencement of this action the defendants as garnishees paid the said debt to K for the purpose of satisfying such judgment. Replication, that at the time of affirming the plaint in the Lord Mayor's Court, M, the intestate, was dead. Rejoinder, that at the time of affirming the said plaint, no one had administered to the estate of M, the intestate, but that before execution was had by K the plaintiff took out letters of administration to the estate of K, and might, according to the practice of the Lord Mayor's Court, and the custom of the city of London, have appeared to the said plaint and defended the same, or might have dissolved the said attachment and defended the said plaint:—Held, on demurrer, that the plaintiff was not estopped as against the defendants from shewing the nullity of the proceedings in the Lord Mayor's Court, and that the defendants could not avail themselves of the payment to K as any defence to the action. Ibid.

*Quære*—Whether the debt sued for by the administratrix was attached at all, inasmuch as there was no debt due to the intestate at the time of the attachment as the intestate was then dead. Ibid.

(B) FOREIGN ENLISTMENT ACT.

The 7th section of 59 Geo. 3. c. 69. enacts that if any person within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without leave and licence of His Majesty for that purpose first had and obtained, equip, furnish, fit out or arm, or attempt or endeavour to equip, &c., or procure to be equipped, &c., or shall knowingly aid, assist or be concerned in the equipping, &c. of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, &c., as a transport or store ship, or with intent to cruise or commit hostilities against any prince, &c., or against the subjects or citizens of any prince, &c., with whom His Majesty shall not then be at war, every such person so offending shall be deemed guilty of a misdemeanor, &c., and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition and stores which may belong to or be on board of any such ship or vessel, shall be forfeited:—Held, that the mere building of ships, as distinguished from equipping, is not prohibited by the statute. Held, also, by *Pollock, C.B.* and *Bramwell, B.*, that the equipment forbidden is an equipment of a warlike character, by means of which the ship on leaving Her Majesty's dominions shall be in a condition to cruise or commit hostilities. Held, by *Channell, B.*, that the statute forbids an equipment for war, but that an equipment *ancipitis usus*—capable of being used for war—is within the meaning of the 7th section, provided the intent be clear that it is to be used for war. Held, by *Pigott, B.*, that the prohibited intent is the main ingredient of the offence struck at by the statute, and that any act of equipping done in furtherance of that intent constitutes the whole offence. *The Attorney General* v. *Sillem (The Alexandra case)* (Exch. and Ex. Ch.), 33 Law J. Rep. (N.S.) Exch. 93; 2 Hurls. & C. 431 (in error), 581.

By the Queen's Remembrancer's Act, 22 & 23 Vict. c. 21. s. 26, it is enacted, that "it shall be lawful for the Lord Chief Baron and two or more Barons of the Court of Exchequer from time to time to make all such Rules and Orders, as to the process, practice and mode of pleading on the Revenue side of the Court," &c., "as may seem to them necessary and proper; and also from time to time, by any such Rule or Order, to extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and any of the Rules of pleading and practice on the Plea side of the said Court to the Revenue side of the said Court, as may seem to them expedient for making the process, practice and mode of pleading on the Revenue side of the said Court as nearly as may be uniform with the process, practice and mode of pleading on the Plea side of such Court":—Held, by the majority of the Court of Exchequer Chamber, *Cockburn, C.J., Crompton, J., Blackburn, J.* and *Mellor, J.* (*dissentientibus Erle, C.J., Williams, J.* and *Willes, J.*), that the Chief Baron and Barons of the Exchequer had no power under the provisions of this section to make rules granting, in Revenue cases, rights of appeal to the Exchequer Chamber and House of Lords similar to those given in ordinary cases by sections 34. and 35. of the Common Law Procedure Act, 1854; and that under such Rules no appeal lay to the Exchequer Chamber against the decision of the Court of Exchequer on a motion for a new trial, in the case of an information for a forfeiture of a ship, filed by the Attorney General under the 59 Geo. 3. c. 69. s. 7. Ibid.

(C) CONSTRUCTION OF FOREIGN DOCUMENTS.

In the construction of a foreign document in the English Courts, the Judge or Court must obtain, first, a translation of the document; secondly, an explanation of any terms of art used in it; thirdly, information on any special law; and, fourthly, on any peculiar rule of construction of the foreign state affecting it; and it is the duty of the English Court with such light to construe the document. *The Duchess di Sora* v. *Phillips* (House of Lords), 33 Law J. Rep. (N.S.) Chanc. 129; 10 H.L. Cas. 624.

Whether there is any rule of the House requiring members who have heard the arguments in a cause to give their judgment upon it—*quære*. Ibid.

(D) FOREIGN JUDGMENTS.

Declaration, that the captain of an English ship, while on a voyage, drew a bill of exchange on the then owners for the necessary disbursements of the ship, and the bill was dishonoured at maturity; that the plaintiff had in the mean time become mortgagee of the ship; that by the French law the *bona fide* holder for value of such a bill, if a French subject, can take proceedings *in rem* in the French courts, and attach and sell the ship in a French port in order to pay the bill; that the defendants, being English subjects and the holders of the bill, after it had been dishonoured conspired with T, a French subject, that they should indorse the bill to him without value, and that he should take proceedings in the French courts, and falsely represent that he was a

*bona fide* holder for value; that this was accordingly done, and orders were thereby obtained from the French Courts that the ship should be attached and sold in a French port; and the plaintiff was thus deprived of his property in her:—Held, that the declaration was bad, as an action could not be maintained while the judgment *in rem*, though in a foreign court and obtained as alleged, remained unreversed. *Castrique* v. *Behrens*, 30 Law J. Rep. (N.S.) Q.B. 163; 3 E. & E. 709.

A woman became, as alleged, by the law of France, donee of the universality of the succession of her deceased husband, and was thereby entitled to all his property, claims and causes of action, and became personally liable to his debts. After his death, she was compelled to pay certain bills of exchange on which he was liable as indorser. She thereupon took proceedings in France and obtained a judgment to recover the amount against the acceptor:—Held, that she might sue upon this judgment in this country in her own name, without taking out administration. *Vanquelin* v. *Bouard*, 33 Law J. Rep. (N.S.) C.P. 78; 15 Com. B. Rep. N.S. 341.

Held, also, that, independently of the judgment, if by the law of France the wife, as such donee, was capable personally of enforcing the claim against the acceptor, she might enforce it personally in this country also, without taking out administration. Ibid.

To a count upon a foreign judgment, it was pleaded that the foreign Court had no jurisdiction because the defendant in the action there was not a trader, and was not resident within a certain district:—Held, that the plea was bad, inasmuch as, consistently with it, the foreign Court had jurisdiction over the person of the defendant and the subject-matter of the action, which was sufficient. Ibid.

Proceedings were instituted in the Supreme Court of New York against the defendants; and the actions, and all the issues therein, were referred to an arbitrator, who reported that there was a contract by the defendants that certain bills should be accepted by them, and that the contract was to be governed by the laws of the State of New York, and that the plaintiffs in the two actions were respectively entitled to judgment for the amount of the bills, with interest and costs. Upon this report, the Supreme Court adjudged that the plaintiffs should recover the said amount. To actions brought in this country on the foreign judgments, by the plaintiffs and by S & Co. respectively, the defendants pleaded that the judgments were erroneous and liable to be reversed, and that they were taking proceedings to obtain such reversal in the Court of Appeal, and they set out the record of the proceedings in the original suit:—Held, first, that the pendency of an appeal could not be a bar to an action upon the judgment. Secondly, that the *lex loci* of the contract must prevail; and that the Court in New York having decided in favour of the plaintiffs and of S & Co, judgment must also be given for them in these actions, although—*Semble*—That by the law of England no action would be maintainable because there was no privity of contract. *Munroe* v. *Pilkington*, 31 Law J. Rep. (N.S.) Q.B. 81; 2 Best & S. 11.

*Quære*—How far a judgment of a foreign Court can be inquired into.

## FORFEITURE.

[See DEVISE—LEASE—LEGACY—SETTLEMENT.]

Trust during the life of I H "to pay and apply the interest and annual produce of trust property to him for his own benefit if he did not make any assignment or mortgage of, or charge upon the same, or any part thereof, by any mode of anticipation, or do any act whereby such interest, &c., if made payable to him without any restriction, would become payable to any other person or persons," with a gift over on the happening of any such event. I H having executed a warrant of attorney under which judgment was entered up against him,—Held, that this being a proceeding *in invitum*, did not work a forfeiture of I H's life interest. *Avison* v. *Holmes*, 30 Law J. Rep. (N.S.) Chanc. 564; 1 Jo. & H. 530.

The estate of a tenant for life was liable to forfeiture on his mortgaging it. He mortgaged it to C D unknown to the parties taking under the forfeiture:—Held, that C D was liable to account to them for the rents, at all events from the filing of the bill, and beyond that from the time he had notice of the trusts creating the forfeiture. *Hennessey* v. *Bray*, 33 Beav. 96.

A B's life interest in a fund in England was liable to forfeiture if A B "should alien, sell, assign, encumber or transfer, or in any manner dispose of or anticipate" it. A B took the benefit of the Insolvent Act in New South Wales, having presented a petition there, by which he surrendered his estate (omitting this life interest from the schedule). The Judge accepted this surrender of his estate and placed it under sequestration in the hands of the Chief Commissioner of Insolvent Estates:—Held, that A B had thereby forfeited his life interest. *Townsend* v. *Early* (No. 2), 34 Beav. 23.

## FORGERY.

[The statute law of England and Ireland relating to indictable offences by forgery consolidated and amended by 24 & 25 Vict. c. 98.]

(A) UNDERTAKING FOR PAYMENT OF MONEY.
(B) ACCOUNTABLE RECEIPT FOR MONEY.

### (A) UNDERTAKING FOR PAYMENT OF MONEY.

The prisoner employed a photographer to counterfeit Austrian bank-notes, directing him to take an impression of the note on a plate of glass by means of the photographic process, and then to get it engraved on metal or wood, so as afterwards to strike off the forged notes. The photographer accordingly took off on a glass plate a "positive" impression of the note, and shewed it to the prisoner, who was arrested while inspecting it. The impression on the glass was a mere shadow of the notes, easily washed off until fixed. No impression could be taken from it, but from it a "negative" could be made, and then from the negative copies of the note could be printed or an engraving could be prepared:—Held, that the prisoner was liable to be convicted under 24 & 25 Vict. c. 98. s. 19. of the offence of without lawful authority or excuse making upon a certain plate an undertaking for the payment of money, purporting to be an undertaking for the

payment of money of a foreign state. *R.* v. *Rinaldi*, 33 Law J. Rep. (N.S.) M.C. 28; 1 L. & C. 330.

Forging a document purporting to guarantee a master to a certain amount in money against the dishonesty of a clerk, is forging an undertaking for the payment of money within 24 & 25 Vict. c. 98. s. 23. *R.* v. *Joyce*, 34 Law J. Rep. (N.S.) M.C. 168; 1 L. & C. 576.

(B) Accountable Receipt for Money.

A person may be indicted for forgery for making a false entry of a receipt of money in a book which purports to be a bankers' passbook with intent to defraud. *R.* v. *Smith*, 31 Law J. Rep. (N.S.) M.C. 154; 1 L. & C. 168.

If a person, with intent to defraud, and to cause it to be supposed, contrary to the fact, that he has paid a certain sum into a bank, make in a book, purporting to be a pass-book of the bank, a false entry, which denotes that the bank has received the sum, he is guilty of forging an accountable receipt for money. *R.* v. *Moody*, 31 Law J. Rep. (N.S.) M.C. 156; 1 L. & C. 173.

A turnpike toll-gate ticket is a receipt for money within the meaning of 24 & 25 Vict. c. 98. s. 23. *R.* v. *Fitch*, 1 L. & C. 159.

## FRAUD AND MISREPRESENTATION.

(A) Action for.
(B) Relief against, in Equity.
(*a*) *When granted.*
(1) *In general.*
(2) *Confidential Relationship and undue Influence.*
(3) *Dealings with Reversioners and expectant Heirs.*
(*b*) *When refused.*

(A) Action for.

The declaration stated that the plaintiff, the defendant and C had entered into a joint adventure; that C advanced 6,000*l.* for it: 2,000*l.* for himself, 2,000*l.* for the plaintiff and as a loan to him, and 2,000*l.* on like terms for the defendant; that afterwards, C wishing to retire, the defendant offered to take the adventure on himself, and to become debtor to C for the plaintiff's 2,000*l.*, if the plaintiff would give up his share in the adventure; that the plaintiff agreed to this, and the defendant informed C of it; that C accepted the defendant as his debtor in lieu of the plaintiff; that thereupon the plaintiff was released from all liability to C; that nevertheless the defendant, knowing that he alone was capable of proving that the plaintiff had assented to the arrangement, falsely, fraudulently, and before the Evidence Act, 14 & 15 Vict. c. 99, passed, in order to make C believe that the plaintiff had never assented to give up his share in the adventure, and to induce C to sue the plaintiff for the 2,000*l.*, and to deter the plaintiff from calling him, the defendant, for a witness, wrote and sent to C a letter, professedly addressed to the plaintiff, pretending to expostulate with the plaintiff for not assenting to the arrangement, and asserting that the plaintiff had positively refused to do so; by means whereof C was induced to sue, and did sue, the plaintiff for the 2,000*l.* and recovered judgment against him for the sum of 2,486*l.*; and that the plaintiff was put to a large expense for costs. The Court held, that the declaration disclosed no cause of action, as it did not shew that the alleged damage arose from the alleged wrongful act of the defendant. *Collins* v. *Cave* (Ex. Ch.), 30 Law J. Rep. (N.S.) Exch. 55; 6 Hurls. & N. 131.

In an action against a husband and wife for a fraudulent representation by the wife, the declaration alleged, that the wife being desirous that the plaintiff should discount a bill of exchange drawn on her husband by one S, fraudulently represented to the plaintiff that such bill was accepted by her husband, whereby the plaintiff was induced to discount such bill; when, in fact the bill had not been accepted by the husband or his authority:—Held, by *Erle, C.J.*, and by *Byles, J.*, that these facts did not constitute a cause of action against the husband and wife. Held, by *Williams, J.*, and *Willes, J.*, that they did constitute such cause of action, as the fraudulent representation was not shewn to have been connected with any contract with the wife. *Wright* v. *Leonard*, 30 Law J. Rep. (N.S.) C.P. 365; 1 Com. B. Rep. N.S. 258.

In an action for a false representation, made on the 24th of October, as to the trustworthiness of W, a tradesman, the plaintiff gave evidence to shew that just before the time that the defendant represented W to be trustworthy the defendant had bought goods of W considerably below their value:—Held, that the defendant was entitled to ask his shopman, who knew all about the purchase of these goods, whether W, on the 24th of October, was trustworthy to his belief. The defendant was allowed also to ask the same question of tradesmen living in the same town with W. *Sheen* v. *Bumpstead* (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 271; 2 Hurls. & C. 193.

(B) Relief against, in Equity.

(*a*) *When granted.*

(1) *In general.*

In a bill seeking to set aside securities as obtained by misrepresentation, *quære*, whether it is sufficient to allege, that "the plaintiff was led by the defendant to believe that he had become possessed of the bills, for the amount of which the securities were given in the manner before mentioned" (which was *bona fide*)? But even if not sufficient on demurrer, advantage cannot be taken of the allegation not being more precise, when the case has been heard and decided on the merits. Where A obtains securities from B, by representing that he had discounted B's bills, in the hands of a third person who might have been a *bona fide* holder, when, in fact, he had obtained them from a person between whom and himself collusion was alleged, the misrepresentation as to the mode of obtaining the bills was held not to be immaterial. Circumstances which constitute a case of fraudulent misrepresentation. *Smith* v. *Kay* (House of Lords), 30 Law J. Rep. (N.S.) Chanc. 45.

The principle by which, in the administration of justice, the limits of responsibility for the consequences of a false representation are to be ascertained, are these:—first, every man must be held

responsible for the consequences of a false representation, made by him to another, upon which that other acts, and, so acting, is injured or damnified; second, every man must be held responsible for the consequences of a false representation, made by him to another, upon which a third person acts, and, so acting, is injured or damnified, provided it appear that such false representation was made with the direct intent, that it should be acted on by such third person in the manner that occasions the injury or loss; third, but to bring it within the second principle, the injury must be the immediate and not the remote consequence of the representation thus made. *Barry* v. *Croskey*, 2 Jo. & H. 1.

A bill averred, that the defendants, the directors and secretary of a projected railway company, having, partly by allotments to fictitious persons, and partly by purchase, obtained possession of all the shares of a given class in the company through their broker, induced the plaintiff, a stock-jobber, to contract to sell them certain of such shares to be delivered upon the "settling day" to be appointed by the committee of the Stock Exchange; and that they then, by false and fraudulent representations, made by them in their official character to the committee of the Stock Exchange, procured the appointment of a settling day, upon the arrival of which the plaintiff being by reason of the scheme, thus contrived by the defendants, unable to procure the shares he had contracted to deliver, except at a ruinous premium, was compelled to pay defendants a sum specified in the bill to release him from his contract, and the bill prayed for a declaration that such contract was fraudulent and void and inoperative, and for repayment to the plaintiff of the amount he had paid in respect thereof. The company having been joined as defendants to the bill upon the ground that they had adopted the fraudulent representations made by their directors and secretary to the committee of the Stock Exchange,—Held, on demurrer by the company, that although the company might have benefited by the fraudulent representations, *e. g.* by obtaining quotation of an increased price for their shares—and although, *semble*, they might be answerable for that increased price or for any other direct advantage derived from such fraudulent representations—yet, it not being shewn that the company knew such representations were made by their directors with intent to defraud the plaintiff by compelling him to perform his contract, or even that they knew of the existence of such a contract, the company were not responsible for the loss the plaintiff had thus incidentally sustained, and the company's demurrer was allowed. Ibid.

But held, that the bill was not open to demurrer on the part of the other defendant as being a mere bill for the recovery of money. Ibid.

A wife having been guilty of adultery, but unknown to her husband, in order the more easily to carry on the illicit intercourse, induced him to execute a deed of separation, whereby he covenanted to pay her an annuity, and to allow her to live separate; the adulterous intercourse was continued, and a divorce was subsequently obtained. The husband filed a bill to set aside the deed of separation, and it was held by the Lord Chancellor (reversing the decision of one of the Vice Chancellors), that the deed must be set aside, on the principle that none shall be permitted to take advantage of a deed which they have fraudulently induced another to execute, that they may commit an offence against morality, to the injury and loss of the party by whom the deed is executed. *Evans* v. *Carrington*, 30 Law J. Rep. (N.S.) Chanc. 364; 2 De Gex, F. & J. 489; 1 Jo. & H. 598.

According to the terms of proposal by a tax collector (A) for a guarantee policy, answers were required by the guarantee society not only from the applicant, but also from his intended employers. Those employers were the Commissioners of Taxes, and instead of resorting to them, the society accepted the answer of the overseer of taxes, who, in reply to inquiries from the society, stated that the collector's accounts would be checked weekly, and that he would not be allowed at any time to hold in his hands more than from 100*l.* to 200*l.* A absconded in default to the amount of 654*l.*, and it appeared in evidence that although it had been the practice prior to A's appointment to check weekly the accounts of the collector who had preceded him, such practice was not continued after his appointment. Upon a bill, by A's sureties, for the purpose of obtaining payment of the money assured by the policy,—Held, by one of the Vice Chancellors, first, that the statement of the surveyor of taxes did not amount to a warranty, inasmuch as it was a representation by a third person, who was not a party to the contract, as to the course intended to be pursued by another person; secondly, that the representation in question being not to a past or existing state of things, but to the future acts of other persons, had no application to the case of a guarantee policy, and as the representation was made fairly and honestly, and was substantially correct, it did not vitiate the policy. *Towle* v. *the National Guardian Assur. Soc.*, 30 Law J. Rep. (N.S.) Chanc. 900; 2 Giff. 42.

The terms on which the guarantee policy was effected made it compulsory on A to effect a life policy with the above society, and he accordingly did so. On the life policy a memorandum was indorsed, stating its connexion with the guarantee policy. The society transferred their life business to a life assurance company, which received the premiums on the life policy, and A also paid the premiums on the guarantee policy to an agent of the latter company. It was decided by one of the Vice Chancellors, that the latter company was liable, with the society which issued the guarantee policy, for the amount thereby assured; but upon appeal, the Lords Justices (reversing that decision) held, that the policy was void from the beginning, as founded on misrepresentation; and on this and other grounds the bill was dismissed, but without costs. Ibid.

A purchase from a poor, sick and illiterate man, shortly before his death, at an undervalue, under circumstances of haste and without proper protection, was set aside at the instance of the heir-at-law. *Clark* v. *Malpas*, 31 Law J. Rep. (N.S.) Chanc. 696; 31 Beav. 80.

The proper decree in such a case, is to direct the purchaser to execute a reconveyance, and not simply to declare the deed void. Ibid.

Where a niece had been induced to render valuable services to her uncle on the faith of his representation that by so doing she would become entitled to

the benefit of the trusts created in her favour by a codicil to his will, and the testator afterwards revoked such trusts, it was held, that he had no right to make such revocation, and a decree was made that the trusts in favour of the niece declared by such codicil should be performed. *Loffus* v. *Maw*, 32 Law J. Rep. (N.S.) Chanc. 49; 3 Giff. 592.

If a person make a representation calculated to induce another to assume a particular liability, and the circumstances are afterwards, before liability assumed, so altered to the knowledge of the person making the representation that the alteration might affect the course of conduct of the person to whom the representation was made, it is the imperative duty of the person who made the representation to communicate to the person to whom he made it the alteration of those circumstances; and a Court of equity will not hold the person to whom the representation has been made to be bound by any contract entered into on the faith thereof unless such a communication has been made. *Traill* v. *Baring*, 33 Law J. Rep. (N.S.) Chanc. 521; 4 Giff. 485.

Assurance society A having on the 4th of May 1861 accepted, by way of re-assurance, a proposal for an assurance for 3,000*l.* on the life of L T, proposed on the 10th of the same month, through its secretary, to assurance society C, that the latter should take the risk of 1,000*l.*, part of the above 3,000*l.*, representing at the same time that assurance society B would take 1,000*l.* of the risk, while it would itself retain 1,000*l.*, and representing also that L T's life was a good one. The proposal of society A was accepted by society C. On the 15th of May 1861, and before the contract between society A and society C was completed, society A, without informing society C, assured 2,000*l.* with society B instead of 1,000*l.*, and did not itself retain any portion of the risk of the 3,000*l.* On the 18th of May 1861 the policy with society C for 1,000*l.* was executed. In January 1862 L T died, and society C subsequently learned that society A, instead of retaining a risk of 1,000*l.* on her life, as they had represented they would do, had got rid of the whole of their risk on L T's life, and upon society C refusing to pay the amount assured, an action was brought against it by society A. Upon a bill by society C against society A, in order to obtain a declaration that the policy of the 18th of May 1861 was fraudulently obtained, and that it ought to be delivered up to be cancelled, a decree to that effect, with costs, was made by one of the Vice Chancellors. On appeal to the Lords Justices, the decision was affirmed. Ibid.

The jurisdiction to relieve the plaintiff in such a case is at least as properly in this Court of equity as in a Court of law. Ibid.

A surety who executes a bond on a misrepresentation by the obligee of a material fact, is entitled to relief in this court; therefore, where the plaintiff was induced to execute a bond on a representation by the obligee that the principal was not indebted to him, which statement was untrue, the Court directed the bond to be cancelled. *Blest* v. *Brown*, 3 Giff. 450.

When the bond by a surety purported to guarantee the payment of flour to be supplied by the obligee (of a specific quality), in order to enable the principal debtor to execute a contract, and the obligee designedly supplied inferior flour so that the contract was annulled, the obligor is entitled to have the bond cancelled. Ibid.

On a bill by the plaintiff who, while lodging at an hotel and seriously ill, executed a bond to the landlord for 1,000*l.*, payable at six months' date, to secure moneys paid and advanced for the plaintiff for hotel charges, the landlord undertaking to rectify all errors in the accounts, the Court restrained an action at law on the bond, the plaintiff giving judgment for the amount of the claim. *Edwards-Wood* v. *Baldwin*, 4 Giff. 613.

The plaintiff agreed to purchase a share in a partnership business, on the footing of a balance-sheet prepared by an accountant employed by the vendor, which all parties believed (with the exception of slight errors) to be, and was treated as, generally correct. It turned out to be grossly inaccurate in regard to the existing liability. The Court set aside the contract. *Charlesworth* v. *Jennings*, 34 Beav. 96.

The circumstance that a person is affected with notice of certain documents does not debar him from claiming relief in respect of false and deceptive representations respecting their contents—per *Turner, L.J.* *Kisch* v. *the Central Rail. Co. of Venezuela (Lim.)*, 34 Law J. Rep. (N.S.) Chanc. 545.

(2) *Confidential Relationship and Undue Influence.*

A being under the impression that he was the absolute owner of an estate which he had not seen for twenty years, sold it to his agent for an annuity of 40*l.* for the joint lives of himself and his wife and the life of the survivor of them. The estate was at the time settled on his wife for her separate use for life, A being entitled only to the reversion in fee expectant on his wife's decease. The interest of the wife was wholly overlooked, both by herself and her husband. The husband pressed the sale forward, and being a solicitor himself prepared the deeds, and was most anxious for the completion of the purchase. He died within a year after it was completed, having devised all his property to his wife. The consideration was grossly inadequate, the net yearly rental of the property being nearly 40*l.* Upon a bill by the wife to obtain a re-conveyance of the estate,—Held, that the sale could not be supported; the agent residing on the spot and knowing the value of the estate, which the vendor did not; and that although (assuming the annuity to be an adequate consideration for the reversion) the purchaser might keep the reversion on paying the consideration stipulated to be paid for the estate in possession, he was not entitled to retain his purchase either with an abatement from the consideration or at a value to be fixed by the Court; and that the plaintiff was entitled to a re-conveyance of the estate and also to the costs of the suit. *Dally* v. *Wonham*, 32 Law J. Rep. (N.S.) Chanc. 790; 33 Beav. 154.

Where a person standing in the relation of confidential agent to another, has, by his participation in a fraud, induced the latter to part with his property at an undervalue, his representatives may be proceeded against in equity to make good the loss occasioned by fraud, even though the agent himself derived no pecuniary benefit. *Walsham* v. *Stainton*, 33 Law J. Rep. (N.S.) Chanc. 68; 1 De Gex, J. & S. 678.

K, a barrister, acted professionally on behalf of

Mrs. S, then a widow, and by his services gained for her very large estates. Soon after the litigation was finally determined in her favour, and while the parties continued still on the most friendly terms, Mrs. S executed a deed whereby, in consideration of K's services, she conveyed to him all the estates to which her title had been thus established, to hold the same to him and his heirs to the use of her, the grantor, for her life, and after her death, to the use of him, his heirs and assigns, subject to a charge of such debts as she might owe at her decease not exceeding 10,000*l.*, and of 10,000*l.*, which was to be subject to her appointment. The lady married again, and differences having arisen between herself and K she filed her bill to have the deed set aside and the reversion reconveyed; and the Master of the Rolls having made a decree according to the prayer, with costs, upon the plaintiff's appeal from that decree, their Lordships dismissed the appeal with costs. *Broun* v. *Kennedy*, 33 Law J. Rep. (N.S.) Chanc. 342; 33 Beav. 133.

A testatrix gave a share in her residuary estate in trust for her daughter for life, with remainder to the daughter's children, and if none attained twenty-one (which happened) as she should appoint generally. In 1821 the daughter without any legal advice except that of the acting trustee, who was a solicitor and was, under the will, interested in the residuary estate, appointed that certain debts due from her husband to the testatrix should be accepted as part of the daughter's share. Her husband became soon afterwards a bankrupt, and died in 1853, and she died in 1858, having in settlements of accounts with the trustees from time to time proceeded on the footing of the deed:—Held, that a bill filed by her representatives in 1859 to set aside the deed on the ground of the appointment being a dealing between trustee and *cestui que trust* to the advantage of the former, and prejudice of the latter, under undue influence and without independent advice, was too late. *Skottowe* v. *Williams*, *Williams* v. *Skottowe*, 3 De Gex, F. & J. 535.

Securities given by plaintiff six months after he attained twenty-one, to the defendants for a debt due to them from his elder brothers, set aside with costs. *Sercombe* v. *Sanders*, 34 Beav. 382.

Voluntary conveyance to a mother by a daughter six months after she had attained twenty-one, and seven days before the daughter's marriage, but unknown to her husband, set aside both on the ground of the maternal influence and of the fraud on the husband's marital rights. *Chambers* v. *Crabbe*, 34 Beav. 457.

A son attained twenty-one in 1855, and in 1857 he conveyed to his father his reversionary estate and interest, in consideration of moneys advanced for his commission, outfit, and debts during his minority, and a further sum of 500*l.* then advanced:—Held, that the deed could not stand except as a security for the 500*l.* *Potts* v. *Surr*, 34 Beav. 543.

The doctrine laid down in *Hoghton* v. *Hoghton*, 15 Beav. 278, adhered to. Ibid.

Transaction between father and son seven years after the latter came of age, by which the father obtained a benefit of 5,790*l.* in the event of the son dying without children, supported, there being a valuable consideration on the part of the father, the settlement being a fit and proper family arrangement, and the transaction not having been impeached until after the death of the father. Ibid.

Securities obtained from sons for their father's debts set aside, the creditors failing to prove (as they were bound to do) that the sons knew the true nature of the transaction, and that no undue influence had been exercised by the father. *Berdoe* v. *Dawson*, 34 Beav. 603.

(3) *Dealings with Reversioners and Expectant Heirs.*

C F was entitled to 1,203*l.* 0*s.* 2*d.* consols, expectant on the decease of his father. Being in want of money, an assurance society lent him 150*l.* on his assuring his life, and mortgaging the policy and his interest in the consols. They also lent him a second 150*l.* on the same terms, but they refused to make further advances. He afterwards in 1856 sold his interest in the consols and the policies, subject to the mortgages, for 70*l.* His father was then aged fifty-six. C F died in 1858, and the mortgages were paid off out of the proceeds of the policies. His father died in 1860. Upon a bill by the administratrix of C F, the Court, considering that the full value of the reversion was 400*l.*,—Held, that the difference between 370*l.* and 400*l.* was ground sufficient to set aside the purchase upon repayment of the 370*l.* and interest. *Foster* v. *Roberts*, 30 Law J. Rep. (N.S.) Chanc. 666; 29 Beav. 467.

Held, also, that the purchaser kept the policies on foot for his own benefit, and that he was entitled to the money which had been paid in respect of them. Ibid.

The burthen of shewing that a fair price has been given for the interest of an expectant heir lies upon the purchaser, and that burthen is not displaced by shewing that substantial value has been given. *Talbot* v. *Staniforth*, 31 Law J. Rep. (N.S.) Chanc. 197; 1 Jo. & H. 484.

A bachelor, aged fifty-nine, tenant for life, with remainder to his first and other sons in tail, purchased from his nephew, who was first presumptive tenant in tail, and under considerable pressure from his creditors, his expectant interest in the estate at an under-value; and the two then cut off the entail, and conveyed the estate to the use of the purchaser in fee:—Held, that this could not be looked upon as a family arrangement, and the purchase was set aside. Ibid.

The fact that a reversion is dependent upon contingencies which do not admit of estimation by actuaries, does not relieve the purchaser from the onus of shewing that fair value was given. Ibid.

Where unfair advantage was taken of the necessities of one who wished only to raise money upon mortgage, but was induced by his solicitor, who betrayed his interests to serve the purposes of the purchaser, to execute an absolute conveyance at a considerable undervalue, one of the Vice Chancellors set aside the transaction as an absolute sale; and, on appeal, the Lords Justices affirmed the decision, and directed that the transaction should stand as a mortgage; that an account should be taken of the rents and profits received by the purchaser, who was defendant, and the amount be set against the principal money advanced by him, on which interest at 5*l.* per cent. must be allowed, and that a re-conveyance must be executed to the plaintiff, the vendor, on his paying the amount found to be due. *Douglas*

v. *Culverwell*, 31 Law J. Rep. (N.S.) Chanc. 543; 3 Giff. 251.

Where the consideration paid for the purchase of a reversionary interest was proved to be 38*l.* less than its value, the purchase was set aside. *Jones* v. *Ricketts*, 31 Law J. Rep. (N.S.) Chanc. 753; 31 Beav. 130.

A purchase of a reversionary interest by a brother from a sister at an undervalue, set aside twenty years after the purchase, and ten years and a half after the reversionary interest fell into possession, the influence of the brother continuing until a year before bill filed. *Sharp* v. *Leach*, 31 Beav. 491.

A B sold to C D a life interest in possession (subject to a mortgage for 800*l.*) and a reversionary interest in two sums of money. The price paid for the whole was 75*l.* and within a month C D sold it for 125*l.* to E F, who within three months afterwards sold it to G H for 550*l.* The value of the property in possession (free from the mortgage) was 1,231*l.*, and of the property in reversion, 312*l.* The purchase was set aside as against G H (who was held to have notice) on the ground of its being a purchase of a reversion at an undervalue. *Nesbitt* v. *Berridge*, *Butler* v. *Berridge*, 32 Beav. 282.

An account settled and signed by an expectant heir for the purpose of a post-obit security is not conclusive as between him and the person dealing with him; but the right of such heir to re-open the accounts does not extend to transactions not of a post-obit character forming items in the account. *Tottenham* v. *Green*, 32 Law J. Rep. (N.S.) Chanc. 201.

The assignee of a post-obit security takes it with notice of all its legal incidents, including the right of the reversioner to open settled accounts between himself and the original mortgagor. Recitals in the mortgage deed of an account settled are not binding on the reversioner even as against sub-mortgagees. Ibid.

The repeal of the usury laws has not altered the rules of the Court of Chancery as to the dealings with expectant heirs, and accordingly, where an extravagant young man entitled in reversion to an estate, and very much pressed for money, had shortly after attaining twenty-one given to a money-lender securities bearing an exorbitant rate of interest, they were ordered to stand as a security only for the sums actually advanced, and interest thereon at 5*l.* per cent. per annum. *Croft* v. *Graham*, 2 De Gex, J. & S. 155.

A B, through a solicitor, borrowed money from C D upon a deposit of title deeds. The solicitor obtained the deeds back, for the purpose, as he stated, of preparing a legal mortgage. Instead of this, he got A B to execute a legal mortgage to himself instead of to C D, and he afterwards raised money on a transfer of this mortgage and, on the delivery of the title-deeds, from a creditor without notice:—Held, that the loss must fall on A B, and that he was liable to pay both mortgages. *Adsetts* v. *Hives*, 33 Beav. 52.

Held, that a purchaser from an old, infirm, and ignorant woman, having no professional advice, was bound to prove that he gave the full value for the property, and failing in such proof, the transaction was set aside with costs. *Baker* v. *Monk*, 33 Beav. 419.

*(b) When refused.*

A sum of 15,000*l.* was paid to the solicitors of the defendants, who desired to invest it. The solicitors did invest 10,000*l.* on a valid security, and they appropriated the remaining 5,000*l.* to their own use. They afterwards obtained from the plaintiff, another client, upon a representation that they were for the purpose of a suit to which he was a party, the execution of two deeds mortgaging his estate to secure to the defendants the sum of 5,000*l.* These deeds the solicitors handed to the defendants; and they became bankrupt in June 1865. On the 11th of October 1855, however, the plaintiff was served with notice of the defendants' intention to sell the plaintiff's interest under the mortgage deed, and an action was afterwards commenced against the plaintiff upon his covenant in the deed. The plaintiff, in April 1859, first discovered from the assignees of the solicitors all the particulars of the case, and then filed a bill to set aside the deeds, and the Master of the Rolls made a decree in his favour; but, upon appeal, the bill was dismissed, with costs, the Lord Chancellor considering that the plaintiff had, by his conduct, deprived himself of any claim to relief. *Wall* v. *Cockerell*, 30 Law J. Rep. (N.S.) Chanc. 417.

A purchaser of real estate upon signing the contract assigned and delivered a negotiable bond, as a deposit, to G T, who (though never admitted) alleged himself to be a solicitor and the solicitor for the vendor. G T transferred the bond to the defendant, as a security for his own debt. The vendor of the real estate was a fictitious person, and the contract a fraud. The purchaser filed his bill to get back the bond from the defendant; and upon an application for an injunction to restrain him from disposing of it,—Held, that the deposit did not make G T a trustee for the plaintiff; and that the defendant, being a purchaser for value, without notice, could not be restrained from dealing with the bond. *Ashwin* v. *Burton*, 32 Law J. Rep. (N.S.) Chanc. 196.

The plaintiff sold some coals to the defendant, and shipped them for exportation, and the bill of lading was made out and delivered to the vendee's agent. The plaintiff, not having received payment, instituted a suit for an injunction, and to obtain possession of the bill of lading, and they supported their equity by allegations of gross fraud which were disproved. The bill was dismissed with costs, the plaintiff's remedy being by action against the purchaser for the price. *Straker* v. *Ewing*, 34 Beav. 147.

This Court visits very severely a plaintiff who makes a charge of fraud against a defendant which he is unable to sustain by evidence. The rule is more stringent where the introduction of the charge is made for the purpose of giving the Court jurisdiction. Ibid.

A husband, by his bill, alleged that his wife, under the advice and assistance of the two trustees of the settlement, secreted and withheld moneys of the wife which ought to be paid over to him, the husband. The bill sought to recover those moneys. The trustees, who were made defendants, demurred, and their demurrer was allowed. *Eaton* v. *Bennett*, 34 Beav. 196.

Sales of annuities charged on a reversion and other property, were supported on evidence of auctioneers and others, in opposition to calculations

of certain actuaries. A clause giving interest on arrears of the annuity held not objectionable. *Tynte* v. *Hodge; Tynte* v. *Beavan*, 2 Hem. & M. 287.

Where plaintiffs in an action against a railway company for compensation for injuries, filed a bill against the company for a declaration that a release given by them to the company for such injuries was a receipt only for 15*l.*, and that the defendants, who had pleaded such release in the action, might be restrained from relying on it as a release of the causes of action, on the ground that the release was obtained by fraud on the part of the company's agents, upon demurrer,—Held, that the fraud alleged was not such as a Court of law could necessarily deal with, and that the plaintiffs were not precluded from coming to this Court by reason of their having commenced the action, they not having attempted an equitable replication, and the Court overruled the demurrer. *Stewart* v. *the Great Western Rail. Co.*, 2 Dr. & S. 438.

Where the vendors of a brewery make various and inconsistent representations as to the profits of the concern, which demanded investigation, for which the vendor afforded every facility, and which the purchaser in fact partially made, the Court decreed specific performance. *Clarke* v. *Mackintosh; Mackintosh* v. *Clarke*, 4 Giff. 134.

W, a solicitor, being indebted to E, and being pressed for payment or fair security, proposed to give him a second mortgage on the G estate. This estate had been bought in the name of the plaintiff, who was, however, only a trustee for W, a fact which did not appear on the deeds. The propusal being acceded to, W sent to E's solicitors a draft of the mortgage deed, which was in the common form, containing a covenant to pay. It was afterwards engrossed and executed by the plaintiff, without any communication between E and the plaintiff. The security of the estate proving insufficient, E sued the plaintiff on the covenant in the deed, and the plaintiff thereupon filed a bill to be relieved, on the ground that he had been defrauded by W into executing a deed containing a covenant to pay:—Held, that E was not bound to inquire whether the plaintiff had agreed to enter into the covenant, and that the frame of the deed did not affect E with notice of any fraud, and the bill was dismissed. *Greenfield* v. *Edwards*, 2 De Gex, J. & S. 582.

## FRAUDS, STATUTE OF.

(A) Contracts required to be in Writing.
  (*a*) *Interest in Land.*
  (*b*) *To answer for the Debt of another.*
  (*c*) *Declaration of Trust.*
  (*d*) *Performance within a Year.*
(B) Note or Memorandum in Writing.
(C) Acceptance and Receipt.
(D) How excluded.

### (A) Contracts required to be in Writing.

#### (*a*) *Interest in Land.*

To an action for goods sold the defendant pleaded that it was agreed that in consideration of the defendant giving up possession of a public-house and stock in trade the plaintiff should pay the defendant 100*l.*, and give up and discharge the defendant from all debts and the causes of action in the declaration, and averred payment of the 100*l.* and delivering up of possession of the premises:—Held, that evidence of a parol agreement, by way of accord and satisfaction, was admissible in support of the plea, although to enforce the delivery of possession it might be necessary to shew a contract in writing to satisfy the 4th section of the Statute of Frauds. *Lavery* v. *Turley*, 30 Law J. Rep. (N.S.) Exch. 49; 6 Hurls. & N. 239.

#### (*b*) *To answer for the Debt of another.*

The plaintiff having entered into a contract to supply C & Co. with iron plates, delivered a part of them, but threatened to keep back the remainder, unless he received payment for them in cash. The defendant, who had an interest in the performance of the contract, thereupon agreed, that if the plaintiff would deliver the remainder of the goods he would cash for him the acceptances of C & Co. for the price of the goods already delivered and thereafter to be delivered, and protect him from the bills when they became due. The defendant by the agreement was to receive 3*l.* per cent. discount on the amount of the bills:—Held, that the agreement was in substance not a purchase of bills, but an engagement on the part of the defendant to answer for the debt and default of C & Co., and must therefore be in writing according to the 4th section of the Statute of Frauds. *Mallett* v. *Bateman*, 33 Law J. Rep. (N.S.) C.P. 243; 16 Com. B. Rep. N.S. 530.

#### (*c*) *Declaration of Trust.*

When the Court of Chancery is called upon to establish or act upon a trust of lands by declaration or creation, the trust must not only be manifested and proved by writing, signed by the party by law enabled to declare the trust, but it must also be manifested and proved by writing, signed as required, what that trust is. *Smith* v. *Matthews*, 30 Law J. Rep. (N.S.) Chanc. 445; 3 De Gex, F. & J. 139.

The Statute of Frauds does not by any means require that all trusts should be created only by writing, but that they shall be manifested and proved by writing so that there may be evidence in writing proving what the trust is. Ibid.

#### (*d*) *Performance within a Year.*

A transaction not in writing, which the Court considered to be a new agreement based upon a former written agreement, was entered into with a joint-stock company, and was not actually performed at the time when the company was ordered to be wound up in bankruptcy. One of the Commissioners allowed a proof for the amount for which the contract had been performed; but, on appeal,—Held, that the transaction was one which, under the 4th section of the Statute of Frauds, ought to have been in writing, being one which could not be performed within a year; and as there was nothing which in the opinion of the Court amounted to a written contract, the proof must be expunged. *Ex parte Acraman, in re the Pentreguinea Patent Fuel Co. (Lim.)*, 31 Law J. Rep. (N.S.) Chanc. 741.

The plaintiff agreed on a Sunday to serve the defendant for a year, the service to commence on

the Monday. On the Monday the plaintiff, with the knowledge and consent of the defendant, commenced the service, and received 20*l.* on account:—Held, in an action for a wrongful dismissal within the year, in which an objection was taken that this was a contract for a year's service to commence on a future day, that the jury might infer a new implied contract on the Monday for a year's service from that day. —*Semble*, also, per *Willes, J.*, that a contract made on one day to serve for a year from the following day is not within section 4. of the Statute of Frauds. *Cawthorn* v. *Cordrey*, 32 Law J. Rep. (N.S.) C.P. 152; 13 Com. B. Rep. N.S. 406.

### (B) NOTE OR MEMORANDUM IN WRITING.

One paper referring to another, in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of the Statute of Frauds; but where the first paper was in these words,—"I agree to let the premises in G L, containing three stables, &c., for the same rent and subject to the same conditions that I hold them myself," it was held (*Campbell, L.C., dissentiente*), that this paper, even though ratified by the proposed lessee, as it did not state the duration of the term, did not contain enough to constitute a memorandum of an agreement sufficient to satisfy the statute. *Fitzmaurice* v. *Bayley*, 9 H.L. Cas. 78.

In the Court of Queen's Bench, in an action on an agreement, the questions discussed were, one of fact, what the parties had said and written to each other, and one of law, what was the construction to be put on two letters of the defendant, which were relied on as a ratification of what his agent had done. In the Exchequer Chamber (upon the proceeding by appeal under the Common Law Procedure Act the judgment of the Court was given on the ground that even if the defendant's letters amounted to a ratification, it was null, for that the paper ratified did not contain a memorandum of agreement sufficient to satisfy the Statute of Frauds:—Held, that it was competent to the Court of Exchequer Chamber to adopt that ground for its judgment. Ibid.

Negotiations having commenced between the plaintiffs and the defendant respecting the lease of a house by the plaintiffs to the defendant, the plaintiffs forwarded a draft lease, which defendant sent to his solicitors, intimating that he would leave the matter in their hands. After a correspondence between the solicitors of each party with reference to the terms of the lease, defendant's solicitors wrote to plaintiff's solicitors, "We have just seen our client, and have altered this draft lease in accordance with his instructions. We trust there will be now no impediment to prevent an early completion; and we shall be glad to receive the draft as soon as you can, that we may engross the counterpart. (Signed) K & B." To this the plaintiffs' solicitors replied by letter, forwarding draft and engrossment of lease and counterpart, claiming as solicitors to lessors to be entitled to engross both, at the expense of the lessee, and requesting the defendant's solicitors, when they had compared, to return the engrossments of the lease and counterpart, when they (the plaintiff's solicitors) would be prepared to exchange. The defendant's solicitors objecting to this, the negotiation went off; and the plaintiffs having brought an action against the defendant for the breach of an agreement to accept a lease on terms previously agreed upon,—Held, that there was no evidence of an authority from the defendant to his solicitors to sign an agreement to accept a lease on terms previously agreed upon; and that, supposing there had been such authority, the letter of the defendant's solicitors was only a proposal, which was not accepted in its entirety; the claim to engross the counterpart lease being a substantial part, and not a consequence of the agreement; and that therefore there was no signed agreement or memorandum thereof to satisfy the 4th section of the Statute of Frauds. *Forster* v. *Rowland*, 30 Law J. Rep. (N.S.) Exch. 396; 7 Hurls. & N. 103.

The plaintiff wrote to A, offering to purchase of him a horse at a certain price, and saying that if he heard nothing further he should assume that A accepted the offer. He did hear nothing further, until after a sale by auction had taken place, when both A and the defendant, who was auctioneer at the sale, wrote to the plaintiff to say that the horse had been sold at the sale by mistake, and expressing their regret at the occurrence:—Held, in an action for the conversion of the horse, that, as there was no memorandum in writing binding on A in existence at the time of the sale, the property in the horse had not then vested in the plaintiff, and that he could not rely on the subsequent letter of A, as that would not relate back so as to complete the plaintiff's title at the time in question. *Felthouse* v. *Bindley*, 31 Law J. Rep. (N.S.) C.P. 204; 11 Com. B. Rep. N.S. 869.

After negotiations between the defendants, Messrs. Evans, and J. Noakes, the factor of the plaintiff, T. Durrell, as to the purchase of hops, the plaintiff, one of the defendants, and Noakes met at Noakes's office, and, after discussion, the price of 16*l.* 16*s.* per cwt. was agreed upon, and Noakes drew out the following document—

"Messrs. Evans,

Bought of J. Noakes.

| Bags. | Pockets. | | £. | s. |
|---|---|---|---|---|
| 33 | | T. Durrell, Ryarsh and Addiogton. | 16 | 16 |

Oct. 19th, 1860."

The defendant requested that the date might be altered to the 20th, which, by the custom of the trade, would give a week's more time for payment. The plaintiff and Noakes consented, and the alteration was accordingly made in the document by Noakes, who handed it to the defendant, and he took it away with him. The document was written on a leaf torn from Noakes's book, in which was a counterfoil, and this was left in Noakes's possession, and followed the terms of the other document, except that instead of "Messrs. Evans, bought of J. Noakes," was simply "Sold to Messrs. Evans":—Held, that there was evidence from which a jury might find that Noakes was the agent of the defendants, as well as of the plaintiff, to draw up a record of the contract between them; and that if he were, the writing by him of "Messrs. Evans" was a signature binding on the defendants within the 17th section of the Statute of Frauds. *Durrell* v. *Evans* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 337; 1 Hurls. & C. 174—reversing the decision of the Court below, 30 Law J. Rep. (N.S.) Exch. 254; 6 Hurls. & N. 600.

In an action against the purchaser of goods, the sold note, signed by the broker acting for both

parties, and which had been delivered by him to the purchaser, is a sufficient memorandum to satisfy the 17th section of the Statute of Frauds in the absence of proof of a variance between it and the bought note. *Parton* v. *Crofts*, 33 Law J. Rep. (N.S.) C.P. 189; 16 Com. B. Rep. N.S. 11.

The plaintiff, a seed-merchant in Kent, wrote to the defendants, seedsmen in London, offering to sell the seed of growing turnips; to which the defendants replied, asking the quantities and price for white globe turnip seed. The plaintiff answered that all he could offer at present was the produce of 5 acres, at 18*s.* 6*d.* a bushel, delivered at the Bricklayers' Arms Station. The defendants offered to take 2 or 3 acres at 16*s.* 6*d.* The plaintiff wrote, saying he could not accept less than 18*s.*, his contract price with London houses. The defendants then wrote the following letter: "In reply to your favour of this morning, we beg to say, as our neighbours are giving you 18*s.* per bushel for white globe turnip, we, as a beginning with you, will take the produce of 3 acres at that price, to be delivered, as soon as harvested, free of carriage to London station. Let us know what other sorts you may have to offer, as also worzel seed of sorts for 1861 harvest. Waiting your reply, we remain, &c." The plaintiff verbally told the defendants he accepted the offer. The defendants having refused to receive the seed,—Held, on action brought, that there was a binding contract in writing within the 17th section of the Statute of Frauds, although the plaintiff never replied in writing to the defendants' last letter. *Watts* v. *Ainsworth*, 31 Law J. Rep. (N.S.) Exch. 448; 1 Hurls. & C. 83.

The plaintiff advertised a house to be let, referring for particulars to E, a house agent. The defendant called upon E, and proposed to take the house from the following Michaelmas-day at a certain rent, and wrote down a specification of alterations and repairs which he would require to have done; and E, with his assent, wrote to the plaintiff, communicating to him the defendant's proposal, with a copy of the specification of repairs, and telling him that he had already set about doing them. In an action brought in a county court for a year's rent, or for the breach of the contract, the above letter was tendered in evidence on the part of the plaintiff, but was rejected by the Judge; and the plaintiff was nonsuited. On appeal to this Court, pursuant to the 14th section of the 13 & 14 Vict. c. 61,—Held, that the letter was properly rejected; and that, assuming it was admissible as a letter written and signed by an agent duly authorized for that purpose by the defendant, it was not such a memorandum of the bargain as to satisfy the 4th section of the Statute of Frauds, inasmuch as it was a mere proposal. *Clarke* v. *Fuller*, 15 Com. B. Rep. N.S. 24.

Although a signed document, not containing the terms of an agreement therein referred to, but referring to another written (but unsigned) document which does contain these terms, may be connected with the latter document by parol evidence so as to take the case out of the Statute of Frauds, the answer of the defendant, wherein the statute is pleaded and insisted on, cannot be made use of for this purpose. And a reference to "the agreement which your client alleges he has entered into," in a signed document, is not a sufficient acknowledgment of the existence of an agreement at all to take the case out of the statute. *Jackson* v. *Oglander*, 2 Hem. & M. 465.

*Semble*—An answer admitting a verbal agreement alleged in the bill but insisting on the statute, must read as if it were an answer denying the agreement *in toto*. Ibid.

### (C) ACCEPTANCE AND RECEIPT.

The defendant, an innkeeper, ordered of the traveller of the plaintiffs, who were wine and spirit merchants at Bristol, two puncheons of rum and one hogshead of brandy, at six months' credit; they were to lie in bond in the plaintiffs' warehouse till wanted. The plaintiffs thereupon sent the defendant an invoice, specifying particular casks of brandy and rum as sold to him, stating that they were free from warehouse rent for six months. The plaintiffs kept a warehouse for their own and other people's goods, and they transferred the particular casks to the defendant's name in their warehouse books, as sold to him. After that entry the plaintiffs could not get the casks out of the bonded cellar in which they were. The defendant did not pay the price when the credit had expired, but asked the plaintiffs to take the goods back or to sell them for him. This the plaintiffs refused to do. The defendant never had the casks out of the plaintiffs' cellar. In an action, by the plaintiffs, for the price,—Held, that there was some evidence of a receipt and acceptance of the casks by the defendant so as to satisfy the 17th section of the Statute of Frauds, for there was ground for saying that the character in which the plaintiffs held the casks had changed from that of mere vendors to that of warehousemen and agents of the defendant. *Castle* v. *Sworder* (Ex. Ch.), 30 Law J. Rep. (N.S.) Exch. 310; 6 Hurls. & N. 828.

The "acceptance" of goods, required by the 17th section of the Statute of Frauds (29 Car. 2. c. 3), in order to make the contract of sale good, may be prior to the "actual receipt," and need not be contemporaneous with or subsequent to it. *Cusack* v. *Robinson*, 30 Law J. Rep. (N.S.) Q.B. 261; 1 Best & S. 299.

The defendant, on the 24th of October, having examined at Liverpool several of a lot of 156 firkins of butter, verbally agreed with the plaintiffs to purchase the whole of them, and directed that they should be sent, by carriers whom he named, to Fenning's Wharf, London. The butter was accordingly delivered by the plaintiffs to the carriers, and by them delivered at Fenning's Wharf, in two lots, on the 26th and 27th of October. Fenning was in the habit of receiving and warehousing butter for the defendant until he sold it. The plaintiffs sent an invoice to the defendant in London, on the 25th of October, with a letter apprising him that the butter had been sent as he had directed. There was no direct evidence that the defendant inspected the butter at the wharf; but on the 27th of October he telegraphed to the plaintiffs that he should send it back as not according to sample, and it was re-delivered, on the same day, by Fenning to the carriers under an order from the defendant:—Held, first, that there was ample evidence that the goods when placed in the wharf were put under the control of the defendant, so as to put an end to any right of the plaintiffs as unpaid vendors; and that, therefore, there was a sufficient "actual receipt" by the defendant, within

the 17th section of the Statute of Frauds. Secondly, that, the defendant having selected at Liverpool the specific firkins as those which he agreed to take as his property as the goods sold, and having directed those specific goods to be forwarded to London, there was an "acceptance" by him within the section. Ibid.

The defendants agreed by parol to purchase of the plaintiff four specific stacks of cotton waste at 1*s.* 9*d.* per pound. They sent their own packer with their sacks and their own carts to fetch it; their packer packed the waste into eighty-one sacks, twenty-one of which were weighed and then loaded on the defendants' cart and taken to the defendants' premises; the rest of the sacks were not weighed. On arrival of the twenty-one sacks at the defendants' premises they refused to accept any portion of the waste, on the ground that it was of inferior quality:—Held, that the property in the waste passed to the defendants, and that there was sufficient evidence of an acceptance and receipt to satisfy the Statute of Frauds. *Kershaw* v. *Ogden*, 34 Law J. Rep. (N.S.) Exch. 159; 3 Hurls. & C. 717.

Hops were sold by sample, and, before prompt day, the buyer's foreman attended at the warehouse of the seller's factors to see them weighed, compared each pocket with the sample, and adjusted the allowances on some which he objected to:—Held, that this was a sufficient acceptance to satisfy the 17th section of the Statute of Frauds. *Simmonds* v. *Humble*, 13 Com. B. Rep. N.S. 258.

(D) How excluded.

A, having been deserted by his wife, and not having heard of her for ten years, married again; afterwards, having discovered that she was alive, and believing himself liable to be convicted of bigamy, he executed a deed, purporting to convey his land to B, for valuable consideration. It was proved, by parol evidence, that the deed was executed on the understanding that B would hold the land at A's disposal. No consideration was paid by B, and A remained for four years in possession of the land, and partly paid off a mortgage upon it:—Held, that the transaction was not illegal, and that A was entitled to a decree for a re-conveyance of the land, the Statute of Frauds being excluded, both on the ground of fraud and of a resulting trust within the 8th section. *Davies* v. *Otty*, 34 Law J. Rep. (N.S.) Chanc. 252; (on demurrer) 33 Beav. 540.

## FREEBENCH.

[See Dower.]

A, by the settlement on his marriage with B, "in order to make some provision for B, in case she should survive him," settled a copyhold estate upon himself for life, with remainder to B for life:—Held, that B's right to freebench out of other copyholds, of which A died seised and intestate, was not barred by the settlement. *Willis* v. *Willis*, 34 Law J. Rep (N.S.) Chanc. 313; 34 Beav. 340.

*Semble*—An intention to bar freebench, which attaches only on copyholds of which a husband dies seised, will not be so readily inferred from an antenuptial provision as under the old law an intention to bar dower. Ibid.

## FRIENDLY AND OTHER SOCIETIES.

[The laws relating to Industrial and Provident Societies consolidated and amended by 25 & 26 Vict. c. 87.—An act to amend the laws relating to Loan Societies (3 & 4 Vict. c. 110.) made perpetual by 26 & 27 Vict. c. 56.]

(A) Benefit, Building and Land Societies.
(B) Rights and Liabilities of the Society.
(C) Rights and Liabilities of the Members.
(D) Jurisdiction of Justices and the County Court.
(E) Actions against.
(F) Dissolution and Winding-up.

(A) Benefit, Building and Land Societies.

The Kent Benefit Building Society, so enrolled and certified, superadded the title of "Freehold Land Society," and borrowed money upon mortgage, and purchased land therewith through the intervention of trustees. The society became embarrassed, and, failing to pay interest, the mortgagee sold the estate, which being insufficient, he brought his action, and recovered the balance against the trustees. On the winding-up of the company, the trustees claimed the money recovered from them in the action:—Held, that the alteration of title did not constitute the society a "Land Society"; that they had no power to purchase land except for building, and the claim must be disallowed. Official manager's costs out of the estate. No order as to the other costs. *In re the Kent Benefit Building Society*, 30 Law J. Rep. (N.S.) Chanc. 785; 1 Dr. & S. 417.

In 1852 certain persons formed themselves into a society, intended to be established under 6 & 7 Will. 4. c. 32, and which was subsequently registered under that act. The respondent became a member, by subscribing for two shares, and made payments on account. In 1853 the society purchased a freehold estate which was divided into allotments among the members, two of which were allotted to the respondent, and, on the 26th of March, 1855, he agreed to take them. He refused to pay either subscriptions or fines subsequently to that date, and an award was duly made against him under the powers of 10 Geo. 4. c. 56. s. 27, which, by 6 & 7 Will. 4. c. 32. s. 4, apply to societies established under 6 & 7 Will. 4. c. 32:—Held, that the respondent could not set up as an answer to a complaint made against him for non-payment of the sum awarded, that the society had ceased to exist as a society under 6 & 7 Will. 4. c. 32, by reason of the purchase of the freehold estate, and that even supposing such purchase was in contravention of the rules and original constitution of the society, the only remedy would be, as was held in *Grimes* v. *Harrison*, by an application to a Court of equity. *Hughes* v. *Layton*, 33 Law J. Rep. (N.S.) M.C. 89; *nom. R.* v. *D'Eyncourt*, 4 Best & S. 820.

Held, also, that the respondent could not withdraw himself from the society, while, according to the rules, he still owed money, unless he paid the money so due. Ibid.

A benefit building society is bound by orders for necessary repairs given by the secretary, though not sanctioned by the number of trustees required by the rules for transacting the ordinary business of the

company, or entered in the minute book. *Allard* v. *Bourne*, 15 Com. B. Rep. N.S. 468.

(B) Rights and Liabilities of the Society.

A society cannot repudiate a debt merely on the ground that it has not been formally secured, though the want of form may affect its priority. *Pare* v. *Clegg*, 30 Law J. Rep. (N.S.) Chanc. 742; 29 Beav. 589.

If a society becomes extinct, and the trustees of its estates and property undertake to apply them for the benefit of creditors, the creditors become *cestuis que trust*, and the Statute of Limitations will not operate as a bar to the debts.

A society, though irrational, if duly certified under the Friendly Societies Acts, will be considered legal as regards contracts with members and third parties. Ibid.

If a society is insolvent, and has ceased to exist, it is sufficiently represented in a suit for the administration of its estate, property and effects, if a single member of each class, interested in the affairs of the society, is brought before the Court. Ibid.

A testator, under the Friendly Societies Act, 9 Geo. 4. c. 56. and the 4 & 5 Will. 4. c. 40, effected a policy of assurance on his life in a sum of 499*l.* 19*s.*, payable on his decease to his widow; and if none, to his executors, administrators or assigns. All previous acts relating to friendly societies were repealed and consolidated by the 13 & 14 Vict. c. 115, and assurances in favour of relations were limited to the sum of 100*l.*, but the rights of parties under former acts were preserved. The testator paid the premiums till his decease, and died indebted, leaving his widow surviving:—Held, in a suit by creditors, that the policy was good, though it exceeded the sum of 100*l.*, and that the widow was entitled to the sum assured; but that the money must be paid into court, as the wife, as administratrix, was found indebted to the estate of the testator. *In re Owen; Clayton* v. *Owen*, 31 Law J. Rep. (N.S.) Chanc. 825; 31 Beav. 285.

If the treasurer of a friendly society makes an assignment of his estate and effects to trustees for the benefit of his creditors, the circumstance that the trustees of the society have been guilty of negligence in not auditing the accounts does not deprive the society of the right conferred by the 18 & 19 Vict. c. 63, to recover out of the estate of the treasurer what is due from him to the society in priority to his general creditors. *Absolum* v. *Gething*, 32 Law J. Rep. (N.S.) Chanc. 786; 32 Beav. 322.

The service of a bill filed in this Court to compel payment of what is due from the assignees of the treasurer of a friendly society is a demand in writing, within the meaning of the 18 & 19 Vict. c. 63. s. 23. Ibid.

(C) Rights and Liabilities of the Members.

By a resolution passed at a meeting of a building society established under the 6 & 7 Will. 4. c. 32, the plaintiff was appointed surveyor of the society. The enrolled rules of the society provided for the appointment of a surveyor to examine houses and property previous to any money being advanced thereon, and to transact all other business that might require the assistance of a surveyor, and for which he should receive out of the funds a reasonable remuneration. At a meeting of the committee of management of the society, on the proposition of the defendant, who was a shareholder and member of the committee, the plaintiff was instructed to prepare plans and specifications for six houses. The plaintiff, who informed the committee that his commission was 3*l.* 10*s.* per cent., prepared the plans and specifications, and the committee entered into a contract with a builder for the erection of the houses on a piece of land which the defendant and two other committeemen had, on behalf of the society, taken on a building lease. The plaintiff superintended the building, and performed the duties of an architect, making reports to the society and giving certificates to the builder. The society having been broken up and the houses disposed of, the plaintiff, who had repeatedly claimed through the secretary his commission from the directors of the society, sued the defendant for the amount:—Held, *Bramwell, B. dissentiente*, that there was no evidence to go to the jury of any contract binding the defendant personally. *Alexander* v. *Worman*, 30 Law J. Rep. (N.S.) Exch. 198; 6 Hurls. & N. 100.

By the Industrial and Provident Societies Acts, 15 & 16 Vict. c. 31. and 17 & 18 Vict. c. 25, the officers or trustees of a society registered under the first of these acts, are the persons to be sued for a debt due from the society. These acts are repealed by 25 & 26 Vict. c. 87, which incorporates the society on its being registered, and makes provision for the prosecution of actions pending against the trustees or officers at the time of the society obtaining its certificate of registration, but omits to provide for pending claims:—Held, that the members of a society registered under the 15 & 16 Vict. c. 31. and 25 & 26 Vict. c. 87, might, in an action brought after the last act, be sued individually for a debt, due from the society before such last act, and for which no action had been ever brought against the trustees or officers. *Dean* v. *Mellard*, 32 Law J. Rep. (N.S.) C.P. 282; 15 Com. B. Rep. N.S. 19.

An advanced member of a building society was held entitled to redeem his mortgage on payment merely of his fines and the subscriptions to the end of the thirteenth year (the estimated duration of the society), though he still remained liable for the subsequent subscriptions. *Handley* v. *Farmer*, 29 Beav. 362.

The mortgage property of an advanced member of a building society became saleable in consequence of his default. The property was sold by the society to the plaintiff, who took the forfeited shares, part of the purchase-money being payable by 20*l.* instalments:—Held, that he was liable under the rules to fines for non-payment of the instalments of the purchase-moneys. Ibid.

In a suit for redemption by an advanced member of a building society, a sum was found due from him to the society beyond that secured by the mortgage. An order on the plaintiff to pay it was made in the redemption suit. Ibid.

(D) Jurisdiction of Justices and of the County Court.

On a complaint, under the 3 & 4 Vict. c. 110. s. 16, for not paying a promissory note given to a loan society, the Justices can only make an order for the payment of the sum found to be due, *simpliciter*, and have no power to postpone the time of payment.

*Parker* v. *Boughey*, 31 Law J. Rep. (N.S.) M.C. 272; 3 Best & S. 43.

Under the statute 18 & 19 Vict. c. 63. ss. 40, 41, the County Court has jurisdiction to reinstate a member of an enrolled friendly society improperly expelled, although the rules of the society prescribe a mode of determining disputes under them. *Ex parte Wooldridge*, 31 Law J. Rep. (N.S.) Q.B. 122; 1 Best & S. 844.

The officers of a friendly society refused to continue sick-pay to a member on the ground that his daughter, who received the money for him, had on two occasions knowingly received too much, and they expelled him from the society. By the 16th of the registered rules of the society, disputes arising under the rules, of any kind whatsoever, were to be referred to a private committee; and if not settled by them to mutual satisfaction, they were then to be referred to a district committee, whose decision was to be final. On an application for a mandamus to compel his restoration,—Held, (*Cockburn, C.J.* doubting,) that the County Court had jurisdiction to reinstate him. Ibid.

*Quære*—Whether rule 16. applied to this case. But held, that if it did, the County Court would direct the society to hear the dispute, and if the rule did not apply, the County Court Judge ought to decide the matter in difference. Ibid.

### (E) Actions against.

By the 10 Geo. 4. c. 56. s. 27. it is enacted that provisions shall be made by one or more of the rules of every friendly society falling within the provisions of that act, specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be made to Justices of the Peace or to arbitrators. By section 40. of 18 & 19 Vict. c. 63. every dispute between any member or members of any such society, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society. The defendant was treasurer of the H Friendly Society, and as such treasurer received in the year 1853 a sum of money. He resigned his office in April 1856 without having paid over the money, and subsequently his name was struck out of the books. By the rules of the society, which was formed under 10 Geo. 4. c. 56, provision was made for a reference to Justices if any dispute should arise as to the legality or payment of any fine or allowance, or between any officer or member, &c. The defendant was, in November 1859, reinstated as a member of the society, by order of two Justices, and an action having been brought against him by the trustees to recover the said sum of money, it was held, that the action was maintainable, for that there was nothing in either of the above sections to take away the common law remedy by action in such a case:—Held, per *Hill, J.*, that 18 & 19 Vict. c. 63. governed the case. *Sinden* v. *Bankes*, 30 Law J. Rep. (N.S.) Q.B. 102; 3 E. & E. 623.

The rules of a benefit building society, formed under the 6 & 7 Will. 4. c. 32, provided that the directors should determine all disputes which might arise concerning the affairs of the company, or respecting the construction of the rules or any of the clauses or things contained, and also of any by-laws, additions, alterations or amendments which should or might thereafter arise between the trustees, officers or other shareholders of the company; and the decision of the board, if satisfactory, should be conclusive, but if not satisfactory, reference should be made to arbitration, pursuant to the statute 10 Geo. 4. c. 56. s. 27:—Held, that a claim by the trustees of the company for subscriptions on shares, under a covenant entered into by a shareholder with them to pay the subscriptions and interest payable on his shares, according to the rules of the society, and perform the rules thereof in respect of the said shares, was not a dispute within the meaning of the statute or rule, and therefore that the shareholder was properly sued in a court of law. *Farmer* v. *Giles*, 30 Law J. Rep. (N.S.) Exch. 65; 6 Hurls. & N. 753.

Held, also, that the covenant was absolute, and that it was no answer that the covenantor had ceased to be a shareholder of the society at the time the subscriptions became due. Ibid.

The trustees of a provident society formed under the 15 & 16 Vict. c. 31, but not registered under the 25 & 26 Vict. c. 87, cannot be sued in an action commenced after the passing of the latter act, as the previous act is absolutely repealed by it without any saving clause. *Toutill* v. *Douglas*, 33 Law J. Rep. (N.S.) Q.B. 66.

An industrial society, formed before the passing of the Industrial and Provident Societies Act, 1862, (which provides for the incorporation of previously-existing societies on registration, and enacts that legal proceedings then pending against a trustee or public officer may be prosecuted against the society in its registered name, but omits to provide for pending claims), cannot, although subsequently registered under that act, be sued as a corporation in an action commenced after the passing of the act for a debt incurred previously thereto.—So held on the authority of *Dean* v. *Mellard*. *Linton* v. *the Blakeney Joint Co-operative Industrial Society*, 34 Law J. Rep. (N.S.) Exch. 211; 3 Hurls. & C. 853.

### (D) Dissolution and Winding-up.

The Court of Chancery has no jurisdiction to wind up an industrial society under the Companies' Act, 1862, even though there has been an omission to register it under the Industrial and Provident Societies Act, 1862. *In re the Chatham Co-operative Industrial Society (Lim.)*, 30 Law J. Rep. (N.S.) Chanc. 737.

An industrial society was duly registered under the Industrial and Provident Societies Act, 1852; which act was repealed by the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87). In November 1862, before the society had been re-registered, an order for winding up the society was made by the Court of Chancery under 25 & 26 Vict. c. 89. In June 1864 the society was registered under 25 & 26 Vict. c. 87. Ibid.

On motion to discharge the order for winding-up,—Held, that the Court of Chancery had no jurisdiction to make the order, and that it must be set aside accordingly. Ibid.

Societies established under the 15 Vict. c. 31. held to be within the provisions of the Winding-up Acts.

*In re the National Industrial and Provident Society*, 30 Law J. Rep. (N.S.) Chanc. 940.

By the Friendly Societies Act disputes are to be referred to the County Courts, which are to make such orders as the Court of Chancery may make, but in Scotch Friendly Societies the jurisdiction is given to the sheriff. Some members of a Scotch society having sought relief before the sheriff, the defendants pleaded to the jurisdiction, whereupon the sheriff directed a case to the Court of Chancery, under the 22 & 23 Vict. c. 63, to ascertain whether that Court had jurisdiction in such a case in England:—Held, that the case did not come within the statute, and this Court declined to express its opinion. *Brodie* v. *Johnson*, 30 Beav. 129.

A provident society registered under the act of 1852 is to be wound up in the county court. *In re the Rotherhithe, &c. Industrial Society*, 32 Beav. 57.

Industrial and provident societies will not be wound up in Chancery; they must be registered under the 25 & 26 Vict. c. 87, and then wound up in the county court. *In re the Midland Counties Benefit Building Society*, 33 Law J. Rep. (N.S.) Chanc. 520.

The Court of Chancery has jurisdiction, under the Companies' Act, 1862, to wind up benefit building societies. *In re the No. 3. Midland Counties Benefit Building Society*, 33 Law J. Rep. (N.S.) Chanc. 739.

By *Turner, L.J.*—Benefit building societies are not within the provisions of the acts regulating friendly societies and industrial and provident societies. Ibid.

F was the holder of fully paid-up shares in an industrial society formed, with unlimited liability, under the Industrial and Provident Societies Act, 1852. After the passing of the Industrial and Provident Societies Act, 1862, which repeals the act of 1852, the society, being in difficulties, was registered under the act of 1862 for the purpose of being wound up, it having been held that a winding-up order could not be made under the repealed act. Upon motion to settle the list of contributories, it was held that F's name must be omitted, notwithstanding there were debts contracted before the registration of the company under the later act. *The Sheffield and Hallamshire Ancient Order of Foresters Co-operative and Industrial Society (Lim.); Fountain's case; Swift's case*, 34 Law J. Rep. (N.S.) Chanc. 593.

An industrial society, formed with unlimited liability under the act of 1852, becomes, upon registration under the act of 1862, a society with limited liability. Ibid.

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## GAME.

[An act for the prevention of poaching, 25 & 26 Vict. c. 114.]



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### (A) Reservation of Right of Shooting.

A let a farm to B, reserving the exclusive right of "hunting, shooting, fishing and sporting," and afterwards let to C the exclusive right of "shooting and sporting over and taking the game, rabbits and wild fowl upon" the farm, and covenanted with C for his quiet enjoyment of such right without interruption from persons claiming through him. B shot rabbits and grubbed up a large quantity of gorse, &c., whereupon C brought an action against A:—Held, first, that B had no right to shoot rabbits, and that his act therefore was a wrongful one, for which A was not liable; secondly, that B was entitled to grub up the gorse, &c. in the reasonable use of the land as a farm, that there was no implied covenant with C that this should not be done, and that A was therefore not liable for such act of B. *Jeffryes* v. *Evans*, 34 Law J. Rep. (N.S.) C.P. 261; 19 Com. B. Rep. N.S. 246.

### (B) Property in Game Feræ Naturæ.

Game started and killed wrongfully by one person on the land of another becomes the absolute property of the owner of the land, and not of the captor, though it be killed and carried away in one continuous act. *Blades* v. *Higgs* (House of Lords), 34 Law J. Rep. (N.S.) C.P. 286—affirming the judgment of the Exchequer Chamber, 32 Law J. Rep. (N.S.) C.P. 182; 13 Com. B. Rep. N.S. 844; and of the Court of Common Pleas, 31 Law J. Rep. (N.S.) 151; 12 Com. B. Rep. N.S. 501.

*Quære*—Whether there would be any difference if the game were started on the land of one person and killed on that of another. Ibid.

### (C) Selling Live Game out of Season.

The 4th section of the 1 & 2 Will. 4. c. 32,—which imposes penalties on any licensed dealer who shall buy, sell, or knowingly have in his possession or control any "bird of game," after the expiration of ten days from the day on which the killing of such bird becomes unlawful; and on any unlicensed person who shall buy or sell any "bird of game" after the expiration of the ten days, or shall knowingly have in his possession or control any "bird of game" (except "birds of game" kept in a mew or breeding-place) after the expiration of forty days from the same period,—extends throughout to *live* birds; and a licensed dealer is therefore liable to penalties for selling *live* pheasants after the 11th of

February. *Loome* v. *Baily*, 30 Law J. Rep. (N.S.) M.C. 31; 3 E. & E. 444.

(D) TRESPASS IN PURSUIT OR SEARCH OF GAME, UNDER 1 & 2 WILL. 4. c. 32. s. 30.

(*a*) *Claim of Right.*

A person charged, under the statute 1 & 2 Will. 4. c. 32. s. 30, with trespassing in pursuit of game in the daytime on land in the occupation of a tenant to A, set up a claim of right to shoot over the land, on the ground that he and every one who chose had always shot there till some recent acts of interruption, and declared his readiness to try the right with A:—Held, that the mere assertion of such a general right in himself and every one else, though he really believed it, without shewing any such claim of right as would be a defence to an action of trespass, did not oust the jurisdiction of the magistrates to convict under the statute in question. *Leatt* v. *Vine*, 30 Law J. Rep. (N.S.) M.C. 207.

The jurisdiction of the Justices to convict summarily under 1 & 2 Will. 4. c. 32. s. 30. for trespass in pursuit of game is ousted when a question of right to be on the land is *bona fide* raised between the complainant and defendant. *Legg* v. *Pardoe*, 30 Law J. Rep. (N.S.) M.C. 108; 9 Com. B. Rep. N.S. 289.

In a prosecution for a trespass in pursuit of game under 1 & 2 Will. 4. c. 32. s. 30, the defendant cannot oust the jurisdiction of the Justices by disputing the title of the person who is alleged in the information to be in occupation of the land in question. In order to do that, he must make a *bona fide* claim of title on behalf of himself, or of those under whom he claims. *Cornwell* v. *Sanders*, 32 Law J. Rep. (N.S.) Q.B. 16; 3 Best & S. 206.

The Justices are to consider whether the occupation is proved as alleged in the information:—Held, by *Cockburn, C.J.*, *Blackburn, J.* and *Mellor, J.*, that if there was any evidence before the Justices proving the occupation as laid, they would be justified in deciding that the information was proved; and that a superior Court ought not, upon a case granted by them under 20 & 21 Vict. c. 43, to interfere with their decision. Held, by *Wightman, J.*, that if the Justices set out the whole of the evidence for the purpose of its being considered by the superior Court, such Court has jurisdiction to consider the matter, and reverse the decision of the Justices, if it appears that they have come to a wrong conclusion. Ibid.

The tenant of P shot game upon land which was occupied by him as tenant. Before the commencement of the tenancy P had granted the right of shooting over the land to G by deed. The tenant having been summoned before Justices was convicted of killing game upon the evidence of G that he had the exclusive right of shooting over the land; that he preserved the game there; that he had given no permission to the tenant to shoot; and that the tenant had killed game at the time in question:—Held, that upon this evidence the Justices ought not to have convicted the tenant, inasmuch as there was not sufficient evidence that the right of shooting was in G without the production of the deed. *Barker* v. *Davis*, 34 Law J. Rep. (N.S.) M.C. 140.

(*b*) *Search for Dead Game.*

A person who, in his own land, shoots a pheasant in the land of another, and goes on the other's land to pick the bird up, commits a trespass of entering land in pursuit of game within the meaning of the 1 & 2 Will. 4. c. 32. s. 30, the shooting and picking up the bird being one transaction. *Osbond* v. *Meadows*, 31 Law J. Rep. (N.S.) M.C. 238; 12 Com. B. Rep. N.S. 10.

*Quære*—Whether entering land for the purpose of picking up dead game is a trespass within that act. Ibid.

The 30th section of 1 & 2 Will. 4. c. 32, which makes it an offence to "commit a trespass by entering or being in the daytime upon any land in search of game," does not apply to a case where the game alleged to be searched for was dead at the time. *Kenyon* v. *Hart*, 34 Law J. Rep. (N.S.) M.C. 87; 6 Best & S. 249.

The respondent was shooting upon his own land, when a pheasant rose and flew across the fence which divided it from the land of T. After it had crossed the boundary, the respondent fired at and killed it. It fell upon the land of T, and the respondent went over while it lay dead upon the ground and brought it away. Upon an information laid against him for committing a trespass by being upon the land of T "in search of game," the Justices dismissed the charge, on the ground that the mere act of entering the land for the purpose of picking up the pheasant, which was then dead, was not such a trespass as was contemplated by the act:—Held, distinguishing *Osbond* v. *Meadows*, that the Justices were right in refusing to convict. Ibid.

(*c*) *Aiding and Abetting, under* 11 *&* 12 *Vict. c.* 43. *s.* 5.

In support of an information, under the 11 & 12 Vict. c. 43. s. 5, against A for aiding and abetting B to commit the offence of trespass in pursuit of game, there was evidence that A drove B in a conveyance along a turnpike-road for a lawful purpose; that the conveyance was afterwards stopped, when B got out and entered a field and shot a hare, which he gave to A on returning to the conveyance, and A then drove along the road:—Held, that there was evidence on which the Justices might find A guilty of the offence so charged. *Stacey* v. *Whitehurst*, 34 Law J. Rep. (N.S.) M.C. 94; 18 Com. B. Rep. N.S. 344.

(*d*) *Firing at from Highway.*

Firing at game from a highway is a trespass in pursuit of game within 1 & 2 Will. 4. c. 32. And where two persons are jointly engaged in the unlawful act, they may be severally convicted thereof. *Mayhew* v. *Wardley*, 14 Com. B. Rep. N.S. 550.

(E) POACHING.

(*a*) *Entering by Night Land open or inclosed, under* 9 *Geo.* 4. *c.* 69.

(1) *Land by Side of a Road.*

The appellant was found with a net, and for the purpose of taking game, upon certain land, which had a hedge on either side, and a metalled road running through it. Between the road, on both sides of it, and the hedges, the land was waste land, varying in extent:—Held, that this land was not either open or inclosed within the meaning of the 9 Geo. 4. c. 69. s. 1, which makes it an offence to enter by night any

land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game. *Veysey* v. *Hoskins*, 34 Law J. Rep. (N.S.) M.C. 97.

(2) *Third Offence.*

An indictment, under 9 Geo. 4. c. 69. s. 1, alleged that on the 26th of December, 1854, C was convicted before &c., for that he, within the space of six calendar months then last past, to wit, on &c., by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, that is to say, about the hour of &c., did, by night, then and there unlawfully enter a certain close &c., with a gun, for the purpose of then and there taking and destroying game, contrary &c., and that he was then sentenced to be imprisoned for the period of three calendar months; that afterwards, to wit, on the 27th of November A.D. 1858, he was duly convicted before &c., for that he, within six calendar months next before &c., to wit, on the 24th of November in the year aforesaid, in the night of the same day, at &c., by night, unlawfully did enter and be in and upon certain inclosed land, in &c., with certain instruments, for the purpose of killing, taking and destroying game thereon, this being his second offence, contrary &c., and was then adjudged to be imprisoned for six calendar months, &c. It then alleged a third offence, which, by the terms of the statute, is made a misdemeanor:—Held, that the indictment was good, as it sufficiently shewed upon the face of it, that two previous convictions of offences within the terms of the act had taken place. *Cureton* v. *the Queen*, 30 Law J. Rep. (N.S.) M.C. 149; 1 Best & S. 208.

(3) *Commencement of Prosecution within Twelve Months.*

On the trial of an indictment for entering upon land armed for the purpose of taking game, the magistrates' warrant, on which the prisoners were arrested, was put in proof in order to shew that the proceedings in the prosecution had been commenced within twelve calendar months after the offence committed. The warrant recited that an information had been laid on oath respecting the offence:—Held, that the information ought to have been proved, and that the warrant alone was no evidence of the commencement of the prosecution. *R.* v. *Parker*, 33 Law J. Rep. (N.S.) M.C. 135; 1 L. & C. 459.

(*b*) *Prevention of Poaching Act, 25 & 26 Vict. c. 114. s. 2.*

(1) *Search by Constable.*

By section 2. of 25 & 26 Vict. c. 114, it shall be lawful for any constable, &c. in any highway, &c. "to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun," &c.; and should there be found any game or such article or thing as aforesaid upon such person, &c., to seize and detain such game, article or thing; and then such constable, &c. may apply for a summons, &c.:—Held, that an actual search was not necessary to lay a foundation for the right to apply for a summons, and to proceed to a conviction under the above section. *Hall* v. *Knox*, 33 Law J. Rep. (N.S.) M.C. 1; 4 Best & S. 515.

(2) *Evidence.*

There is no difference between the evidence necessary to support a conviction under the 25 & 26 Vict. c. 112. s. 2. and that in any ordinary case. All that is necessary is that the Justices should have such evidence as, according to well-known rules, is sufficient to lead to the inference that the offence has been committed. *Brown* v. *Turner*, 32 Law J. Rep. (N.S.) M.C. 106; 13 Com. B. Rep. N.S. 485.

Proof that defendants were found together on a highway at six o'clock A.M. with bags containing one hare and several rabbits, and with nets and stakes, is evidence upon which Justices may convict them, under the 25 & 26 Vict. c. 114. s. 2. of having obtained the game by having been unlawfully on land in pursuit of game, or of having used the nets for the purpose of unlawfully taking game, without direct proof that any of the defendants had been upon any land or had used any of the nets. *Evans* v. *Botterill*, 33 Law J. Rep. (N.S.) M.C. 50; 3 Best & S. 787.

## GAMING.

Persons tossing up halfpence and betting money on the number of heads and tails, are not guilty of an offence under the 5 Geo. 4. c. 83. s. 4, which makes liable to be convicted of being a rogue and vagabond "every person playing or betting in any highway, at or with any table or instrument of gaming, at any game or pretended game of chance." *Watson* v. *Martin*, 34 Law J. Rep. (N.S.) M.C. 53.

The defendant was in the habit of resorting to a certain tree in Hyde Park for the purpose of making bets on horse races. He there received deposits on such bets from many persons, and from the plaintiff among others. It was held by the Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas (34 Law J. Rep. (N.S.) C.P. 46; 17 Com. B. Rep. N.S. 669), that the defendant was not a person from whom the plaintiff could recover his deposit under section 5. of the statute 16 & 17 Vict. c. 119, since the spot in Hyde Park which the defendant frequented was not a "place" within the meaning of the act. *Doggett* v. *Catterms* (Ex. Ch.), 34 Law J. Rep. (N.S.) C.P. 159; 19 Com. B. Rep. N.S. 765.

## GAOL.

[See PRISON AND PRISONER.]

## GAS.

[The Metropolis Gas Act, 1860, (23 & 24 Vict. c. 125.) amended by 24 & 25 Vict. c. 79.]

*Liability of Gas Company for Polluting Wells or Streams.*

A private act of parliament, which incorporated a gas company, and empowered them to make the necessary works, contained an enactment, (s. 160)

that if the company should at any time "cause or suffer to be conveyed or to flow" into any stream, &c., or place for water, within the limits of the act, any washing produced in making gas, or do any act to the water contained in any such stream, &c. or place for water, whereby the water therein should be fouled or corrupted, then the company should forfeit for every such offence 200*l.* Sect. 161. imposed an additional penalty of 20*l.* per day for the continuance of such pollution more than twenty-four hours after notice. Sect. 165. made the company liable to a penalty if any water was polluted by the escape of gas. The site for the gas-tank was selected by an experienced engineer, and the company built it in a proper manner, and with all ordinary care and prudence. They knew that mines had been worked in the neighbourhood, but did not know that any mines had been worked under their own lands. After some years the gas-tank cracked at the bottom, the washings, produced in the process of making gas, escaped, percolated underground through the earth, and polluted the water in the plaintiff's well. The company then found on inquiry, that mines had been worked by strangers to them, under part of their land, and close up to the tank. The crack in the tank was caused by the subsidence of the soil, owing, in all probability, to the mining operations:—Held, that the company were liable under s. 160. to the penalty of 200*l.* for polluting the plaintiff's water by their gas washings. *Hipkins* v. *the Birmingham and Staffordshire Gas Co.* (Ex. Ch.), 30 Law J. Rep. (N.S.) Exch. 60; 6 Hurls. & N. 250.

By the Croydon Improvement Act, 10 Geo. 4. c. lxxiii. s. 27, it is enacted that, if the Commissioners, or any company or other person making or supplying gas within the limits of the act, shall suffer any impure matter to flow into any stream, &c., they shall be liable to a penalty of 200*l.*, to be sued for by any common informer, and to a further penalty of 20*l.* a day for the continuance of the nuisance after notice, to be paid to the informer or the party injured, as the Justices should think fit. By the Gasworks Clauses Act, 1847 (10 Vict. c. 15), s. 21, a like penalty is imposed upon the undertakers of any gasworks for the same offence, which penalty is by s. 22. "to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act"; and by s. 23, a daily penalty of 20*l.* is imposed on them for the continuance of the nuisance after the notice, to be recovered in like manner:—Held, that a gas company established under an act of parliament in which the provisions of the Gasworks Clauses Act are incorporated, are liable to the penalties imposed by the 10 Vict. c. 15, but not to those imposed by the 10 Geo. 4. c. lxxiii. *Parry* v. *the Croydon Gas and Coke Co.*, 15 Com. B. Rep. N.S. 568.

## GAVELKIND.

The custom of gavelkind being that the lands of an intestate dying without issue are partible amongst his brothers equally, the Court will apply all the incidents of descent to that custom, and the descendants of a deceased brother will stand in the same position *jure representationis* as their respective parents would have occupied; nor does the right of representation stop at the children of a brother, by analogy to the Statute of Distributions. Therefore, where a man died intestate and without issue, seised of gavelkind lands, leaving a nephew and two sons of a deceased nephew, it was held that the latter were entitled *jure representationis* to the share which their father, if living, would have taken. *Hook* v. *Hook*, 32 Law J. Rep. (N.S.) Chanc. 14; 1 Hem. & M. 43.

## GUARANTIE.

[See INDEMNITY—PRINCIPAL AND SURETY.]

(A) AVOIDANCE OF THE CONTRACT; FRAUD.
(B) CONSIDERATION.
(C) CONSTRUCTION.
  (*a*) *Condition Precedent.*
  (*b*) *Advance on Banking Account.*
  (*c*) *Continuing Guarantie.*
(D) DETERMINATION OF THE CONTRACT.
(E) ADVANCES BEYOND THE AMOUNT GUARANTEED.

### (A) AVOIDANCE OF THE CONTRACT; FRAUD.

P was employed by the plaintiffs, who were coal-merchants, to sell their coals on commission, on the terms that he was to be answerable for the price of the coals sent out to customers on his order, and to pay for them monthly. T guaranteed the due performance by P of his engagements to the amount of 300*l.* After some years, P, not paying for the coals supplied according to his agreement, and owing the plaintiffs, on the coal account, above 1,300*l.*, they required further security. P having stated to them that the defendant would become surety for him, they prepared an agreement, which, after reciting the original agreement between P and the plaintiffs, the guarantie by T, and that P had for some time been salesman to the plaintiffs on the terms stated, and that in order to induce them to continue the arrangement with P the defendant had agreed to guarantee, went on to provide that the defendant should give a floating and continuing guarantie to the plaintiffs for three years to secure the amount of any balance that might at any time during the three years be due from P to them. This agreement, however, did not recite that any debt was then due from P to the plaintiffs, nor did they inform the defendant of the fact. The defendant executed the agreement without making any inquiry. In an action against the defendant on his guarantie, he pleaded that the guarantie was obtained from him by the fraud of the plaintiffs, and by the fraudulent concealment of material facts:—Held, by the majority of the Court of Exchequer Chamber that there was some evidence, taking the circumstances of the case and the recitals in the agreement together, from which a jury would be justified in saying that the plaintiffs had been guilty of intentional fraudulent misrepresentation to induce the defendant to sign the agreement. *Lee* v. *Jones* (Ex. Ch.), 34 Law J. Rep. (N.S.) C.P. 131; 17 Com. B. Rep. N.S. 482.

A, being about to compound with his creditors, in order to induce B (one of them) to execute the

deed without the knowledge of the other creditors, gave him two promissory notes for 25*l.* each beyond the amount of the composition. Upon the first of these becoming due it was dishonoured, and an action was brought upon it, judgment obtained and execution issued. C, who was a party to the notes, in consideration of A's forbearing to enforce the judgment, gave him a guarantie for the amount of the judgment and the outstanding note; and thereupon the two notes were given up:—Held, that the guarantie was tainted with the original fraud, and therefore could not be enforced, notwithstanding part of the consideration for it was the giving up a judgment in an action in which the illegality might have been, but was not, pleaded. *Clay* v. *Ray*, 17 Com. B. Rep. N.S. 188.

### (B) CONSIDERATION.

The defendants gave the plaintiffs the following guarantie: "In consideration of your agreeing, at our request, from time to time, to supply on credit to P such goods as he may require and you may think fit to supply, we do hereby guarantee to you the due and regular payment of such sums as he now owes, and may at any time owe to you, on any account whatsoever, so that we shall not be answerable for more than 400*l.* in respect of his dealings with you":—Held, that there being no agreement by the plaintiffs to supply any goods, and no goods having been supplied, no action lay against the defendants for 400*l.* due from P at the time of the guarantie. *Westhead* v. *Sproson*, 30 Law J. Rep. (N.S.) Exch. 265; 6 Hurls. & N. 728.

A guarantie in the following form, "Gentlemen,—As Mr. D informs me you require some person as guarantie for goods supplied to him by you in his business, I have no objection to act as such for payment of your account," is not on its face a guarantie in respect of a past supply, but is to be read as for goods to be supplied. *Hoad* v. *Grace*, 31 Law J. Rep. (N.S.) Exch. 98; 7 Hurls. & N. 494.

*Semble*—That if it were ambiguous, or primarily imported a past consideration, parol evidence would be admissible to shew that the parties intended it to refer to a future supply. Ibid.

Therefore to a declaration that in consideration the plaintiffs would sell and deliver from time to time goods to D on credit, the defendant guaranteed and promised the plaintiffs to be responsible for the payment of the price, and averring a delivery and non-payment by D or the defendant, a plea merely setting out the guarantie in the above terms, was held bad on demurrer. Ibid.

### (C) CONSTRUCTION.

#### (*a*) *Condition Precedent.*

By an instrument in writing, in consideration of the plaintiffs' execution on a judgment against a third person being stayed until a certain day, the defendant undertook to pay the debt and costs if not then paid by the principal debtor, and the plaintiffs, in consideration of the undertaking, agreed to stay execution until the above-named day if the defendant gave to W satisfactory references as to his ability to pay the amount, but not otherwise, and if the references were not satisfactory, then the guarantie was to be given up within a week from that date:—Held, that, even if the giving of references was a condition for the benefit of the plaintiffs, which they could renounce, it lay upon them (the references being unsatisfactory) to shew that they had renounced the condition, and had elected to treat the instrument as in force. *Morten* v. *Marshall*, 33 Law J. Rep. (N.S.) Exch. 54; 2 Hurls. & C. 305.

Therefore a plea that the references were not given and were not satisfactory, and thereupon the defendant requested the plaintiffs to give up the undertaking, which they refused, and the defendant became and was discharged from performing it, was held an answer to a declaration on the undertaking. Ibid.

#### (*b*) *Advance on Banking Account.*

A, wishing to be allowed from time to time to overdraw his account with his bankers, the plaintiffs, the defendant gave them the following document: "On demand I promise to pay to Messrs. G & Co. (the plaintiffs) 300*l.* with interest on same, to secure an advance now or hereafter on a banking account with A." A became insolvent, and paid by agreement with his creditors a composition of 16*s.* in the pound, and the plaintiffs, who had advanced much more than 300*l.*, received the dividend on their whole advance, leaving a balance on the whole of more than 300*l.*:—Held, that the promise by the defendant was only to repay an advance of 300*l.*, and that he was therefore only liable for the balance of 300*l.* after deducting 16*s.* in the pound from that amount. *Gee* v. *Pack*, 33 Law J. Rep. (N.S.) Q.B. 49.

#### (*c*) *Continuing Guarantie.*

In consideration of the plaintiff supplying C with goods, the defendant agreed to be answerable up to 200*l.* for the price of goods supplied to C at any time due to the plaintiff on an account current after two months' credit. Some time after, 332*l.* being then due from C to the plaintiff for goods supplied, C executed a mortgage-deed to the plaintiff as security for the then existing debt and for any future debt for goods to be supplied. The deed contained a proviso that if C paid the plaintiff the 332*l.* in six months from its date, and all sums due for future supplies in six months from their date, without prejudice to the plaintiff's right not to give credit in respect of future supplies, the mortgaged premises were to be reconveyed to C. There was also a covenant to pay the existing debt in six months, and future debts within six months from their accruing due, without prejudice to the plaintiff's refusing to give credit for future debts. The parties in fact dealt on a two months' credit only. In the course of dealing C paid off the 332*l.* A further debt exceeding 200*l.* having subsequently accrued, which C could not pay, the plaintiff sued the defendant on the guarantie. The defendant pleaded that he was discharged by time having been given by the plaintiff to C:—Held, reversing the judgment of the Court below, that by the mortgage-deed the plaintiff did not give time to C, except in respect of the 332*l.* debt, and that, as that debt had long been discharged, the giving that time did not prejudice the surety as to other and future debts due from C to the plaintiff; and that, as in fact only a two months' credit was given by the plaintiff to C, the guarantie remained in force, and that the defendant was liable,

up to 200*l.*, on C's failure to pay the sum due in respect of goods supplied by the plaintiff to C subsequent to the mortgage-deed. *Bingham* v. *Corbitt* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 37.

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 4,—which enacts that no promise for the debt or default of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, or for the debt or default of such a firm, shall be binding in respect of anything done after a change in any one or more of the persons constituting the firm, or the person trading under the name of the firm, unless the intention of the parties that such promise shall continue notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise,—is only an affirmance of the law of England previous to the statute. *Backhouse* v. *Hall*, 34 Law J. Rep. (N.S.) Q.B. 141; 6 Best & S. 507.

Three persons carried on the business of shipbuilders under the name of "G W & W J Hall." No person of that name had been in the partnership for some time, and the plaintiff and defendant being both aware of the constitution of the partnership, the defendant gave the plaintiff the following guarantie: "In consideration that you have at my instance and request consented to open an account with the firm of G W & W J Hall, ship-builders, I hereby guarantee the payment to you of the moneys that at any time may become due not exceeding 5,000*l.*":—Held, that the guarantie ceased on the death of one of the partners, as a contrary intention did not appear by express stipulation, or by necessary implication from the nature of the firm or otherwise. Ibid.

(D) Determination of the Contract.

A guarantie, for the space of twelve months, for the due payment of all such bills as the plaintiffs might discount for D & Co. to the extent of 600*l.*, may be revoked by a notice given during the twelve months; although some discount may have been made and repaid before notice. *Offord* v. *Davies*, 31 Law J. Rep. (N.S.) C.P. 319; 12 Com. B. Rep. N.S. 748.

The death of the surety does not operate as a revocation of a continuing guarantie. *Bradbury* v. *Morgan*, 31 Law J. Rep. (N.S.) Exch. 462; 1 Hurls. & C. 249.

J L gave a guarantie in the following terms: "Messrs. B & Co.—I request you will give credit in the usual way of your business to H L; and in consideration of your doing so I do hereby engage to guarantee the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of 100*l.*":—Held, that the liability was not determined by the death of J L, but that his executors were liable to B & Co. for goods sold and credit given to H L subsequent to the death. Ibid.

(E) Advances beyond the Amount guaranteed.

A surety gave to a creditor a guarantie to the extent of 5,000*l.*, against losses that might arise from advances to be made to his principal. Advances were made to the principal to an amount considerably exceeding 5,000*l.*, and after his death the creditor proved in an administration suit for the whole debt, and received dividends thereon. He afterwards recovered the 5,000*l.* in an action against the surety. Upon a bill filed by the surety,—Held, that he was entitled to be paid such a proportion of the past and future dividends as was received in respect of the 5,000*l.*, and that he had not lost his equity by not pleading a set-off to the action. *Thornton* v. *M'Kewan*, 32 Law J. Rep. (N.S.) Chanc. 525.

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## GUNPOWDER.

[The Law concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks, amended by 24 & 25 Vict. c. 130.—The act 23 & 24 Vict. c. 139, concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks, &c., amended by 25 & 26 Vict. c. 98.]

*"Fireworks"; Fog Signals.*

By 23 & 24 Vict. c. 139. s. 6. "the following regulations shall be observed with regard to the manufacture of loaded percussion-caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature; that is to say,—No such manufacture shall be carried on without such licence for that purpose as hereinafter mentioned, or within the respective distances hereinafter mentioned, and set opposite to the descriptions of the respective articles, (that is to say)" &c. "from any dwelling-house or any building in which persons not connected with the same manufacture are employed," &c. By s. 11. power is given to Justices of the Peace to license places for the making and keeping of such things. By s. 7. every person making or causing to be made percussion-caps, or making, or keeping, or causing to be made or kept, ammunition, fireworks, fulminating mercury, or other explosive preparation or composition contrary to the act, is to forfeit for every such offence any sum not exceeding 10*l.*:—Held, (*Cockburn, C.J., hæsitante,*) that a person who manufactured and kept fog-signals, being tin cases filled with gunpowder and fitted with nipples and percussion-caps, upon premises within the specified distances, and for which premises he had not obtained a licence, was liable to the penalty imposed by s. 7. Held, by *Wightman, J.*, that fog-signals came within the term "fireworks." *Bliss* v. *Lilley*, 32 Law J. Rep. (N.S.) Q.B. 105; 3 Best & S. 128.

*Having or Keeping.*

By the 11th section of 12 Geo. 3. c. 61. it is provided, that no person shall have or keep at any one time, being a dealer in gunpowder, more than 200 lb. of gunpowder; and not being such, more than 50 lb. in any house, warehouse, &c., occupied by the same person, &c.:—Held, that the word "have" is explained by the word "keep," and that the mere having in one's possession, for a temporary purpose, more than the specified quantity of gunpowder, does not necessarily bring the case within this section. *Biggs* v. *Mitchell*, 31 Law J. Rep. (N.S.) M.C. 163; 2 Best & S. 523.

A carrier and licensed carman had at one time, in a sort of warehouse upon his premises, 300 lb. of gunpowder, which had been sent there from different persons a few hours before it was found, and which was to be forwarded by carriers to different places, the warehouse being a temporary halting-place in the course of the transit:—Held, that he was not liable to be convicted, under the 11th section of 12 Geo. 3. c. 61, for "having or keeping" more than 200 lb. of powder at one time. Ibid.

## HABEAS CORPUS.

[See EXTRADITION—JURISDICTION—PARENT AND CHILD—PRISON AND PRISONER.]

*Jurisdiction; Foreign Dominions or Colonies.*

The superior Courts of Westminster have jurisdiction at common law to issue a writ of *habeas corpus ad subjiciendum* to any part of the dominions of the Crown of England; and the establishment of an independent judicature in any part of such dominions does not oust this jurisdiction, if the statute by which the judicature was established is silent on the point. A writ was accordingly granted by this Court, to certain gaolers and other public functionaries in Upper Canada, to bring up the body of a British subject, alleged to be illegally in their custody. *Ex parte Anderson*, 30 Law J. Rep. (N.S.) Q.B. 129; 3 E. & E. 487.

The Isle of Man is not a *foreign* dominion of the Crown within the meaning of the 25 Vict. c. 20; and the writ of *habeas corpus ad subjiciendum* may issue out of the English Courts to that island. *In re Brown*, 33 Law J. Rep. (N.S.) Q.B. 193; 5 Best & S. 280.

*Quære*—Whether in order to bring a colony or foreign dominion of the Crown within that enactment, it must have a court capable of issuing the writ of *habeas corpus* itself, or whether any analogous process would be sufficient. Ibid.

A legislative body, such as the House of Keys in the Isle of Man, has not, merely from its being endowed with legislative functions, the power to commit for contempt. Ibid.

*On whose Application granted.*

The Court granted a rule *nisi* for a *habeas corpus* to bring up a prisoner (access to whom was denied by the gaoler), on the application of the prisoner's father. *In re Thompson*, 30 Law J. Rep. (N.S.) M.C. 19; 6 Hurls. & N. 193.

## HACKNEY CARRIAGE.

*Licence; Commissioners of Police.*

The Commissioners of Police have a discretionary power under the 6 & 7 Vict. c. 86. ss. 8. and 14; they may question the applicant, and may temporarily suspend the renewal of a licence to a driver or conductor of a hackney carriage or omnibus; and they are not bound to renew the licence on the bare production of a certificate of good conduct and fitness. *Ex parte Mitcham*, 33 Law J. Rep. (N.S.) Q.B. 325; 5 Best & S. 585.

*Licence; Towns Police Clauses Act.*

The possession of a revenue licence to let horses and carriages for hire, under the 2 & 3 Will. 4. c. 120, does not supersede the necessity of the proprietor having a licence for his carriage to ply for hire under the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), ss. 37. and 45. *Buckle* v. *Wrightson*, 34 Law J. Rep. (N.S.) M.C. 43; 5 Best & S. 854.

*Notice of Action under 6 & 7 Vict. c. 86.*

To entitle a defendant to notice of action under a statute, he must honestly intend to put the law in motion, and really believe in the existence of a state of facts which, if they existed, would have justified him in doing as he did. The 24th section of the Hackney Carriage Act, 6 & 7 Vict. c. 86, empowers the proprietor of a cab, if he has any complaint against his driver, to summon him before a magistrate, who may indorse on his licence the nature of the offence; and section 47. provides that a notice of action shall be given where a party is sued for anything done under the authority of the act:—Held, that a cab proprietor, who, without summoning the driver before a magistrate, defaced his licence by writing on it that he had been dismissed for damaging his cab and bringing home no money, was not entitled to a notice of action, inasmuch as he could not have honestly intended to put the law in motion, or really believe that he was acting under the authority of the statute. *Heath* v. *Brewer*, 15 Com. B. Rep. N.S. 803.

## HARBOURS, DOCKS AND PIERS.

[The formation, management, and maintenance of piers and harbours in Great Britain and Ireland facilitated by "The General Pier and Harbour Act, 1861" (24 & 25 Vict. c. 45).—The construction and improvement of harbours by authorizing loans to harbour authorities, by abolishing passing tolls, &c., facilitated by "The Harbours and Passing Tolls, &c., Act, 1861" (24 & 25 Vict. c. 47).—"The General Pier and Harbour Act, 1861," amended by 25 Vict. c. 19.—The act, 24 & 25 Vict. c. 80. (for authorizing advances of money out of the Consolidated Fund for carrying on public works and fisheries, for employment of the poor, and for facilitating the construction and improvement of harbours, and for other purposes), amended by 25 & 26 Vict. c. 30.—Certain powers and duties relative to harbours and navigation under local and other acts transferred from the Admiralty to the Board of Trade by 25 & 26 Vict. c. 69.—Harbour regulations for the protection of Her Majesty's ships, dockyards and naval stations, authorized by 26 & 27 Vict. c. 30.—An act to amend, so far as regards "The Harbours and Passing Tolls, &c. Act, 1861," certain acts authorizing the advance of money out of the Consolidated Fund for carrying on public works and fisheries and employment of the poor, 26 & 27 Vict. c. 81.]

*Qualification of Commissioners.*

By a local act (1 Will. 4. c. cxxxv.) "twelve inhabitant householders resident in the town or parish, rated to the relief or maintenance of the poor of the said parish by one or more rate or rates to the amount

of 10*l.* per annum " were (*inter alia*) appointed Harbour Commissioners:—Held, that property assessed to the amount of 10*l.*, and not a payment of rates to the amount of 10*l.*, conferred a qualification. *Easton* v. *Alce*, 31 Law J. Rep. (N.S.) Exch. 115; 7 Hurls. & N. 452.

*Dues and Charges.*

The Commercial Dock Company having received certain timber, entered or transferred into the names of C M & Co., timber-brokers, who were merely agents, and not the true owners, refused to deliver the timber to the owners until the dock charges for wharfage, rent, &c. due on other goods entered or transferred into the name of C M & Co. had been paid:—Held, that the right of the dock company to a lien for charges did not depend on the common law, but was governed, in respect of the present question, by the statute 10 Vict. c. 27; and that the company had no right to obtain goods belonging to one person for charges due in respect of goods belonging to another owner, though all the parcels of goods were entered in the dock books in the name of the same person, such person being in reality merely an agent for the respective owners. *Dresser* v. *Bosanquet* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 374; 4 Best & S. 486.

Timber was consigned by the plaintiff's ship *Johan* to the defendant, and landed and delivered to him in a harbour, by the statute for the regulation of which certain dues were payable thereon by him. The defendant failing to pay these dues, the *Johan* was detained for nine days by the harbour authorities, at the expiration of which time the master obtained her release by paying the demand himself:—Held, that, assuming that the defendant was by the statute not liable to pay the dues, and that the detention of the vessel was unjustifiable, the plaintiff was only entitled to recover the amount he had paid for the dues, but not damages for the time the vessel was detained, inasmuch as he might at once have procured her release by payment of the money. *Möller* v. *Jecks*, 19 Com. B. Rep. N.S. 332.

## HAWKER.

*Penalty; Trading Person.*

A person who goes from the town in which he resides and takes a room at another town and there sells goods which are brought direct from the town of his residence, is liable to a penalty, under the 50 Geo. 3. c. 41. s. 17, as a " trading person " going from town to town trading without a hawker's licence. *Manson* v. *Hope*, 31 Law J. Rep. (N.S.) M.C. 199; 2 Best & S. 498.

## HEALTH.

[See PUBLIC HEALTH.]

## HEIRLOOMS.

A testator devised freehold estates to trustees upon trust during the life of his son J M to make certain payments out of the rents, and after J M's decease in trust for his first and other sons successively in tail male, then in trust for his daughter A L for life, with remainder to her first and other sons successively in tail male, with ulterior trusts. The testator gave the use and enjoyment of his plate to his daughter during her life, and after her decease he gave the same in the nature of an heirloom to the person who for the time being should be in the actual enjoyment and possession of his freehold estates under the limitations of his will. The testator died, and in 1844 (J M being then alive) A L and her eldest son H W M L executed a disentailing assurance. A L and H W M L died in 1856, and the latter left E M L his eldest son. J M died in 1861 without issue:—Held, that the words " actual enjoyment and possession " did not import as a condition that the legatee of the plate should be in the physical reception of the rents and profits of the devised estates, and therefore that notwithstanding his estate had been barred by the disentailing assurance, E M L, as being the person who under the limitations contained in the will, would have come into possession of the freehold estates in the natural order of events, was entitled to the plate. *Hogg* v. *Jones*, 32 Law J. Rep. (N.S.) Chanc. 361; 31 Beav. 45.

## HIGHWAY.

[The better management of highways in England provided for by 25 & 26 Vict. c. 61.—The above-named act amended by 27 & 28 Vict. c. 101.—Waywardens prevented from contracting for works within their own district by 26 & 27 Vict. c. 61.]

[See RATE—TURNPIKE.]

(A) REPAIR.
  (*a*) *Liability to repair.*
  (*b*) *Jurisdiction of Justices to order Indictment for Non-repair.*
(B) DEDICATION.
(C) FORMATION OF HIGHWAY DISTRICTS.
(D) DIVERTING AND STOPPING UP HIGHWAYS.
(E) NUISANCES AND OBSTRUCTIONS.
(F) ALLOWANCE OF SURVEYORS' ACCOUNTS.
(G) COSTS.
  (*a*) *Of Prosecution of Indictment for Non-repair.*
    (1) *When Defendants plead Guilty.*
    (2) *When Road found not to be a Highway.*
  (*b*) *Of Appeal on Abandonment of Certificate for diverting a Highway.*

### (A) REPAIR.

*(a) Liability to repair.*

A landowner in a district under the Public Health Act, 1848 (11 & 12 Vict. c. 63), gave notice to the Local Board of Health of his intention to dedicate a certain road as a highway; to which the Local Board of Health replied that they would not adopt the road as it had not been sewered, levelled, paved, flagged, and channelled to their satisfaction, referring to the 11 & 12 Vict. c. 63. ss. 69, 70. The landowner, however, obtained and enrolled the certificate of two Justices, under the 5 & 6 Will. 4. c. 50. s. 23, and

the public then used the road, which was kept in repair by the landowner for twelve months; after which, it being out of repair, an indictment was preferred against the inhabitants of the parish:—Held, that the inhabitants were not liable, inasmuch as the road had not become a highway; for that, assuming the 23rd section of the Highway Act (5 & 6 Will. 4. c. 50.) to apply to the case, the road had not been made to the satisfaction of the local board, who were the surveyors. *R.* v. *the Inhabitants of Dukinfield*, 32 Law J. Rep. (N.S.) M.C. 230; 4 Best & S. 158.

Where a railway is carried over a highway by means of a bridge, no liability to keep in repair the immediate approaches on each side of the bridge is cast upon the company by reason of any of the provisions in the Railways Clauses Consolidation Act, 1845, even though the company have lowered the level of the old highway in making those approaches. *The London and North-Western Rail. Co.* v. *the Surveyor of Highways of Skerton*, 33 Law J. Rep. (N.S.) M.C. 158; 5 Best & S. 559.

*(b) Jurisdiction of Justices to order Indictment for Non-repair.*

An alleged highway being out of repair, the surveyor of the parish in which it was alleged to be situate was summoned before the Justices in petty sessions, under the 5 & 6 Will. 4. c. 50. s. 94, when he denied the liability, on the ground that an indictment had been already preferred against the parish, and recently tried, and a verdict of not guilty returned; on this the Justices refused to make an order directing an indictment against the parish under section 95. On application to this Court to rule the Justices to make the order, the Court refused to interfere. *Ex parte Bartlett*, 30 Law J. Rep. (N.S.) M.C. 65; 3 E. & E. 253.

On the hearing of a complaint, under the 5 & 6 Will. 4. c. 50. s. 73, for leaving rubbish on a highway after notice to remove it, the defendant, who was the owner of the land on both sides of the alleged highway, denied it to be a highway; and, as he claimed the soil subject to a private right of way only, he contended that the Justices ought not to adjudicate in the matter, on the ground that title to land came in question:—Held, that the objection was untenable, for that the Justices had jurisdiction under the statute to determine whether the road was a highway or not. *Williams* v. *Adams*, 31 Law J. Rep. (N.S.) Q.B. 101; 2 Best & S. 312.

Where, on the hearing of a summons, under s. 40. of the South Wales Highway Act (23 & 24 Vict. c. 68), against the district surveyor of highways for the non-repair of a highway in a parish, the liability to repair is disputed on behalf of the parish, the Justices have power to direct an indictment to be preferred under s. 95. of the General Highway Act (5 & 6 Will. 4. c. 50). *R.* v. *James*, 32 Law J. Rep. (N.S.) M.C. 211; 3 Best & S. 901.

Where, on the hearing of a summons against the surveyors of a parish for the non-repair of a highway, the surveyors deny the duty of the parish to repair, on the ground that the alleged highway is not a highway, the Justices cannot proceed to make an order under the 5 & 6 Will. 4. c. 50. s. 95, that an indictment be preferred, without making any inquiry as to whether the road be a highway. *R.* v. *Johnson*, 34 Law J. Rep. (N.S.) M.C. 85.

(B) DEDICATION.

Occupation roads laid out through an estate for the use and convenience of the inhabitants are not thereby dedicated to the public. *Selby* v. *the Crystal Palace District Gas Co.*, 31 Law J. Rep. (N.S.) Chanc. 595; 30 Beav. 606.

An estate was purchased for the purpose of building houses; a part was laid out as private roads, and upon a partition, the owners taking the roads covenanted that the other freeholders and the occupiers of the houses should have the full use and enjoyment of the roads in as absolute a manner as if they were public roads:—Held, by *Romilly, M.R.*, that a request to be supplied with gas by a minority of the occupiers of houses was sufficient, without the consent of the freeholders, to justify the breaking up the roads by the gas company to lay down their pipes to comply with such request. On appeal to the Lords Justices, the decision was affirmed, as every occupier had the same right, for the purpose of his use and enjoyment, to call in all such aid as he might have done if the roads had been public roads. Ibid.

(C) FORMATION OF HIGHWAY DISTRICTS.

The 5 & 6 Will. 4. c. 50. s. 18. enacts, that "if it shall be determined by a majority of two-thirds of the votes of the vestrymen *present at the meeting*," to form a highway board for the parish, it shall be lawful for the vestry to nominate and elect a certain number of persons to form the board. The majority of two-thirds of the vestrymen present at a vestry meeting of a parish having voted for the appointment of such a board, a poll was demanded by the minority, which the chairman refused, and a board were then nominated and appointed:—Held, that a poll was demandable of common right; that the right was not excluded by the words of the statute; and the board were therefore not duly elected. *R.* v. *How*, 33 Law J. Rep. (N.S.) M.C. 53.

A provisional order for forming a highway district under the Highway Act of 1862 constituted the township of E and other parishes and places named therein a highway district, and directed that one waywarden should be elected for each of the said parishes, townships and places. E was divided into three hamlets, each of which maintained its own highways. The separate hamlets were not named in the order:—Held, that the provisional order, and the final order based on it, were bad, as the provisional order did not state whether any or what waywardens were to be elected for the three hamlets. *R.* v. *the Justices of the West Riding*, 34 Law J. Rep. (N.S.) M.C. 227.

(D) DIVERTING AND STOPPING UP HIGHWAYS.

By s. 113. of the 5 & 6 Will. 4. c. 50, the General Highway Act, nothing in that act shall apply to any roads or footways which are or may be paved, repaired or cleaned, broken up or diverted, under or by virtue of the provisions of any local or personal act of parliament. By s. 84. any person who is desirous to stop up or divert a highway may require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if the inhabitants shall agree to the proposal, the surveyor shall apply to two Justices to view the highway, and to proceed

as empowered by s. 85. of the same act. By s. 5. the word "parish" shall be construed to include "parish, township," &c., "or any other place or district maintaining its own highways; and whereever anything is prescribed to be done by the inhabitants of any parish in vestry assembled, the same shall be construed to extend to any meeting of inhabitants contributing to the highway-rates in places where there shall be no vestry meeting," &c. *Wright* v. *the Overseers of Frant*, 32 Law J. Rep. (N.S.) M.C. 204; 4 Best & S. 118.

A certain portion of the parish of F was, by the Tunbridge Wells Improvement Act, 1846, so far as concerned the highways, &c., vested in Commissioners, with powers to maintain and repair the same. These Commissioners were to be liable to indictment in case they did not keep the highways in sufficient repair, and they had power to expend a portion of the town improvement rates in so keeping them in repair. No power was given to divert or stop up any of the highways. Proceedings were taken under the statute 5 & 6 Will. 4. c. 50. for the purpose of diverting a highway within that portion of the parish of F which was included in the district vested in the Commissioners, and two Justices having made a certificate under s. 85. that the proposed new highway was nearer or more commodious to the public,—Held, by *Cockburn, C.J.* and *Mellor, J.*, that by reason of s. 113, the provisions of the General Highway Act did not apply to the particular highway at all, and that the certificate of the Justices was bad on that ground, as also upon the ground that the assembly of inhabitants ought not to have been the vestry of F, but the persons who, under the Improvement Act, were those who had to contribute to the rates in the district. By *Blackburn, J.* (on the first ground *hæsitante*), that the certificate was made without jurisdiction upon the second ground. Ibid.

*Semble*—That the certificate was not bad by reason of its not stating that the proposed new highway was nearer and more commodious to the public. Ibid.

*Quære* — Whether *The Queen* v. *Shiles* is not wrongly decided? Ibid. (Note. See 35 Law J. Rep. (N.S.) M.C. 217.)

Under ss. 84. and 85. of the 5 & 6 Will. 4. c. 50, Justices can only certify the diversion of a highway with reference to the existing state of circumstances, and they cannot certify on the ground that the new road will be shorter than the existing road when the latter shall have been altered pursuant to the powers given by a local act. *R.* v. *the Local Board of Midgley*, 33 Law J. Rep. (N.S.) M.C. 188; 5 Best & S. 621.

On an appeal against a certificate ordering the diversion of a highway and the stopping up of several others, the Quarter Sessions may quash it as to the diversion and confirm it as to the stopping up; although the 87th section of the 5 & 6 Will. 4. c. 50, giving this power of partial confirmation, is confined in terms to an appeal against a certificate for diverting more highways than one. Ibid.

### (E) NUISANCES AND OBSTRUCTIONS.

The mere fact that a piece of ground, part of a public highway, has for twenty years been used by an innkeeper for the standing of the vehicles belonging to his guests, is no answer to a complaint for the obstruction under the 72nd section of the Highway Act, 5 & 6 Will. 4. c. 50. *Gerring* v. *Barfield*, 16 Com. B. Rep. N.S. 597.

Where an ordinary highway runs between fences, one on each side, the right of passage which the public have along it extends *prima facie*, and unless there be evidence to the contrary, over the whole space between the fences. The public are entitled to the use of the entire space. *R.* v. *the United Kingdom Electric Telegraph Co. (Lim.)*, 31 Law J. Rep. (N.S.) M.C. 166; 2 Best & S. 647, note (*a*).

A permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law. Ibid.

Where therefore the defendants, for the purposes of profit to themselves, placed telegraph posts upon a highway, with the object and intention of keeping them there permanently, and did permanently keep them there, such posts being of such sizes and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot-passengers,—it was held that the defendants were liable to be found guilty upon an indictment for a nuisance; and also, that even if the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or although sufficient space was left for the public traffic, the defendants were still liable to conviction. Ibid.

Where an obstruction or erection exists upon land, and afterwards the land or that which is immediately adjoining to it is dedicated to the public as a way, the dedication is subject to the inconvenience or risk arising from the obstruction or erection. *Fisher* v. *Prowse; Cooper* v. *Walker*, 31 Law J. Rep. (N.S.) Q.B. 212; 2 Best & S. 770.

The defendant occupied a house adjoining a public street, with a cellar belonging to the house. The mouth of the cellar opened into the footway of the street by a trap-door. During the day the trap-door was open, but at night it was closed by a flap, which slightly projected above the footway, and such had been the condition of the flap as long as living memory went back, and before the defendant had anything to do with the house. The plaintiff coming along the street fell over the flap and sustained injury, in respect of which he brought an action:—Held, that the proper conclusion to draw from this state of things was, that the street had been dedicated to the public with the cellar-flap upon it, and subject to its being continued there, and therefore that the defendant was not liable, as the maintenance of the cellar-flap in the same position was not unlawful.—*Coupland* v. *Hardingham* commented on. Ibid.

A public street was subject to the right of the occupiers of a house adjoining, to have steps standing in the street and leading up to the house, all persons passing along having the right to go over them. While the steps were so standing, the vestry of the parish lowered the level of the street, and it became necessary for the convenient occupation of the house to erect new steps. This was done by the defendant, causing no greater obstruction than before:—Held, in an action brought in respect of an injury caused by falling over these steps, that the defendant was entitled to keep them there, and therefore that the plaintiff could not recover. Ibid.

Upon the trial of an indictment for making a tramway upon and along a public highway in the parish of L, the jury found that accidents had happened in consequence of the tramway being laid down; that the tramway was a nuisance, an obstruction in a substantial degree of the ordinary use of the highway for carriages and horses, and that it rendered the highway unsafe and inconvenient in a substantial degree. The defendants proposed to offer evidence to shew that a great number of persons were carried along the tramway; that a saving of money was effected thereby; that the tramway was not a nuisance or an obstruction, and that it was a great advantage to the public in general who used the highway:—Held, that the finding of the jury amounted to a verdict of guilty, and that the evidence tendered by the defendants was inadmissible. *R.* v. *Train*, 31 Law J. Rep. (N.S.) M.C. 169; 2 Best & S. 640.

The tramway was laid down under a contract entered into by one of the defendants with the vestry of L, in pursuance of resolutions which were passed by the vestry:—Held, that the laying down the tramway could not be said to be a paving or repairing of the street within the meaning of the 18 & 19 Vict. c. 120. s. 98. (the Metropolis Local Management Act), so as to be justifiable under the powers given to the vestry under that section. Ibid.

By 5 & 6 Will. 4. c. 50. s. 70. it shall not be lawful for any person to erect a steam-engine within the distance of twenty-five yards from any part of a carriage-way, unless such steam-engine be within some house or building, or behind some wall or fence sufficient to conceal or screen the same, so that the same may not be dangerous to passengers, horses, or cattle:—Held, that this provision applies to the case of a portable steam-engine upon wheels and drawn by horses, and used to drive a thrashing-machine within a barn, although such steam-engine was not in any way fixed in the soil. *Smith* v. *Stokes*, 32 Law J. Rep. (N.S.) M.C. 199; 4 Best & S. 84.

The defendant was the lessee of a building divided into two distinct dwellings, the outer door of the lower opening upon a street made on the original level of the ground, and the outer door of the upper opening upon the level of a causeway which had been raised high above the original level in order to give access to the roadway of a bridge. A space left between the building and the retaining wall of the causeway belonged to the defendant as such lessee; the bottom of it was used as an area, and that part above which was on the same level with the causeway was bridged over by a flagging, in the centre of which was a grating which let in light and air to the lower part of the building. The road on the causeway was a common highway to be repaired by the parish, and the flagging and grating had been placed where they were at the time of making the causeway and before the defendant became lessee, and they had been dedicated to and used by the public as part of the highway before the Highway Act, 5 & 6 Will. 4. c. 50, and they continued to be so used although there was a flagged foot-pavement between them and the carriage-way. The defendant underlet the building, and having distrained for rent on the goods of some lodgers who occupied the upper dwelling, a crowd was collected on the flagging and grating. A, who was passing at the time, having been beckoned to by one of the lodgers, endeavoured to get to the door, but in doing so he stepped on the grating, when it and a portion of the flagging gave way and he fell through into the area below, and was so killed. The giving way of the flagging and grating was caused by its insufficiency and by the extraordinary crowd pressing upon it at the time:—Held, that the defendant was not liable to an action for damages by the administratrix of A, whether the passage over the area was a private or a public way; since if it was a private way, the occupier and not the landlord of the building would be liable; and if it was a public way, the public and not the defendant were bound to maintain and repair it. *Robbins* v. *Jones*, 33 Law J. Rep. (N.S.) C.P. 1; 15 Com. B. Rep. N.S. 221.

### (F) ALLOWANCE OF SURVEYORS' ACCOUNTS.

A complaint made by an inhabitant of a parish against the accounts of the surveyor of highways at the special sessions for highways under the 44th section of the General Highway Act, is the subject of an appeal to one of the superior Courts under 20 & 21 Vict. c. 43, even though the Sessions make no order on such complaint, otherwise than by allowing the surveyor's accounts. *Townsend* v. *Reed*, 30 Law J. Rep. (N.S.) M.C. 223; 10 Com. B. Rep. N.S. 308, 317.

By the General Highway Act, 5 & 6 Will. 4. c. 50. s. 111, the surveyor may charge in his account the law expenses incurred in defending any appeal which the inhabitants of any parish shall agree at a vestry to defend, after the same shall have been agreed to by such inhabitants at a vestry, "*and* allowed by two Justices of the Peace within the division where such highway shall be; which expenses when so agreed to *or* allowed shall be paid by such parish:—Held, that "and" in that section is by mistake put for "or," and that, therefore, the surveyor may charge such expenses after they have either been agreed to at a vestry, or allowed by two Justices. *Townsend* v. *Read*, 30 Law J. Rep. (N.S.) M.C. 245; 10 Com. B. Rep. N.S. 317.

*Quære*—Whether an allowance of the surveyor's accounts by the Justices in special sessions, under s. 44. of that act, be a sufficient allowance by two Justices within the meaning of s. 111. Ibid.

### (G) COSTS.

#### (a) *Of Prosecution of Indictment for Non-repair.*

##### (1) *When Defendants plead Guilty.*

Section 95. of the 5 & 6 Will. 4. c. 50. enacts, that, where an indictment has been preferred for the non-repair of a highway by direction of Justices pursuant to that section, "the costs of such prosecution shall be directed, by the Judge before whom such indictment *is tried*," to be paid out of the highway rates of the parish:—Held, that when the defendants *plead guilty*, the presiding Judge has power to make such order as to costs. *R.* v. *the Inhabitants of Haslemere*, 32 Law J. Rep. (N.S.) Q.B. 29; 3 Best & S. 313.

Where on an indictment for the non-repair of a highway the defendants have pleaded guilty, there is no power in the Court before whom it is preferred to award costs, under the 5 & 6 Will. 4. c. 50. s. 98, which makes it lawful to award costs, if it shall

appear to the Court that the defence was frivolous and vexatious. *R.* v. *the Inhabitants of Denton*, 34 Law J. Rep. (N.S.) M.C. 13; 5 Best & S. 821.

(2) *When Road found not to be a Highway.*

Where, on the trial of an indictment, ordered by Justices under the 25 & 26 Vict. c. 61. s. 19, for the non-repair of an alleged highway, the road is found not to be a highway, the Court has no power to order costs. *R.* v. *Buckland*, 34 Law J. Rep. (N.S.) M.C. 178; 6 Best & S. 397.

(*b*) *Of Appeal on Abandonment of Certificate for diverting a Highway.*

Notice of appeal to the Quarter Sessions against a certificate of Justices, made under the 5 & 6 Will. 4. c. 50. s. 85, for the diversion of a highway, having been given under s. 88, the person at whose instance the certificate had been obtained gave notice of his intention to abandon all further proceedings; the appeal was entered at the sessions and was called on in its order, when no one appearing, it was struck out; the appellant afterwards, on the same day, applied for costs under s. 90, but the Sessions refused to make any order. On a motion for a mandamus to the Justices,—Held, that, as the Sessions were "required" to award costs whether the appeal was tried or not, they must enter continuances and make the order. *R.* v. *the Justices of the West Riding*, 31 Law J. Rep. (N.S.) M.C. 271; 2 Best & S. 811.

## HOUSE BREAKING.

To support a conviction under the statute 24 & 25 Vict. c. 95. s. 58, which renders it a misdemeanor for a person to be found at night armed with intent to break or enter into any house or building, and to commit any felony therein, it is necessary that the person should be proved to have the intent of breaking into or entering some particular building, and proof of a general intent to break into houses will be insufficient. *R.* v. *Jarrald*, 32 Law J. Rep. (N.S.) M.C. 258; 1 L. & C. 301.

The indictment must, as in burglary, allege the ownership and situation of the premises intended to be broken into. Ibid.

Husband & Wife
v. Baston & Feme

## INCLOSURE ACTS.



### (A) Assessing Value of Interests.

Where proceedings were taken, under the General Inclosure Act, 8 & 9 Vict. c. 118, for the inclosure of certain land at the instigation of persons who claimed rights of common over the same, and the owner of such land was interested therein in respect of brick earth which he could get from it without interfering with the rights of common,—Held, that the interest of such owner in respect of the brick earth ought to be taken into consideration by the Assistant Commissioner in calculating the interests of the assenting and dissenting parties, under s. 27, notwithstanding all "mines, minerals, stone and other substrata," had been expressly reserved to such owner by the provisional order; and the Court granted a prohibition against the Commissioners proceeding with the inclosure without the consent of such owner, or taking the value of his interest in the brick earth into account in reckoning the assents and dissents. *Church* v. *the Inclosure Commissioners*, 31 Law J. Rep. (N.S.) C.P. 201; 11 Com. B. Rep. N.S. 664.

### (B) Setting out Private Roads.

Where a provisional order has been made, under the Inclosure Acts, ordering certain land therein described to be allotted to an individual in lieu of his rights in the lands to be inclosed, and the order does not expressly exempt such allotment from having a right of way reserved over it, the Inclosure Commissioners have power in proceeding with the inclosures to order the valuer to set out a private road over such land for the use of another allottee. *Grubb* v. *the Inclosure Commissioners* (Ex. Ch.), 31 Law J. Rep. (N.S.) C.P. 221—affirming the decision below, 30 Law J. Rep. (N.S.) C.P. 155; 9 Com. B. Rep. N.S. 612.

### (C) Stopping up Roads; Notice of Appeal.

The General Inclosure Act, s. 63, enacts that any person within four months after the first Sunday on which a notice of an intention to stop up a way has been given on the church-door, may make his complaint by appeal to the Justices at the Quarter Sessions on giving the valuer fourteen days' notice in writing of such appeal, together with a statement in writing of the grounds thereof:—Held, that notice of intention to appeal, given to the valuer within the four months, against the stopping up of a highway under the powers of the General Inclosure Act, is good, although the sessions be not held nor the appeal heard until after the four months have expired. *R.* v. *the Justices of Essex*, 34 Law J. Rep. (N.S.) M.C. 41.

### (D) Rights of Mine-Owner.

An act (13 Geo. 3. c. 67.) for inclosing the moors and commons within the manor of Lanchester, containing a saving of all the original rights of the Bishop of Durham as lord of the manor, and also provided "that the bishop, his successors, lessees and assigns, should at all times thereafter work and enjoy all mines under the said moors and commons, and full and free liberty of winning and working mines belonging to the see and bishopric of Durham wheresoever the same should be, and of leading and carrying away the coals, minerals, &c., gotten thereout, or out of any other lands or grounds whatsoever":—Held in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the bishop had no right to carry over the inclosed lands coal gotten from mines within the manor, but not belonging to the see. *Hedley* v. *Fenwick*, 3 Hurls. & C. 349.

(E) Executors of Tenant for Life.

Trustees of settled estates with a power of sale and exchange under which the sale moneys were made applicable in satisfaction of charges on the settled estates, and as to the surplus in the purchase of other lands, sold a portion of the settled estates and paid the proceeds to a tenant for life, who expended the greater part thereof upon allotments made under the Inclosure Acts in fencing, draining, roadmaking, &c., and died without creating any charge under the acts:—Held, that the money was not expended in accordance with the provisions of the settlement either in satisfaction of an existing charge or in the purchase of lands; but that, though the forms of the Inclosure Acts had not been complied with (see *Drinkwater* v. *Coombe*, 2 Sim. & S. 340; 3 Law J. Rep. Chanc. 178), any sums properly expended for the purposes mentioned in the acts, not exceeding 5*l.* per acre, ought to be allowed to the executors of the tenant for life. *Vernon* v. *Earl Manvers*, 32 Law J. Rep. (N.S.) Chanc. 244; 31 Beav. 617.

(F) General Expenses.

By an act for inclosing lands in the town of Nottingham (8 & 9 Vict. c. vii.), the Commissioners were to set out allotments for recreation of the inhabitants, for a cemetery, to the lords of the manor for right of soil, to the vicar, and Earl Manvers and certain charitable trustees, and other the persons entitled to corn-tithes, vicarial tithes, &c., and to the said vicar in respect of the glebe lands and rights of common belonging to such vicar, and to certain persons entitled to common rights; and by s. 66, after having made the before-mentioned allotments, they were to divide and allot the remainder of the lands to be inclosed unto and amongst the several owners and proprietors thereof and persons who should be entitled to any estate, right or interest therein, in proportion to the value of their respective rights and interests. S. 69. enacted that the several allotments to be made in pursuance of the act (except the allomtents to the mayor, &c., for places of recreation, &c., and the allotments to the said vicar and other persons in lieu of tithe) should be inclosed by the allottees; and by s. 70. it was provided that allotments in lieu of tithes were to be fenced at the general expense. By s. 86. the Commissioners were, before setting out any allotments to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of lands to be inclosed, to allot what they should judge sufficient to defray the expenses of and incident to the inclosure, and sell the same to defray such expenses. And by s. 89, in case the lands so set apart should be found insufficient to defray such expenses, the deficiency was to be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be inclosed, except the said vicar and persons entitled to tithes, and the mayor, &c. in respect of allotments for recreation, &c.:—Held, that the vicar was not liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe lands, towards the general expenses of the Inclosure Act. *Eddison* v. *Brookes*, 17 Com. B. Rep. N.S. 606.

(G) Costs; Opposing Drainage Works.

The security which may be taken by the Inclosure Commissioners from a landowner, under section 6. of 10 & 11 Vict. c. 38, for the costs of proceeding on an application for leave to execute drainage works under the act, is confined to the Commissioners' costs; the costs of a person opposing the application successfully cannot be recovered under it. *In re the Inclosure Commissioners*, 33 Law J. Rep. (N.S.) Q.B. 171.

## INDECENT EXPOSURE.

[See Nuisance.]

## INDEMNITY.

[See Guarantie.]

[Persons in the United Kingdom having omitted to qualify themselves for offices and employments indemnified, and the time limited for those purposes respectively extended, by 24 & 25 Vict. c. 77, 25 & 26 Vict. c. 60, 26 & 27 Vict. c. 107, 27 & 28 Vict. c. 49. and 28 & 29 Vict. c. 97.—Certain persons indemnified from penal consequences incurred by sitting and voting as Members of the House of Commons while holding the office of Under-Secretary of State by 27 & 28 Vict. c. 21.]

An authority by a landlord to a broker to distrain goods for rent contained the following clause: "And for your so doing this shall be your sufficient warrant and authority and indemnification against all costs and charges in respect to any law expenses, action or actions that may arise, and as well as any other and all charges or expenses which you may be at or brought against you on this account":—Held, (*Bramwell, B. dubitante*) that the indemnity extended to the costs of defending an action of trover, wrongfully brought against the broker and by the tenant, who admitted the tenancy and the rent being due, was nonsuited. *Ibbett* v. *De la Salle*, 30 Law J. Rep. (N.S.) Exch. 44; 6 Hurls. & N. 233.

## INDIA.

[The law concerning the Indian Civil Service amended by 24 & 25 Vict. c. 54.—Provision for the constitution of the Council of the Governor General of India, and for the local government of the several Presidencies and Provinces of India, and for the temporary government of India in the event of a vacancy in the office of Governor General, made by the "Indian Councils Act, 1861" (24 & 25 Vict. c. 67).—High Courts of Judicature in India established by 24 & 25 Vict. c. 104.—Further facilities given to the holders of India Stock by 26 & 27 Vict. c. 73.—The term for granting fresh letters patent for the High Courts in India extended, and further provision made respecting the territorial jurisdiction of the said Courts, by 28 Vict. c. 15.]

## INDICTMENT.



### (A) Form and Requisites.

It is sufficient in an indictment for stealing the property of a joint-stock banking company to allege the stolen property to belong to one of the partners named and others, under the 7 Geo. 4. c. 64. s. 14. *R.* v. *Pritchard*, 30 Law J. Rep. (N.S.) M.C. 169; 1 L. & C. 34.

No indictment for a felony, either created by a statute or at common law is good, unless it allege that the accused did the act charged as the offence "feloniously." *R.* v. *Gray*, 33 Law J. Rep. (N.S.) M.C. 78; 1 L. & C. 365.

A defendant was tried and found guilty at Quarter Sessions on an indictment charging a conspiracy "by divers false pretences, against the form of the statute in such case made and provided, R B of his moneys to defraud, against the form of the statute," &c.:—Held, that the indictment sufficiently charged a conspiracy to obtain money by false pretences, and that, after verdict, it must be taken that the jury had found the defendant guilty on facts proving that offence, which was cognizable by the Sessions. *Latham* v. *Regina*, 33 Law J. Rep. (N.S.) M.C. 197; 5 Best & S. 635.

### (B) Misjoinder of Counts.

It is no objection in point of law that an indictment charges several distinct felonies in different counts; the statute 24 & 25 Vict. c. 96. s. 5. does not alter the law in this respect. But the ordinary course of charging two or three distinct acts of stealing against the same person to have been committed within six months, ought not to be departed from. *R.* v. *Heywood*, 33 Law J. Rep. (N.S.) M.C. 133; 1 L. & C. 451.

The prisoner was tried upon an indictment which contained two counts, one for embezzlement, and the other for larceny as a bailee. At the close of the case for the prosecution, it was objected that the indictment was bad for misjoinder of counts, and the Court thereupon directed the counsel for the Crown to elect upon which count he would proceed, the counsel for the prisoner contending that such a course was inadmissible. The counsel for the Crown elected to proceed upon the second count, and on that count the prisoner was convicted:—Held, that the conviction was right. *R.* v. *Holman*, 1 L. & C. 177.

### (C) Quashing.

When it is made clear, either on the face of an indictment or by affidavit, that it has been found without jurisdiction, the Court will quash it on motion by the defendant after plea pleaded; but in a doubtful case they will leave him to his writ of error. *R.* v. *Heane*, 33 Law J. Rep. (N.S.) M.C. 115; 4 Best & S. 947.

### (D) Finding of the Jury.

On writ of error on a record in which there were two counts for misdemeanor, to which the defendant had pleaded not guilty, and the finding of the jury was guilty on the second count (without noticing the first), whereupon judgment of imprisonment was passed,—Held, that the judgment was not affected by reason of no finding being entered on the first count. *Latham* v. *Regina*, 33 Law J. Rep. (N.S.) M.C. 197; 5 Best & S. 635.

### (E) Removal by Certiorari; Costs.

A prosecutor removing an indictment into the Court of Queen's Bench by *certiorari* is only liable to pay costs to the defendant if acquitted, by virtue of the recognizance to pay costs in such event as required by s. 5. of the 16 Vict. c. 30; and if the prosecutor has entered into a recognizance only to prosecute with effect, and to do and perform such order as the Court shall direct, he is not liable to costs, and the Court has no power, under s. 6, to order costs to be taxed against the prosecutor. *R.* v. *East Stoke*, 34 Law J. Rep. (N.S.) M.C. 190; 6 Best & S. 536.

### (F) Judge's Consent to.

The 1st section of 22 & 23 Vict. c. 17. gives power to a prosecutor, or other person, to present to a grand jury an indictment for perjury and certain other misdemeanors, if such indictment be preferred by the direction or with the consent in writing of a Judge of one of the superior Courts:—Held, that it is a matter for the discretion of the Judge to whom the application is made to decide what materials ought to be before him, and that it is not necessary to summon the party accused, or to bring him before the Judge in any way. Therefore, where some time after the trial of an action, during which perjury was alleged to have been committed, the accusing party appeared before the Judge who tried the action, and, producing a newspaper report of the trial, applied for a consent to a prosecution being commenced, and the Judge wrote upon the newspaper report, "I consent to a prosecution in this case,"—it was held that he had rightly exercised the jurisdiction given by the above section. *R.* v. *Bray*, 32 Law J. Rep. (N.S.) M.C. 70; 3 Best & S. 255.

*Quære*—Whether an indictment under the 24 & 25 Vict. c. 115. (an Act for the government of the Navy), s. 57, for giving false evidence before a court-martial, is an indictment for perjury within the 22 & 23 Vict. c. 17. (the Vexatious Indictments Act), s. 1. *R.* v. *Heane*, 33 Law J. Rep. (N.S.) M.C. 115; 4 Best & S. 947.

*Quære*—Whether the latter enactment applies to offences committed out of England and Ireland. Ibid.

### (G) Indictable Offences.

The prisoners committed fornication in open day on a common in the sight of one witness only, but so that any one passing over the common or along a public footway adjacent could have seen them. There was no proof that any persons were passing over the common or along the footway at the time. *Quære*—Whether this was an indictable offence. *R.* v. *Elliot*, 1 L. & C. 103.

If upon the hearing of a case there is a difference of opinion, and the dissenting Judges desire it, a rehearing before the full Court will be directed. Ibid.

(H) NOLLE PROSEQUI BY THE CROWN.

The Attorney General has power to enter a *nolle prosequi* to an indictment without calling the prosecutor and the defendant before him; and where (the indictment having been removed into this court) a *nolle prosequi* was thus entered, the Court refused to interfere. *R. v. William Allen*, 31 Law J. Rep. (N.S.) M.C. 129; 1 Best & S. 850.

## INDUSTRIAL SOCIETIES.

[See FRIENDLY AND OTHER SOCIETIES.]

## INFANT.

[See PLEADING, Equitable Pleading.]



(A) MAINTENANCE.

The testator gave his residue, on trust to apply the income for the maintenance, education, and support of his children, until the youngest attained twenty-one. The children having been maintained, &c., the Court declined directing an account of the application of the income during the minority of the youngest child, without a special case being made out. *Hora* v. *Hora*, 33 Beav. 88.

Bequest by a man to his wife, to be applied for the maintenance, &c., of herself, and their children:—Held, that the right of an unmarried daughter to maintenance, &c., did not cease on her attaining twenty-one. *Carr* v. *Living* (No. 2), 33 Beav. 474.

Where this Court had appointed a guardian and settled a scheme for the education of an infant peer, who was entitled to large estates in England and Scotland, it restrained the tutor dative from continuing certain proceedings in the Court of Session relative to the education and residence of the infant, and as to his English estates which had been instituted in Scotland, so as to supersede the scheme approved by this Court. *The Marquess of Bute* v. *Stuart*, 2 Giff. 582.

Under a scheme settled in chambers an infant ward of Court was articled to an attorney, and a premium of 300 guineas paid with him. Afterwards the infant was desirous of having the articles cancelled, and upon a summons to vary the scheme, which was attended by the attorney, an order was made at chambers directing the articles to be delivered up to be cancelled, and 100*l.*, part of the premium, to be repaid. Upon appeal by the attorney from so much of the order as directed a return of a portion of the premium, it was held, there being no evidence of misconduct on his part, that the Court had no jurisdiction to make such an order. *Craven* v. *Stubbins*, 34 Law J. Rep. (N.S.) Chanc. 126.

Gift to a widow, she maintaining and educating the testator's son and two daughters thereout, until the son attained twenty-one:—Held, that the son who had married and ceased to reside with his mother, but was still a minor, was not entitled to maintenance. *Staniland* v. *Staniland*, 34 Beav. 536.

(B) RELIGIOUS EDUCATION.

Where a Roman Catholic father (who lived till his eldest child was seven years old) allowed the mother, who was a Protestant, to have the exclusive charge of the education of the children during his life, and they were with his full knowledge brought up in the Protestant faith, he was held to have abdicated his right to direct the religious education of his children; and the Court, in ordering a scheme to be settled for their education, disregarded a direction in his will that they should be brought up in the Roman Catholic faith. *Hill* v. *Hill*, 31 Law J. Rep. (N.S.) Chanc. 505.

The Court will not take a child of tender years from the custody of its mother on the ground that the mother's religion differs from that of the deceased father, and that such change of custody is requisite to the training of the child in the father's religion. *In re Austin; Austin* v. *Austin*, 34 Law J. Rep. (N.S.) Chanc. 499; 34 Beav. 257.

A Roman Catholic died intestate, leaving a Protestant widow and an infant daughter less than three years old, who had been baptized a Roman Catholic, but with one Protestant sponsor. A year before his death he prepared the draft of a will which he never executed, containing a direction that his children should be brought up as Roman Catholics, but he did not otherwise express any wish on the subject. His widow married a Protestant. *Romilly, M.R.*, made an order appointing the mother and a maternal uncle-in-law, a Protestant, guardians, and declined to give any immediate directions as to the religious training of the child, but directed the guardians to inform the Court after a few years of the course of education they proposed to adopt. *Lord Westbury, L.C.*, upon appeal, varied the order by declaring that, having regard to the circumstances, the child ought to be brought up and educated, when capable of receiving religious education, as a member of the Roman Catholic Church, and by appointing the mother, her husband and the maternal uncle to act as guardians until the child should attain the age of seven years, and directing that when she should attain that age application should be made to the Court respecting the guardianship and the religious instruction of the child, with liberty to apply in the mean time. Ibid.

(C) MANAGEMENT OF PROPERTY.

Bill to rectify a lease of an infant's property, sanctioned by the Court in pursuance of an agreement, by excluding certain trade fixtures, alleged to have been improperly comprised in the lease, and also by expunging the covenant as to delivery up of possession of growing crops and other particulars, dismissed with costs, there being no evidence that the

ease was inconsistent with the agreement, one of the essees being the infant's guardian. *Seaton* v. *Staniand*, 4 Giff. 61.

(D) Dealings by.

An executor, an infant, who never proved the will, received during his infancy assets of the testator and paid them to the tenant for life, by whom they were lost:—Held, that by reason of his infancy at the time of the receipt, he was under no liability to account for them. *Stott* v. *Meanock*, 31 Law J. Rep. (N.S.) Chanc. 746.

(E) Settlement of Property.

The 18 & 19 Vict. c. 43. renders valid a post-nuptial settlement of an infant's estate made with the approbation of the Court. *Powell* v. *Oakley*, 34 Beav. 575.

(F) Contracts.

An infant, who has no property of her own to settle, may contract with a solicitor for the preparation of a marriage settlement by her intended husband, under which proper provision is made for her benefit, as such may be considered a necessary suitable to her estate and condition. *Helps* v. *Clayton*, 34 Law J. Rep. (N.S.) C.P. 1; 17 Com. B. Rep. N.S. 553.

(G) Liability for Wrongs independent of Contract.

The defendant, an infant, hired a horse for a ride on the road, the owner expressly refusing to allow the horse to be used for jumping. The defendant, however, lent the horse to a friend, who rode it with the defendant's permission across the fields, and at fences, in endeavouring to jump which the horse was injured:—Held, that this was an actionable wrong independent of any contract, and that therefore the defendant, notwithstanding his infancy, was liable for the injury which had been done to the horse. *Burnard* v. *Haggis*, 32 Law J. Rep. (N.S.) C.P. 189; 14 Com. B. Rep. N.S. 45.

(H) Ward of Court of Chancery.

An order in Chancery, on petition, constituting a guardian of an infant, makes that infant a ward of Court. *Stuart* v. *Bute; Stuart* v. *Moore*, 9 H.L. Cas. 440.

In cases relating to the care of infants, the benefit of the infant is the foundation of the jurisdiction, and the test of its proper exercise. On this subject there ought to be a perfect reciprocity of action between the Courts of England and Scotland, although, as to judicial jurisdiction, the two countries are to each other independent foreign countries. Ibid.

The Lord Chancellor, though "Chancellor of Great Britain," has only certain statutory powers in Scotland, which are not of a judicial nature. Ibid.

The 48 Geo. 3. c. 151. s. 15. applies to judgments and orders in regular suits, and not to orders made with respect to the custody of infants. The latter kind of orders may be made either on a bill or petition. Ibid.

*Semble*—That every order respecting the custody of an infant, whether granting or refusing the petition as to its custody, is to be treated as a final judgment, and therefore subject to appeal. Ibid.

A was the son of a person who was at once a peer of the United Kingdom and a peer of Scotland. A was born in September 1847. A's father had estates in both countries, and resided at intervals in both. He died in England, in March 1848. A's mother was, in May 1848, appointed by the Court of Chancery his guardian, and A's uncle (the heir presumptive to the title) was appointed tutor-at-law in Scotland. This appointment gave him no right to the custody of the infant's person, but only conferred on him the management of the property till the infant should become fourteen years of age. A's mother died in Scotland, in December 1859. By the will of the mother S and M were appointed guardians, and that appointment was confirmed by the Vice Chancellor, by whom a scheme for the infant's education was prepared and approved of. A was then in Scotland, under the personal care of M. She proposed to bring him to England to be educated, as S proposed, in accordance with the scheme of the Court of Chancery. She brought him to London, but in consequence of disagreements between herself and S, suddenly carried him back to Scotland. Proceedings in the Court of Session were instituted, to compel her to give up the custody of the infant to S; but though the Court of Chancery had, on the application of S, directed that he should be brought back to England to be educated, the Court of Session pronounced an interlocutor, postponing the case for nearly four months, and afterwards two other interlocutors interdicting anybody whatever from taking the infant, "a domiciled Scotch subject," out of the jurisdiction of the Court of Session:—Held, that these interlocutors were erroneous; that the jurisdiction of the Court of Chancery over the infant had been established at a prior time; that his mother, having afterwards changed his domicil of fact, did not affect the matter; that under such circumstances no question of conflicting jurisdiction between the two Courts could arise, but that both, representing the Sovereign as the *parens patriæ*, were bound to assist each other in doing what was necessary to ensure the benefit of the infant, which in cases of this kind was the primary consideration dominating all others. Ibid.

## INFERIOR COURT.

[A limited equitable jurisdiction conferred on the County Courts by 28 & 29 Vict. c. 99.]

[See Mandamus—Prohibition—Slander.]

(A) Officers of the County Court.
- (a) *Powers and Authority.*
- (b) *Liability.*
- (c) *Mistakes by.*

(B) Jurisdiction of the County Court.
- (a) *When concurrent with the Superior Court.*
- (b) *Title in question.*
- (c) *Whole Cause of Action within the District.*
- (d) *Action for Slander.*
- (e) *Amendment of Particulars to give Jurisdiction.*
- (f) *Pendency of Action in the Superior Court.*

(C) Costs; Refusal of Judge to review Taxation.

(D) Bond to stay Proceedings.

(E) Appeal to the Superior Court.
- (a) *When it lies.*
- (b) *Time for appealing.*

(c) *Costs.*
(1) *Security for.*
(2) *On Appeal.*

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(A) OFFICERS OF THE COUNTY COURT.

(a) *Powers and Authority.*

A registrar of a county court became lessee of offices for a term of years, paying rates, rent, taxes, &c. In these offices he carried on his own private practice as an attorney and solicitor as well as his business as registrar, and was allowed by the Treasury a certain sum for the accommodation provided for the purposes of the county court, and for which he gave receipts describing the sum as rent. The treasurer of the court gave notice to the registrar of his intention to audit the accounts of the court on a particular day, and he attended for that purpose after the office was duly closed under the 6th Rule of Practice of the County Courts:—Held, that the treasurer was justified in breaking open the office to get at the books kept by the registrar. *Burridge* v. *Nicholetts*, 30 Law J. Rep. (N.S.) Exch. 145; 6 Hurls. & N. 383.

The effect of the 9 & 10 Vict. c. 95. s. 48. is to vest the books of a county court kept by the registrar in the treasurer, and his right of access to the books is not limited to the period when the office is open to the public. Ibid.

*Quære*—Whether the possession of the county court office was vested in the treasurer. Ibid.

To an action of trespass the defendant pleaded not guilty by statute, referring in the margin to several statutes or sections. At the trial, his counsel justified the act complained of *(inter alia)* under a section not referred to, but no objection was taken, and no amendment nor application to amend made; the whole question of justification being reserved for the opinion of the Court:—Held, that the plea might be treated as if the omitted section had been specified in the margin. Ibid.

The Judge at Nisi Prius reserved leave to the defendant to move the Court above to set aside the verdict found for the plaintiff and enter a nonsuit, on the understanding (as appeared by his notes) that the judgment of the Court above should be final; a rule was made absolute to set aside the verdict for the plaintiff and to enter a nonsuit, no objection having been taken during the argument that the plaintiff was not bound by any agreement not to appeal; the plaintiff gave notice of appeal against the decision of the Court making the above rule absolute. The Court made absolute a rule to stay proceedings in such appeal (although the plaintiff made an affidavit that neither he nor his counsel had consented to be bound not to appeal, and that had he been asked he should not have consented), and held, that it was contrary to justice and custom that the agreement not to appeal should be unilateral, and that under the circumstances both parties were bound not to appeal. Ibid.

(b) *Liability.*

The high-bailiff of a county court is liable, to the same extent as the sheriff, for the wrongful act of a person employed by one of his sub-bailiffs, to whom a warrant is delivered for execution. Where, therefore, a warrant to the high-bailiff, to levy on the goods of B, was delivered for execution to one of the sub-bailiffs, and he seized goods of B on the 3rd of December, and left C in possession, and C the next day wrongfully sold the goods, contrary to the 9 & 10 Vict. c. 95. s. 106, the high-bailiff was held liable. *Burton* v. *Le Gros*, 34 Law J. Rep. (N.S.) Q.B. 91.

(c) *Mistakes by.*

The defendant, having recovered judgment in the county court against the plaintiff's brother, and a *fi. fa.* having issued against the goods of the latter, requested a clerk in the registrar's office to write to the high-bailiff, that he (the defendant) would contest any claim that might be made by any third person claiming the goods at the address given on the back of the execution, and that he (the defendant) desired the high-bailiff should be so informed, in order that the officer who levied would not in any way be deterred from putting the warrant in force by reason of any party setting up a claim. The officer having seized some of the plaintiff's goods, besides those belonging to the plaintiff's brother, at the address given on the back of the execution, the plaintiff, without giving notice, under s. 138. of 9 & 10 Vict. c. 95, brought his action against the defendant for damages for trespass and conversion:—Held, that the letter written by the defendant's request to the high-bailiff of the county court was merely a direction to the officer to do his duty, and did not render the defendant liable to the plaintiff for a mistake of the officer who levied. *Cronshaw* v. *Chapman*, 31 Law J. Rep. (N.S.) Exch. 277; 7 Hurls. & N. 911.

*Quære*—Whether an execution creditor interfering in the execution of process of the county court is entitled to notice of action under s. 138. of 9 & 10 Vict. c. 95. Ibid.

(B) JURISDICTION OF THE COUNTY COURT.

(a) *When concurrent with the Superior Court.*

If a railway company injure a chattel of the plaintiff in county court district A, the company cannot be sued for it in county court district B, merely because they have a local station in district B, at which passengers are booked and goods received for carriage; for a railway company does not carry on its business within the meaning of the statute 9 & 10 Vict. c. 95. s. 60. at every place where it has a station, but only at the principal office, where the directors meet and the general business of the company is transacted. *Shiels* v. *the Great Northern Rail. Co.*, 30 Law J. Rep. (N.S.) Q.B. 331.

In order to give jurisdiction to a county court on the ground that the cause of action arose within the district, it is a condition precedent that leave to issue the summons be granted pursuant to s. 60. of the 9 & 10 Vict. c. 95, or s. 15. of the 19 & 20 Vict. c. 108; and an action having been tried and judgment given without such leave, the Court refused to rule the Judge of the county court to issue execution, on the ground that he had no jurisdiction. *Brown* v. *the London and North-Western Rail. Co.*, 32 Law J. Rep. (N.S.) Q.B. 318; 4 Best & S. 326.

A railway company "carries on its business" within the meaning of the 9 & 10 Vict. c. 95. s. 60. only at the principal station where the general superintendence of the whole concern is centred;

and not at any station, however large, where the local management of any portions of the line is conducted subject to the supervision of the general manager at the principal station.—Affirming *Shiels* v. *the Great Northern Rail. Co.* Ibid.

(*b*) *Title in question.*

Where an action of replevin is commenced in a county court, and the defendant does not take steps to remove it under s. 67. of 19 & 20 Vict. c. 108, the Court has power to try the action notwithstanding title to an incorporeal hereditament comes in question, s. 58. of 9 & 10 Vict. c. 95. not applying to an action of replevin. *Fordham* v. *Akers*, 33 Law J. Rep. (N.S.) Q.B. 67; 4 Best & S. 578.

(*c*) *Whole Cause of Action within the District.*

Where the question is, whether "the cause of action" has arisen within the jurisdiction of a county court, that means, in the case of a contract, the contract sued upon; and as a contract is an entire thing, the cause of action arises thereupon (so far as regards the contract itself) at the time and place when such contract is finally entered into. *Aris* v. *Orchard*, 30 Law J. Rep. (N.S.) Exch. 21; 6 Hurls. & N. 160.

Where a contract for sale of goods within the Statute of Frauds is made by parol at one place and time, and ratified at another place and time by part payment, or delivery,—*semble*, that "the cause of action," within the meaning of the County Courts Act, arises at the latter time and place; and it is clearly so if the terms are then finally settled. Ibid.

The defendant resided at B, and the plaintiff bargained with him there by parol for the purchase of a horse from him for a price above 10*l.*, but the bargain was not completed; and the next day the defendant, within the jurisdiction of the County Court of T, completed the bargain, and agreed to warrant the horse, and then delivered the horse to the plaintiff:—Held, that he was rightly sued in that court for a breach of the warranty, and that the "whole" cause of action arose there, within the meaning of the County Courts Act, (9 & 10 Vict. c. 95.) s. 60. Ibid.

(*d*) *Action for Slander.*

The Salford Court Act, (9 & 10 Vict. c. cxxvi.)—reciting that the Court has cognizance of all pleas or personal actions where the debt or damage is under 40s.,—enacts, that the Court "shall have authority to try all actions at present cognizable by the said Court where the debt or damage is under 40s., and all actions of assumpsit, covenant, detinue and debt, whether the debt be by specialty or on simple contract; and all actions of trespass and trover, provided the sum or damages sought to be recovered shall not exceed 50*l.*" A subsequent section enacts, that if the parties in any action arising within the jurisdiction (except actions for libel, *slander*, &c.), wherein the sum sought to be recovered exceeds 50*l.*, agree in writing, the Judge shall have power to hear such actions:—Held, that the Court has jurisdiction in actions of slander, where the damages claimed do not exceed 50*l.* *Farrow* v. *Hague*, 33 Law J. Rep. (N.S.) Exch. 258; 3 Hurls. & C. 101.

By the same act, where the debt or damage recovered is under 40s., the Judge has power to certify that the plaintiff is entitled to full costs as settled under the provisions of that act. A plaintiff in an action for slander for words actionable as spoken of him in the way of his business recovered 1s. damages in the Salford Court, and the Judge certified for full costs, notwithstanding the statute 21 Jac. 1. c. 16. s. 6:—Held, that even if the Judge had no power to certify, prohibition would not lie. Ibid.

*Quære*—Whether the Judge had power to certify. Ibid.

(*e*) *Amendment of Particulars to give Jurisdiction.*

If the particulars of the plaintiff's claim, served with the county court summons, do not disclose a matter of complaint within the jurisdiction, the Judge cannot amend the particulars so as to turn the complaint into one over which he has cognizance. *Hopper* v. *Warburton*, 32 Law J. Rep. (N.S.) Q.B. 104.

(*f*) *Pendency of Action in the Superior Court.*

The fact of the pendency of an action of ejectment is not a bar to the plaintiff proceeding in the county court, under 19 & 20 Vict. c. 108, for the recovery of possession of the same tenements. *Williamson* v. *Bissill*, 31 Law J. Rep. (N.S.) Exch. 131; *nom.* *Bissill* v. *Williamson*, 7 Hurls. & N. 391.

(C) COSTS; REFUSAL OF JUDGE TO REVIEW TAXATION.

Upon an application for a rule to compel a county court Judge to review the taxation of costs in a plaint tried before him,—Held, that the reviewal of taxation of costs was in the discretion of the Judge, and that the refusing by him to review was not "the refusing to do an act relating to the duties of his office" within the meaning of s. 43. of 19 & 20 Vict. c. 108. *Clifton* v. *Furley*, 31 Law J. Rep. (N.S.) Exch. 170; 7 Hurls. & N. 783.

(D) BOND TO STAY PROCEEDINGS.

Where in a plaint in a county court the plaintiff claims more than 5*l.* damages for a tort, and the defendant seeks to have the case tried in a superior Court, under the 19 & 20 Vict. c. 108. s. 39, and tenders to the registrar, pursuant to that section and s. 70, and County Court Form, No. 31, a bond executed by himself and two sureties, the registrar's duty is only to inquire into the sufficiency of the sureties; and he cannot refuse to receive the bond, on the ground that the defendant is by law incapable of executing a valid bond. *Young* v. *the Brompton, Chatham and Gillingham Waterworks*, 31 Law J. Rep. (N.S.) Q.B. 14; 1 Best & S. 675.

*Semble*—That where the defendants are an incorporated joint-stock company, it is within the scope of their general authority to execute such a bond. Ibid.

(E) APPEAL TO THE SUPERIOR COURT.

(*a*) *When it lies.*

No appeal lies to this Court from the county court, in respect of an order made in exercise of its powers in a winding-up proceeding under the 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87. *Henderson* v. *Bamber*, 19 Com. B. Rep. N.S. 540.

*Quære*—Whether the county court, under the authority conferred upon it by that statute, has power to make an order restraining proceedings in

the Liverpool Passage Court against a member of an industrial society registered under the 25 & 26 Vict. c. 89, which is being wound up in the county court by virtue of the jurisdiction conferred upon it by the 25 & 26 Vict. c. 87. s. 17. Ibid.

(*b*) *Time for appealing.*

Upon the trial of an action in the county court, with a jury, the Judge, upon a special finding of the jury, directed the verdict to be entered for the defendant; but upon the application of the plaintiff's attorney he "reserved leave for the plaintiff to move to enter a verdict for the plaintiff or for a new trial," and notice of the application was afterwards given, pursuant to the Rules of Practice:—Held, that the plaintiff's right of appeal was to be reckoned from the day the motion was refused, and not from the day of trial. *In re Foster* v. *Green*, 30 Law J. Rep. (N.S.) Exch. 263; 6 Hurls. & N. 793.

(*c*) *Costs.*

(1) *Security for.*

The Court cannot entertain an appeal from a county court, where the condition of giving security for the costs of appeal (or for the amount of the judgment in the case of a defendant) imposed by the 14th section of the 13 & 14 Vict. c. 61. has not been strictly complied with. *Norris* v. *Carrington*, 16 Com. B. Rep. N.S. 10.

(2) *On Appeal.*

Upon an appeal from the decision of a county court Judge or the Judge of the Sheriffs' Court of the city of London on the ground of misdirection, the appellant, if successful, is entitled to costs. *Schroder* v. *Ward*, 32 Law J. Rep. (N.S.) C.P. 150; 13 Com. B. Rep. N.S. 410.

Where, on an appeal from a county court, the Court above orders a new trial on the ground of misdirection, the Court will not give the appellant the costs of the appeal. *Gee* v. *Lancashire and Yorkshire Rail. Co.*, 30 Law J. Rep. (N.S.) Exch. 11; 6 Hurls. & N. 211.

## INHERITANCE.

By a marriage settlement real estate, of which the lady was seised as heir to her maternal grandfather, was conveyed to trustees, upon trust for the lady and her heirs until the marriage, and after the marriage, upon trust for the lady for life; with remainder, in default of issue of the marriage, in trust for the lady and her heirs, if she survived her husband; but if she predeceased him, then in trust for the person or persons who would at her death have become entitled to the property if she had died intestate, and without having been married. The lady died without issue in her husband's lifetime:—Held, that the ultimate trust being for the benefit neither of the settlor nor of the heirs of the settlor, was unaffected by the 3rd section of the Inheritance Act, and that the persons intended to take thereunder were those who would have been entitled if the settlement had never been executed; and, consequently, that the heir *ex parte materna* took the property, by purchase, under the settlement. *Heywood* v. *Heywood*, 34 Law J. Rep. (N.S.) Chanc. 317; 34 Beav. 317.

## INJUNCTION.

(A) Special Injunction.
  (*a*) *When granted or decreed.*
    (1) *In general.*
    (2) *Ancient Lights.*
    (3) *Nuisances.*
    (4) *Contracts.*
    (5) *Trade Marks.*
  (*b*) *When refused or dissolved.*
(B) To restrain Action at Law.
(C) Damages in Lieu of.
(D) Practice.
  (*a*) *Interim Order.*
  (*b*) *Establishing Title at Law.*
  (*c*) *Form of Order.*
(E) Writ of Injunction.

(A) Special Injunction.

(*a*) *When granted or decreed.*

(1) *In general.*

Injunction to prevent the user of a volunteer rifle range for ball practice, until it had been rendered free from danger. *Banister* v. *Bigge*, 34 Beav. 287.

A tenant from year to year may file a bill to protect an ancient light, but the injunction will be limited to the period of the continuancy of the plaintiff's interest. *Simper* v. *Foley*, 2 Jo. & H. 555.

A tenant from year to year filed a bill against adjoining tenants holding under the same landlord to restrain the erection of new buildings interfering with the free access of light and air to the premises occupied by him. The landlord thereupon gave the tenant notice to quit, and, at the time of the hearing, only eight months of the tenancy were unexpired:—Held, by *Romilly, M.R.*, that the slender extent of the plaintiff's interest constituted no sufficient reason for denying him the protection of the Court; and, it appearing that the plaintiff had remonstrated with the defendants previously to the erection of the new buildings, a mandatory injunction was awarded compelling the defendants to pull them down. *Jacomb* v. *Knight*, 32 Law J. Rep. (N.S.) Chanc. 601.

Upon appeal, *Knight Bruce, L.J.* and *Turner, L.J.*, held, that though the extent of the plaintiff's interest did not necessarily disentitle him to relief, yet it was a material ingredient for consideration; and as it was not clear that the plaintiff had sustained material injury, and as the inconvenience to the defendants of compelling them to pull down their buildings would be far greater than any which the plaintiff could endure if the buildings were allowed to stand and he were left to bring an action for damages, the bill ought to be dismissed without costs, without prejudice to any action the plaintiff might be advised to bring. Ibid.

The Court will deal with a reference to arbitration as with an action at law, and grant an injunction, restraining persons from proceeding with it. *Maunsell* v. *the Midland Great Western (of Ireland) Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 513; 1 Hem. & M. 130.

A Court of equity will not, in the absence of fraud, interfere to prevent the obstruction of light

and air, or other easements, if the obstruction has been completed before the filing of the bill; and in such a case the Court has no jurisdiction to award damages. But where a small portion of a building which obstructed the plaintiffs' light and air was completed after the filing of the bill, the Court ordered such portion to be pulled down, and directed an inquiry as to damages in respect of the injury caused by the other part of the building. *Lawrence* v. *Austin; Durell* v. *Pritchard*, 34 Law J. Rep. (N.S.) Chanc. 598: see *Durell* v. *Pritchard*, 35 Law J. Rep. (N.S.) Chanc. 598, where this decree was affirmed, but on different grounds.

Injunction granted on a bill by a churchwarden, on behalf of himself and the parishioners, to restrain the incumbent and his agents from dismantling the church and selling the pews, &c. with a view to improve the building, the incumbent having obtained no faculty. *Cardinall* v. *Molyneux*, 2 Giff. 535.

(2) *Ancient Lights.*

Upon motion for an injunction to restrain the defendant from interfering with the plaintiff's ancient lights, it was held, that there was no necessity for the party complaining to be in the occupation of the house to entitle him to the interference of the Court. But as it appeared the plaintiff had altered the position of his windows, and had also made new lights, the Court declined to decide the legal question, and directed the adjournment of the motion until an action should have been brought to try the plaintiff's right. *Wilson* v. *Townend*, 30 Law J. Rep. (N.S.) Chanc. 25; 1 Dr. & S. 324.

The jurisdiction of the Court to interfere by way of mandatory injunction should be exercised with great caution; and, *semble*, not at all where damages afford an adequate compensation for the injury done. *Isenberg* v. *the East India House Estate Co. (Lim.)*, 33 Law J. Rep. (N.S.) Chanc. 392.

It is the duty of the Court in a case in which it considers damage has been done, though not of such a character as to warrant the exercise of its jurisdiction by mandatory injunction, to direct an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained. Ibid.

A plaintiff coming to the Court for an injunction to restrain the erection of new buildings by his neighbour, on the ground of interference with his light and air, must shew that his own residence will be rendered substantially less comfortable for purposes of occupation. *Johnson* v. *Wyatt*, 33 Law J. Rep. (N.S.) Chanc. 394; 2 De Gex, J. & S. 18.

Though an injunction be refused in such a case, the Court if it appear that damages have been sustained, may, if it think fit, exercise the jurisdiction conferred by Sir Hugh Cairns's Act (21 & 22 Vict. c. 27), and direct an inquiry as to damages. Ibid.

It is not in every case in which an action can be maintained for the obstruction of ancient lights that an injunction will be granted by a Court of equity, but the standard of the amount of damage that calls for the exercise of the jurisdiction has not been defined with any certainty. *Jackson* v. *the Duke of Newcastle*, 33 Law J. Rep. (N.S.) Chanc. 698.

In order to justify the interference of the Court by injunction, the obstruction of the ancient lights of a manufactory or of business premises must be such as to render the building to a material extent less suitable for the business carried on in them. Ibid.

Such obstruction must be one which diminishes the value of the premises for the purposes for which they are used at the time; and the fact that the obstruction may render the premises less fit for some other purposes to which they may by possibility be applied at a future time cannot be taken into consideration. Ibid.

Therefore, where the owners of premises used as the counting-house of a grocer's shop applied for an injunction to restrain the erection of a building which would obscure an ancient light, and the Court was of opinion upon the evidence that the intended erection would not materially interfere with the enjoyment of the premises as a counting-house so as to require its interference by injunction,—Held, that the possible future injury, by rendering the premises less fit for a business requiring more light, was not a ground for such interference. Ibid.

(3) *Nuisances.*

A plaintiff who in an insignificant degree obscured the light and air to his own dwelling was held not to be thereby disentitled to an injunction to restrain the defendant from erecting a building so as seriously to diminish the supply of light and air. *Arcedeckne* v. *Kelk*, 2 Giff. 683.

Nothing short of an act by the plaintiff which will produce somewhat the same amount of injury as that of which he complains will deprive him of his right to relief in this Court. Ibid.

The lessee of a dwelling-house, in which he carried on business as a diamond merchant, was held entitled to an injunction restraining the owners of premises adjacent (who afterwards purchased the reversion of the plaintiff's house) from constructing the party-wall so as to occasion such an obstruction of the plaintiff's ancient lights, however slight, as would injure him in his business. *Herz* v. *the Union Bank of London*, 2 Giff. 686.

This Court will interfere to restrain apprehended injury where it is clear that the act intended to be committed would injure or destroy a clear legal right. Ibid.

The owners of premises, situated in a densely populated neighbourhood, having purchased large quantities of damp jute, being salvage from a fire, proceeded to bring it on their property for the purpose of drying it. It being established by evidence that jute when dry is highly inflammable and perhaps (though as to this the evidence was conflicting) liable when wet to ignite spontaneously,—the Court, on an interlocutory application by the owner of adjoining premises, granted an interim injunction, until the hearing of the cause or further order, to restrain the owners of the jute from bringing more jute on to their premises, and from allowing the damp jute then there to remain in such quantities as to occasion danger to adjoining property; the plaintiffs undertaking at once to indict the defendants as for a nuisance. *Hepburn* v. *Lordan*, 34 Law J. Rep. (N.S.) Chanc. 293; 2 Hem. & M. 345.

(4) *Contracts.*

Parties who have mutually bound themselves will be restrained from doing any act inconsistent with a charter-party which they have entered into *bona*

*fide*. *Sevin* v. *Deslandes*, 30 Law J. Rep. (N.S.) Chanc. 457.

Where a contract contains an express negative covenant, and complete justice can be done between the parties, the Court will grant an injunction to restrain breach of the negative covenant; but the Court rarely interferes where there is no distinct negative stipulation, but the negative obligation is inferred only from the positive contract. *Peto* v. *the Brighton, Uckfield and Tunbridge Wells Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 677.

A solicitor's clerk executed a bond to his employer, the condition whereof, after reciting an agreement that the clerk should give a bond not to carry on the business of a solicitor within fifty miles of a given place, was, that if he carried on business within the specified distance, then, provided he paid to the solicitor 1,000*l*. as liquidated damages, the bond should be void. The clerk commenced business as a solicitor within the distance. On a bill being filed by the solicitor,—Held, that he was entitled to an injunction restraining the clerk from practising within the specified distance. *Howard* v. *Woodward*, 34 Law J. Rep. (N.S.) Chanc. 47.

A, the owner of land through which a company proposed to make a railway upon a viaduct, withdrew his opposition to the company's bill in parliament, in consideration of an agreement by the company, among other things, not to erect, on the land to be taken by them from him, within 80 feet from other premises in his possession, any building, "except their proposed railway," above the height of 18 feet. The bill passed; and a viaduct, 33 feet high, part of which was within 80 feet from the plaintiff's premises, was erected on the land taken from A. This viaduct was wide enough for and carried two lines only. Subsequently to its erection, a conveyance of A's land to the company was prepared and executed; which contained a covenant on the part of the company to the same effect (omitting only the exception as to the railway, then completed) as the provision in the agreement restraining buildings. On the company afterwards beginning to build brick piers above the height of 18 feet within 80 feet of A's other premises, with a view to widening their viaduct so as to carry four lines instead of two, an injunction to restrain the company from erecting any such buildings in breach of their covenant was granted by *Kindersley, V.C.;* and an appeal motion on the part of the company to the Lords Justices was *(dissentiente Knight Bruce, L.J.)* refused. *Lloyd* v. *the London, Chatham and Dover Rail. Co.*, 34 Law J. Rep. (N.S.) Chanc. 401; 2 De Gex, J. & S. 568.

Per *Turner, L.J.*—The circumstance that a work undertaken in breach of a valid covenant is one of great public importance, is not sufficient to induce a Court of equity to refuse to restrain the breach of covenant. Ibid.

Per *Turner, L.J.*—Courts of equity will not leave parties to their remedy at law by refusing to enforce a covenant specifically, on the ground that the injury is not substantial, unless on the clearest evidence of its triviality. Ibid.

A surgeon at W, upon taking an assistant, required him to give his bond in a penalty, not to practice at W. Afterwards, he discharged the assistant, who thereupon commenced practice at W. The surgeon then filed a bill to restrain him, to which the defendant demurred. The Court overruled the demurrer, holding that, notwithstanding the pecuniary penalty, the plaintiff was entitled to a remedy in equity. *Fox* v. *Scard*, 33 Beav. 327.

Property was conveyed to certain trustees of a building society. A scheme was laid down for the buildings, with certain regulations applicable to every lot of ground. Each allottee or purchaser from the society entered into restrictive covenants with the trustees, who were the conveying parties to him; and it was covenanted that the trustees should be deemed trustees of the covenants for the benefit of all claiming under conveyances already made by them. The plaintiffs and the defendant in the suit became allottees or purchasers. Soon after his purchase the defendant built a large hotel, on some of the lots he had purchased, and he afterwards on certain other of his lots, and in front of lots which the plaintiffs had purchased, began erecting stables, with a large "midden," or receptacle for manure, of which the former were completed without formal protest from the plaintiffs, who, however, ultimately filed a bill against the defendant, praying that they might have the benefit of the covenants entered into by the defendant, for an injunction against building in violation thereof, and that the buildings already so erected might be pulled down, and damages be accorded to the plaintiffs. The Vice Chancellor of the County Palatine of Lancaster made a decree, declaring that the only proper buildings were such as had been approved by the covenantees, directing the demolition of certain portions of the buildings raised, and awarding an injunction to restrain the defendant from using the stables otherwise than as general outbuildings: — Held upon appeal that, under the circumstances, the injunction must be dissolved, and the order directing demolition discharged, on the ground of acquiescence; and that if the plaintiffs desired to proceed for the purpose of recovering damages, they must amend their bill by making it one on behalf of themselves and all the allottees and making the trustees defendants. *Eastwood* v. *Lever*, 33 Law J. Rep. (N.S.) Chanc. 355.

Held, also (per *Turner, L.J.*), that the plaintiffs had an equity against the defendant by virtue of the covenants entered into by the latter with the trustees, and that no sanction by the trustees to deviate from the covenants could affect that equity. Ibid.

A plaintiff, though barred by acquiescence or otherwise from his remedy by injunction, may obtain damages under Sir Hugh Cairns's Act, 21 & 22 Vict. c. 27, and that even though no action would be maintainable at law by the plaintiff. Ibid.

### (5) *Trade Marks.*

Where S, a tradesman, who had been in the employ of a large firm, put his own name over his shop, but on the plates under the shop-windows and on the sun-awning "from T & G," his former employers, the word "from" being much smaller than the words "T & G," and it was proved that some persons had been misled into thinking that the shop was the shop of "T & G," the Court held that what S was doing was calculated to mislead the incautious, unwary and heedless portion of the public; and on bill by T & G granted an injunction restraining him from using the name of their firm

about his shop in such a way as to mislead the public into the belief that his shop was the shop of T & G, or that their business was carried on there. *Glenny* v. *Smith*, 2 Dr. & S. 476.

(*b*) *When refused or dissolved.*

Where the occupier of a house and grounds in London erected a translucent screen of glass thirty-five feet high and thirty feet distant from the plaintiff's dwelling, having louvres to admit air, the Court refused to grant an injunction. *Radcliffe* v. *the Duke of Portland*, 3 Giff. 703.

The plaintiff obtained a judgment against a tenant for life in remainder, whose estate was liable to forfeiture by his non-user of the name and arms of the testator. Upon a bill to realize the charge, the Court, at the hearing, refused to grant an injunction to restrain the tenant for life from forfeiting his life estate. *Semple* v. *Holland*, 33 Beav. 94.

Where a railway company, acting *bona fide*, has made a mistake as to the lands they have valued and taken possession of, and the question between the company and the landowner is merely one of value, this Court will not, by injunction, stay the works on the property taken. The Court in such cases has regard to the injury which may be done to the public. *Wood* v. *the Charing Cross Rail. Co.*, 33 Beav. 290.

If an owner of lands complains of an easement usurped over his property, and delays his application for relief, a Court of equity will not interfere until he has established his right at law to an abatement. *Cooper* v. *Hubbuck*, 31 Law J. Rep. (N.S.) Chanc. 123; 30 Beav. 160.

The defendants, being in the use and occupation of a railway bridge over a certain highway, and being owners of the soil on either side of the road, commenced the construction of buttresses in the road, on a line with the existing abutments, for the purpose of widening their bridge. The plaintiffs, in whom the soil of the road was vested under the Metropolitan Local Management Act, as surveyors of the highways, filed a bill to restrain the defendants from further narrowing the road, on the ground of public inconvenience:—Held, that the alleged inconvenience was not of sufficient magnitude for the interference of the Court. *The Wandsworth Board of Works* v. *the London and South-Western Rail. Co.*, 31 Law J. Rep. (N.S.) Chanc. 854.

The plaintiff, the manager of a London theatre, engaged the defendant, a provincial actor, desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject, the Court inferred an engagement on the part of the plaintiff to employ the defendant for a reasonable time, and on the part of the defendant, not to perform elsewhere. The plaintiff, having (under these circumstances) delayed the defendant's appearing for five months, the defendant broke his engagement, and went to another theatre:—Held, that he had a right to do so, and that the plaintiff was not entitled to an interlocutory injunction to prevent his performing there. *Fechter* v. *Montgomery*, 33 Beav. 22.

The owner of a trade-mark obtained an injunction against a dock company restraining them from parting with certain imported goods to which the trade-mark had been fraudulently affixed. Subsequently it appeared that the dock warrants had been indorsed for value to a person innocent of the fraud. Upon motion by the holder of the warrants,—Held, that upon his removing the trade-mark he was entitled to have the injunction dissolved, without providing for the plaintiff's costs of suit. *In re Uzielli; Ponsardin* v. *Peto*, 33 Law J. Rep. (N.S.) Chanc. 371; 33 Beav. 642.

A company cannot, by user, acquire an exclusive right to use, in its title of incorporation, a general term descriptive merely of the locality with which the business carried on by the company is connected; and the Court will not restrain the use of such general term by a new company, even though it be in evidence that the former company may have been prejudiced by similarity of name. *The Colonial Life Assur. Co.* v. *the Home and Colonial Assur. Co. (Lim.)*, 33 Law J. Rep. (N.S.) Chanc. 741; 33 Beav. 548.

A B sold a piece of land to C D, and covenanted for quiet enjoyment. Afterwards, A B raised the level, by three inches, of a brook running past C D's grounds, through his, A B's, property:—Held, that this was not a proper subject of complaint for the interference of the Court. *Ingram* v. *Morecraft*, 33 Beav. 49.

(B) TO RESTRAIN ACTION AT LAW.

The underlessee of certain premises entered into an agreement with the freeholders for a new lease, dating from a period anterior to the expiration of the underlease. Disputes however having arisen between them, the defendant purchased a reversionary interest of ten days, and, on the expiration of the underlease, brought his action of ejectment against the underlessee, who still remained in possession with the avowed object of getting into possession and obtaining a lease to himself. The cause was tried after the determination of the reversionary interest, and a verdict was returned for the plaintiff at law. Upon a bill filed by the underlessee to restrain him from issuing a writ of possession, it was held, that the proceedings at law were vexatious and contrary to *bona fides;* and an injunction was granted. *Buckland* v. *Gibbins*, 32 Law J. Rep. (N.S.) Chanc. 389.

(C) DAMAGES IN LIEU OF.

Where buildings complained of were finished before bill filed, and the plaintiffs were not occupiers but owners in reversion of servient tenement, the Court ordered inquiry as to damages occasioned by new building. *The Curriers' Co.* v. *Corbett*, 2 Dr. & S. 355.

In a case for an injunction, which, from circumstances arising after the bill was filed, could not be granted, the Court, under Sir Hugh Cairns's Act (21 & 22 Vict. c. 27.) s. 2, awarded damages, though not specifically prayed for by the bill. *Catton* v. *Wyld*, 32 Beav. 266.

(D) PRACTICE.

(*a*) *Interim Order.*

On the 16th of March F and S obtsined an interim order restraining T from obstructing their ancient lights by continuing the erection of certain buildings. On the hearing of the motion for an injunction, it appeared that the parties had been at issue as to their rights since the 27th of January:—

Held, that this ought to have been stated to the Court on the application for the interim order, and that after the delay which had occurred such an *ex parte* application was improper. *Fuller* v. *Taylor*, 32 Law J. Rep. (N.S.) Chanc. 376.

Where a plaintiff on obtaining an interim injunction gives a personal undertaking as to damages, the Court has jurisdiction to order assessment of such damages, notwithstanding a dismissal of the bill. By the giving of such an undertaking a party puts himself in the power of the Court, actually and wholly independent of the suit. *Newby* v. *Harrison*, 30 Law J. Rep. (N.S.) Chanc. 863; 3 De Gex, F. & J. 287.

(*b*) *Establishing Title at Law.*

It is the habit and rule of a Court of equity not to grant a perpetual injunction to restrain the infringement of a patent, unless the legal validity of the patent has been conclusively established. *Hills* v. *Evans*, 31 Law J. Rep. (N.S.) Chanc. 457.

If a nuisance is alleged, this Court will not grant an injunction to restrain it until it has been established at law. *The Attorney General* v. *the United Kingdom Electric Telegraph Co. (Lim.)*, 31 Law J. Rep. (N.S.) Chanc. 329; 30 Beav. 287.

A claim of unobstructed frontage to a high road must be established at law before the Court will grant an injunction to restrain any interference with the soil between the high road and the boundary fence of the landowner. Ibid.

(*c*) *Form of Order.*

It is highly inconvenient for the Court to grant an injunction to restrain the performance of works, "in any other manner than authorized by the words of an act of parliament," unaccompanied by a statement of what, in the opinion of the Court, is the right mode of constructing those works. *The Warden, &c. of Dover Harbour*, v. *the London, Chatham and Dover Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 474; 3 De Gex, F. & J. 559.

(E) Writ of Injunction.

The plaintiff, a surgeon, hired the defendant as his assistant, and by an agreement in writing between them, the defendant, in consideration of the premises therein contained, promised and agreed with the plaintiff that he, the defendant, would not practise as a surgeon-apothecary within the distance of five miles from C, without the consent in writing of the plaintiff first had and obtained, under the penalty or penal sum of 100*l.* to be recoverable by the plaintiff as and for liquidated damages. The defendant having left the plaintiff's service set up in practice within the prescribed limits, and the plaintiff issued a writ of summons indorsed to recover the penalty of 100*l.* and with a claim for a writ of injunction to restrain the defendant from practising within the prescribed limits, and before delivering declaration in the action applied by motion for an injunction for the same purpose:—Held, that the plaintiff having commenced an action for the recovery of liquidated damages, was not entitled to an injunction. *Carnes* v. *Nesbitt*, 30 Law J. Rep. (N.S.) Exch. 348; 7 Hurls. & N. 158.

*Semble*—That the injunction would have been granted had the plaintiff brought his action for unliquidated damages. Ibid.

Where a declaration, claiming a writ of injunction, did not disclose facts shewing clearly that there could not be an injunction, the Court refused to allow the defendants to demur to so much of the declaration as claimed the writ. *Bilke* v. *the London, Chatham and Dover Rail. Co.*, 33 Law J. Rep. (N.S.) Exch. 206; 3 Hurls. & C. 95.

A railway company having conveyed to A a piece of land abutting on their viaduct, with a covenant not to build within six feet of the wall of the viaduct, —The Court, in an action against A's widow (who took by assignment) for building against the wall in breach of the covenant, in which action she had suffered judgment by default, refused to grant an injunction against her commanding her to remove the building, it appearing that it had been erected by her under-tenant, and that consequently she could not obey the writ if granted. *The London and South-Western Rail. Co.* v. *Webb*, 15 Com. B. Rep. N.S. 450.

Where a railway company has so acted as to render it necessary and proper for any person to come to the Court for redress under the Railway and Canal Traffic Act, the Court will, as a general rule, make the rule absolute with costs. *Baxendale* v. *the London and South-Western Rail. Co.*, 12 Com. B. Rep. N.S. 758.

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## INNKEEPER.

[See Lien.]

[Certain duties of customs and inland revenue granted by 25 Vict. c. 22.—The law respecting the liability of innkeepers amended by 26 & 27 Vict. c. 43.]

*Liability in respect of Guests' Property.*

An innkeeper is liable for the value of property of his guest lost while in his house, unless the loss has been caused by the negligence of the guest. The omission of the guest to leave valuable articles with the innkeeper, or to fasten his door on retiring to rest, is not necessarily such negligence as disentitles him to recover. Nor does a notice by the innkeeper that if such precautions are neglected he will not hold himself responsible in case of loss *per se* relieve from or limit his liability. And the action is maintainable against the executors of the innkeeper, at all events if brought within the time limited by the 3 & 4 Will. 4. c. 42. s. 2. *Morgan* v. *Ravey*, 30 Law J. Rep. (N.S.) Exch. 131; 6 Hurls. & N. 265.

By an arrangement between an innkeeper and her ostler, the latter had the profit from the stables arising from the supply of corn and hay, not only for the guests in the inn, but for residents in the town whose horses he was allowed to take care of. A guest (who had no notice of the above arrangement) arrived with his horse and gig at the inn, and subsequently left the inn without his horse, stating that he should not return till the following Monday, and requesting his horse might be properly attended to. He did not return for a fortnight, and in the mean time the ostler drove the horse out with a friend on a Sunday evening, when the horse took fright at a steam-engine, and was injured and the gig broken. The ostler stated, as the reason for taking him out,

that the horse wanted exercise. In an action brought in the county court against the innkeeper, judgment was giving for the plaintiff:—Held, on appeal, that the facts were not inconsistent with the defendant's liability as innkeeper; and by *Martin, B.*, that the defendant was liable whether as livery-stable keeper or innkeeper. *Bather* v. *Day*, 32 Law J. Rep. (N.S.) Exch. 171; *nom. Day* v. *Bather*, 2 Hurls. & C. 14.

## INSOLVENT.

(A) Vesting Order.
(B) Discharge.
(C) Protection from Process.

### (A) Vesting Order.

Where the wearing apparel and working tools of an insolvent (under the 1 & 2 Vict. c. 110.) do not exceed the value of 20*l.*, the property in them remains in the insolvent after the vesting order by reason of the exception in the 37th section of the act; and it is not necessary, in order to prevent them vesting in the assignee, that they should have been inserted by the insolvent in his schedule as excepted, as required by the 69th section. *Willsmer* v. *Jacklin*, 31 Law J. Rep. (N.S.) Q.B. 1; 1 Best & S. 641.

*Quære*—When the value of such articles exceeds 20*l.* Ibid.

A vesting order made upon the petition of a trading firm under the Indian Insolvency Act, 11 & 12 Vict. c. 21, vests in the official assignee the separate property of each partner as well as the joint estate of the firm. *Brown* v. *Carbery*, 16 Com. B. Rep. N.S. 2.

### (B) Discharge.

The defendant drew a bill of exchange, dated the 30th of October, 1858, on S, for 45*l.*, and indorsed the same to W. He afterwards became insolvent, and in his schedule, delivered pursuant to 1 & 2 Vict. c. 110, he set out the consideration for the bill, and described the bill as one drawn by S and accepted by himself, and given by him to W on or about November, 1858. After the schedule was filed W wrote to the defendant informing him that he had received notice from a large firm in the City of the dishonour of the bill. The schedule was afterwards amended in some other respects, but no alteration was made in the description of this bill. The jury disbelieved the evidence of W, and found that the misdescription of the bill was unintentional on the part of the defendant, and that he had no intention to mislead:—Held, that the defendaot was entitled to the benefit of the act, and that therefore the plaintiff could not recover. *Romillio* v. *Halahan*, 30 Law J. Rep. (N.S.) Q.B. 231; 1 Best & S. 279.

The discharge of an insolvent debtor under the 1 & 2 Vict. c. 110. s. 75. is no release of a debt created by the payment of a surety, after the discharge of a bill the consideration for which was inserted in the schedule as a debt for money lent due to the payee. *Litten* v. *Dalton*, 17 Com. B. Rep. N.S. 178.

### (C) Protection from Process.

The final order, under 7 & 8 Vict. c. 96. s. 22, constitutes an absolute bar to the actions in respect of which it is a protection,—though not in terms an order for distribution as well as for protection. And it is not the less a final order because it contains also an adoption of the proposal for payments of the debts made in the petition. The statutes 5 & 6 Vict. c. 116. and 7 & 8 Vict. c. 96. do not authorize the assignees to take the profits of a benefice, there being no provision therein equivalent to the 55th section of the old Insolvent Act, 1 & 2 Vict. c. 110. *Markin* v. *Aldrich*, 11 Com. B. Rep. N.S. 599.

## INSURANCE.

[See Ship and Shipping—Insurance.]

### *1.—INSURANCE COMPANIES.*

(A) Rights of Policy-holders in general.
(B) Charge on Assets only; Priority.

### *2.—INSURANCE ON LIVES.*

(A) Construction of the Contract of Insurance.
  (*a*) *Quarterly or Annual Premiums.*
  (*b*) *Suicide of Assured.*
(B) Insurable Interest.
(C) Misrepresentation.
(D) Donatio Mortis Causa.

### *3.—INSURANCE AGAINST FIRE.*

(A) Construction of the Contract of Insurance.
(B) Premiums.
(C) Payment for Losses.
(D) Reinstating Premises.
(E) Right to Policy.

### *4.—INSURANCE AGAINST ACCIDENTS.*

(A) Construction of the Contract of Insurance.
  (*a*) *Death by Sunstroke.*
  (*b*) *Death by Drowning.*
  (*c*) *Death from excepted Disease caused by external Violence.*

### *5. MUTUAL INSURANCE.*

### *1.—INSURANCE COMPANIES.*

#### (A) Rights of Policy-holders in general.

The deed of association of the Waterloo Assurance Company, which bound the policy-holders, contained a power to dissolve, on exercising which the directors were to get from another company an undertaking to pay all future liabilities, and to transfer to such company so much of the funds as should be agreed on between the contracting parties, as would be sufficient

to enable the latter company to comply with their undertaking:—Held, that the amount to be paid over was a matter of agreement between the two companies, with which the policy-holders had no concern, and that a policy-holder who refused to be transferred had no claim upon the Waterloo Company. *In re the Waterloo Life, &c. Assur. Co. (Carr's case)*, 33 Beav. 542.

(B) CHARGE ON ASSETS ONLY; PRIORITY.

The deed providing that the actuary should estimate the amount of profits, that this estimate might be rejected or reduced by a meeting of shareholders, and that six-tenths of the divisible profits so ascertained should be apportioned by the actuary as he thought fair among the participating policy-holders,—Held, that such policy-holders were not partners. *In re the English and Irish Church and University Assur. Soc.*, 1 Hem. & M. 85.

Held, also, that, the company being in course of winding-up *pari passu*, claimants under both classes of policies were entitled to be paid out of the assets, with general creditors, as to whom the liability of the shareholders was unlimited. Ibid.

The assets in hand being insufficient to provide for all claims,—Held, that the general creditors were entitled in the first instance to be paid *pari passu* with the policy-holders, notwithstanding the possibility of their recovering further sums from individual shareholders, and that the question of marshalling did not at that stage arise. Ibid.

An assurance society granted policies both in the participating and non-participating form. The former class stipulated that the funds and property of the society should, subject to the deed of settlement, be liable to pay the sum assured with such further sum as should, pursuant to the rules of the society, be appropriated by way of bonus or addition, with a proviso declaring that the funds of the society should alone be liable, and negativing personal liability. The latter class stipulated that the funds and property of the society should, subject to the deed, be liable to pay the sum assured, with a proviso that the funds of the society by the deed applicable to the payment of policies should alone, subject to prior claims thereon pursuant to the deed, be liable, and negativing personal liability. Ibid.

An insurance company issued policies providing, in some instances, "that the capital stock and funds of the company should be subject and liable to pay" the amount insured; in others, "that the capital stock, or so much thereof as should for the time being have been subscribed, and other the stocks, funds, securities and property of the company unapplied at the time of any demand made, should alone be liable to answer," &c.; in others, "that the stock and funds of the company should alone be answerable under this guarantie"; and all the policies contained a proviso that no officer or shareholder of the company should be liable for any demand beyond the amount of his particular share or interest:—Held (by *Wood, V.C.*, and also on appeal by *Knight Bruce, L.J.* and *Turner, L.J.*), that these expressions and clauses did not create such a charge upon the stock and funds of the company as to give the policy-holders any claim upon its assets in preference to the general creditors of the company; *Knight Bruce, L.J.*, however, expressing a doubt. *In re the State Fire Insur. Co.*, 33 Law J. Rep. (N.S.) Chanc. 123; 1 De Gex, J. & S. 634.

The State Fire Insurance Company issued policies, providing that the capital stock and funds of the company should be liable to make good the damage by fire sustained by the insured, and should alone be liable for all demands under the policies, and that the shareholders should not in any event be liable in respect of any claim upon the company beyond the amount of their interest in the capital stock of the company at the time when such claim might arise. The company was wound up, and it having been held that the policies did not create such a charge upon the stock and funds of the company as to give the policy-holders any claim upon its assets in preference to the general creditors, calls to the amount of the whole nominal capital were made, and the proceeds were distributed amongst the policy-holders and general creditors *pari passu*. A further call was made under the winding-up, and the official manager proposed to divide the proceeds amongst the general creditors, to the exclusion of the policy-holders. The policy-holders contended that the proceeds of this call must be marshalled, and so much must be recouped to the previous fund as would enable the policy-holders to receive on the whole an equal dividend with the general creditors:—Held, that the doctrine of marshalling did not apply, and that the proceeds of the further call must be distributed amongst the general creditors only. *In re the State Fire Insur. Co.*, 34 Law J. Rep. (N.S.) Chanc. 436.

An additional call was, however, directed to be made for the purpose of providing for the general costs of the winding-up, leaving the capital stock and funds to bear only the cost of their realization. Ibid.

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## 2.—*INSURANCE ON LIVES.*

(A) CONSTRUCTION OF THE CONTRACT OF INSURANCE.

(*a*) *Quarterly or Annual Premiums.*

A life policy was headed "The annual premium 33*l.* Whole term, payable by quarterly instalments of 8*l.* 5*s.* each." The policy was dated the 2nd of August, 1856, and recited a payment up to the 2nd of November of that year, and declared that if the life insured should die "before the expiration of twelve calendar months from the date hereof," and the assured should "on or before that period, or on or before the expiration of every succeeding twelve calendar months, pay the annual amount of premium," the insurance office should be liable. If the life should die "before the whole of the quarterly payments" were payable, the directors might deduct from the sum insured what would be "sufficient to satisfy the whole of the said premiums for that year." If the life died before "having been assured fifteen months and made two annual payments," the policy was to be void. The life died within twelve months after the third quarterly payment became due, but before it was paid:—Held, that the policy must be construed to have become void on non-payment of any quarterly premium, the payment of all the quarterly instalments being a condition precedent to the continuance of the policy for the current year. *The Phœnix Life Assur. Co.* v. *Sheridan* (House of

Lords), 31 Law J. Rep. (N.S.) Q.B. 91; 8 H.L. Cas. 745.

(b) *Suicide of Assured.*

There is no principle of public policy upon which a life assurance is void by the suicide of the assured while in a state of insanity. *Horn* v. *the Anglo-Australian and Universal Family Life Assur. Co.*, 30 Law J. Rep. (N.S.) Chanc. 511.

Certain policies of assurance were effected by L on his own life, which contained a proviso making them void in case of the death of the assured by his own act, whether felonious or not, except to the extent of any interest acquired therein by actual assignment for valuable consideration. L mortgaged the policies together with other property, for a sum far exceeding the amount of the policy moneys, and subsequently in a fit of insanity, committed suicide. The assurers paid to the mortgagee the money due on the policies, and afterwards filed a bill against L's executor, praying that the sums paid by them might be charged on the other property included in the mortgage, or, at all events, that the mortgage moneys might be apportioned amongst all the property comprised in the mortgage; and that if the mortgaged premises other than the policies should prove insufficient to raise the amount the plaintiffs might be declared entitled to, then that the plaintiffs might stand as creditors in respect of the deficiency against the general assets of the assured:—Held, by *Wood, V.C.*, and also, on appeal, by *Knight Bruce, L.J.* and *Turner, L.J.*, that the exception from the proviso operated, not merely for the protection of an assignee for value, but, in the absence of fraud, for the benefit also of the assured: And also, that the plaintiffs were principal debtors in respect of what was due upon the policies; and therefore, that the bill must be dismissed. *The Solicitors' and General Life Assur. Soc.* v. *Lamb*, 33 Law J. Rep. (N.S.) Chanc. 426; 1 Hem. & M. 716; 2 De Gex, J. & S. 251.

(B) Insurable Interest.

The plaintiff was employed as clerk by P, a banker. In 1854 his salary was increased from 300*l.* to 600*l.*, P engaging that it should continue at that amount for seven years at the least. In 1856, being indebted to the bank, he insured the life of P for 5,000*l.* in the G Insurance Company, P having promised that payment of the debt should not be enforced in P's lifetime. In 1857 the plaintiff insured the life of P for 2,500*l.* in the company of which the defendant was a director; and on the death of P, in 1861, he received the 5,000*l.* from the G company. At the time of making the policies, the sum of 5,000*l.* was sufficient to include the whole of the insurable interest, if any, which the plaintiff had in the life of P, and that insurable interest was the same at the time of making either policy:—Held, that the plaintiff had no insurable interest in the life of P by reason of the promise by P that payment should not be enforced in his lifetime. But held, that the plaintiff had an insurable interest in the life of P by reason of the promise that the salary should last for seven years. And further, that the plaintiff could not recover the 2,500*l.* from the defendant, as he had already received the 5,000*l.* from the G Insurance Company by virtue of 14 Geo. 3. c. 48. s. 3. *Hebden* v. *West*, 32 Law J. Rep. (N.S.) Q.B. 85; 3 Best & S. 579.

(C) Misrepresentation.

A declaration upon a policy of insurance upon the life of F set out the policy, by which it appeared that F had agreed that a declaration delivered to the defendants should be the basis of a contract between him and them. The policy contained a proviso that "if any statement in the said declaration (which declaration shall be considered as much a part of the policy as if the same had been actually set forth therein) was untrue, or if the assurance by the policy should have been effected by or through any wilful misrepresentation, concealment or false averment whatsoever," &c.; "that the said policy should be void, and all moneys paid in respect thereof should be forfeited." The declaration contained answers to a number of questions, and then continued, "I do hereby declare that the above-written particulars are correct and true throughout; and I do hereby agree that this proposal and declaration shall be the basis of the contract," &c.; "and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the money which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the policy granted in respect of such assurance shall be absolutely null and void." Breach, that F had died, and that the defendants did not pay. The defendants pleaded that divers statements in the declaration were untrue, and that divers of the particulars in the declaration alleged to be correct and true were incorrect and untrue, by reason whereof the said policy was void:—Held, a bad plea, inasmuch as it appeared from the policy and declaration, when taken together, that the policy was not avoided by a misrepresentation, unless such misrepresentation was wilful and designed. *Fowkes* v. *the Manchester and London Life Assur. Assoc.*, 32 Law J. Rep. (N.S.) Q.B. 153; 3 Best & S. 917.

(D) Policy; Donatio Mortis Causa.

A life policy may be the subject of a *donatio mortis causa*. *Witt* v. *Amiss*, 30 Law J. Rep. (N.S.) Q.B. 318; 1 Best & S. 109.

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## 3.—*INSURANCE AGAINST FIRE.*

(A) Construction of the Contract of Insurance.

A ship was insured for three months against fire, and was described in the policy "as lying in the Victoria Docks, with liberty to go into a dry dock, and light the boiler fires once or twice during the currency of the policy":—Held, that the ship was covered while she was in the river passing from the Victoria Docks to a dry dock, and *vice versa*, but not while she was in the river for any other purpose. *Pearson* v. *the Commercial Union Assur. Co.*, 33 Law J. Rep. (N.S.) C.P. 85; 15 Com. B. Rep. N.S. 304.

A damage sustained from the atmospheric concussion caused by an explosion of gunpowder at a distance, is not a damage insured against by a policy for the payment of such loss or damage as should be occasioned by fire to the property insured. *Everett*

v. *the London Assur. Co.*, 34 Law J. Rep. (N.S.) C.P. 299; 19 Com. B. Rep. N.S. 126.

(B) Premiums.

Where the lessee of a factory, under a covenant with his lessor to keep the premises insured in the Alliance or such other office as the lessors should appoint, executed an underlease to the plaintiffs, whereby the plaintiffs covenanted to pay any sum or sums of money expended in fire insurance, and, in erroneous belief that the premises, which were empty, were used for a hazardous trade, paid 26*l.* 5*s.* per cent. for insurance in another office, and sought to recover the amount at law against the underlessee, the Court restrained the action upon the plaintiffs undertaking to pay the amount of premium which was found to be properly payable, and made the defendants pay the costs of the suit. *The Leather Cloth Co.* v. *Bressy*, 3 Giff. 474.

(C) Payment for Losses.

The fire policies issued by an insurance company provided that the company would not be responsible for any losses by explosion, except explosion by gas. A vessel laden with gunpowder took fire and exploded, and the concussion of the air caused considerable damage to the property, more especially to the windows and glass, of persons who had effected insurances with the company. The directors having decided to pay the losses thus occasioned, a bill was filed by one of the shareholders seeking an injunction to restrain the directors from so applying the funds of the company:—Held, that assuming the company not to be legally liable, yet, as the evidence proved that payment of such losses, as of favour, was in accordance with the course pursued by other companies in the particular case, and with the usual custom of fire insurance companies, the directors must be regarded as acting fairly within the limits of their authority for the benefit of the company, and the bill was dismissed with costs. *Taunton* v. *the Royal Insur. Co.*, 33 Law J. Rep. (N.S.) Chanc. 406; 2 Hem. & M. 130.

The distinction, between an application of the funds of a company to a purpose not falling properly within the objects of the company, and a gratuitous payment out of the funds thereof in the ordinary course of business, pointed out and explained. Ibid.

(D) Reinstating Premises.

Under an agreement with their landlord S, W M and J M insured certain houses of which they were joint tenants, from year to year for 500*l.* The houses were burnt down, and S thereupon informed the Insurance Company that he was the person entitled to the benefit of the policy, and claimed to have it laid out in rebuilding the houses. The Insurance Company entered into an arrangement with W M and J M, and cancelled the policy. S thereupon rebuilt the houses at his own expense, and filed a bill to compel the insurance company to pay him so much of the sum due on the policy as had been properly expended by him in rebuilding:—Held, upon a demurrer by the company, that no sufficient request had been made to the company to satisfy section 83. of 14 Geo. 3. c. 78. That S was not entitled under the above section to rebuild the houses himself and then call upon the company to refund the money so expended. *Simpson* v. *the Scottish Union Fire and Life Insur. Co.*, 32 Law J. Rep. (N.S.) Chanc. 329; 1 Hem. & M. 618.

The 83rd section of the 14 Geo. 3. c. 78, by which the governors and directors of insurance offices are authorized, upon the request of any persons entitled to any house or other buildings which may be burnt down or damaged by fire, or upon any grounds of suspicion that the owners or occupiers or other parties effecting the insurance have been guilty of fraud or incendiarism, to cause the insurance money to be laid out in rebuilding, &c., is a general enactment, and is not limited in its operation to the metropolitan district. *Ex parte Gorely, in re Barker*, 34 Law J. Rep. (N.S.) Bankr. 1.

Trade fixtures, put up by a tenant, being removable by him, are not comprised in the expression "house or other buildings" in the statute. Therefore where such fixtures are separately insured and destroyed by fire during the tenancy, the landlord is not entitled to have the insurance money laid out under the act; and a covenant by the tenant to deliver up the fixtures at the determination of the tenancy, was held, as conferring a mere personal right resting in contract, to make no difference in this respect. Ibid.

(E) Right to Policy.

R, the owner of a cargo of wheat shipped at Odessa for England valued at 7,000*l.*, effected two policies, one for 4,000*l.* and the other for 3,000*l.* The cargo fell in value, and was agreed, on the 8th of March, to be sold to an agent of B for 5,358*l.* by a contract for sale of cargo, including all shipping documents, freight and insurance, and the documents were accordingly delivered; and B, on the 13th, gave an order for the amount, which was paid on the following day. R indorsed on the policy for 3,000*l.*, "We transfer this policy to Messrs. —— to the extent of 1,700*l.*," and the same was delivered to the agent of B. The ship and cargo were totally lost on the 16th of the same month. The insurance company paid 1,300*l.*, the remainder of the 3,000*l.*, into court; and *Wood, V.C.* decided that the same belonged to R, for that B, under his contract, was not entitled to an assignment of all existing policies effected on the cargo, but merely to have the cargo sufficiently insured; and that a provision in his contract, that the price was to be paid in exchange for bills of lading and policies of insurance, did not alter the case. From this decision B appealed:—Held, reversing that decision, that R was not so entitled, but that the whole 3,000*l.* secured by the policy belonged to B, the wheat having been sold as insured at the price set upon it by the vendors in the policies, and not at the price to which it had afterwards fallen. *Ralli* v. *the Universal Marine Insur. Co.*, 31 Law J. Rep. (N.S.) Chanc. 313; 2 Jo. & H. 159.

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## 4.—*INSURANCE AGAINST ACCIDENTS.*

(A) Construction of the Contract of Insurance.

(*a*) *Death by Sunstroke.*

By a policy of assurance effected by S with the

Maritime Passengers' Assurance Company, "for granting assurances against loss of life and personal injury arising from accidents at sea," it was agreed that in case S should sustain any personal injury from or by reason or in consequence of any accident which should happen to him upon any ocean, sea, river or lake, during the continuance of the said policy, the company should pay to him a reasonable compensation; and that if he should die from the effects of the said injury within, &c., the company should pay to his executors, &c., 100*l.* At the time of effecting the policy, S was about to sail on a voyage to Aden. He proceeded on his voyage, and arrived in the Cochin River, on the south-west coast of India, where he was struck down by a sunstroke while attending to his duty in the ship, and died the same day from the effects of the said sunstroke:—Held, in an action brought by his personal representative upon the policy, that the death could not be said to have arisen from accident within the meaning of the policy, and therefore that the plaintiff could not recover. *Sinclair* v. *the Maritime Passengers' Assur. Co.*, 30 Law J. Rep. (N.S.) Q.B. 77; 3 E. & E. 478.

(*b*) *Death by Drowning.*

By a policy of assurance the defendants agreed to pay the representatives of H a sum of money if H died from "injury caused by accident or violence." The policy provided that no claim should be made in respect of any injury unless the same should be caused by some outward and visible means of which satisfactory proof could be furnished to the directors. A claim was made by the representatives of a person assured, upon evidence that he went to bathe in the sea, and was not seen alive afterwards, his clothes being found on the beach, and a naked body, believed to be his by some of his friends, having been subsequently washed ashore:—Held (reversing the judgment of the Court of Exchequer), that there was evidence that the assured was accidentally drowned, and that such a death was a death by an injury insured against. *Trew* v. *the Railway Passengers' Assur. Co.*, 30 Law J. Rep. (N.S.) Exch. 317; 6 Hurls. & N. 839.

(*c*) *Death from excepted Disease caused by external Violence.*

A policy for insuring the payment of a sum of money in case the insured should be injured by accidental violence and die from the direct effect of such accident, was subject to the following condition: "this policy insures against all forms of cuts, stabs," &c., "when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured," "but it does not insure against death or disability arising from rheumatism, gout, *hernia*, erysipelas, or any other disease or cause arising within the system of the insured before or at the time or following such accidental injury":—Held, that the insurers were liable under such policy where the insured died from hernia caused solely by external violence. *Fitton* v. *the Accidental Death Insur. Co.*, 34 Law J. Rep. (N.S.) C.P. 28; 17 Com. B. Rep. N.S. 122.

*5.—MUTUAL INSURANCE.*

A club or association of shipowners was formed for the mutual assurance of ships belonging to the members, and the regulations by which the association was governed provided for the management of affairs by a finance committee, consisting of treasurer, secretary, &c., for the creation of a general fund or stock, by payment of premiums, &c.; and if the funds were at any time found insufficient the treasurer was to collect from each member such a per-centage as might be deemed necessary. No provision was made for granting policies, and the regulations were apparently framed on the assumption that policies would not be needed:—Held, notwithstanding the enactment of the 35 Geo. 3. c. 63. s. 11, that the association was not illegal.—Whether, in order to found a valid claim for a loss, in any particular case, a policy must have been granted, *quære*. *Bromley* v. *Williams*, 32 Law J. Rep. (N.S.) Chanc. 716; 32 Beav. 177.

Upon a bill filed by a member of the above-described association, to recover the amount of a loss incurred by him, alleging that no finance committee had been appointed,—Held, that seven of the members were properly made defendants as representing the whole body, and that the treasurer and secretary (though not alleged to be members) were properly made defendants as being the active managers of the concern, and having the control of the funds. Ibid.

## INTEREST.

(A) When Recoverable.
  (*a*) *Children's Portions.*
  (*b*) *By Statute* 3 & 4 *Will.* 4. *c.* 42.
(B) Rate of.

### (A) When Recoverable.

#### (*a*) *Children's Portions.*

Where portions for younger children are created, if their interests are vested, and the contingencies have happened on which the portions are to be paid, interest on them is payable, and the portions must be raised, although the only means of raising them may be the sale or mortgage of a reversionary term. The intention of the parties creating the portions is to govern. But if the principal is not raiseable till the death of the survivor of father or mother, though the title to the portion may be vested, interest on it will not be payable till that time, except on express words. *Massy* v. *Lloyd*, 10 H.L. Cas. 248.

*Lord Cottenham's* observations on this point (*Lord Milltown* v. *Trench*, 4 Cl. & F. 307-8) adopted. Ibid.

There is a distinction between the word "payable," when used in speaking of a sum payable to a beneficiary, and when used in speaking of a sum payable by a trustee. Ibid.

In a marriage settlement the estate was given to trustees on trust to pay the rents to the wife for life; to raise by sale or mortgage a sum of 10,000*l.* for a child of the wife by a former marriage, and also a sum of 500*l.* for a relative of the first husband, then, after the death of the wife, to pay 1,000*l.* a year to the husband for life; to raise 15,000*l.* for younger child or children, to be paid at such time, in such shares, and with such yearly interest as the wife should appoint, and, in default of appointment, at twenty-

one or marriage, and until such portion should become payable, to raise money for the maintenance and education of the children as the wife should deem meet, not exceeding, &c.: Provided, that if there should be no younger child, or it should die before twenty-one or marriage, 5,000*l.* additional should be paid to the wife's daughter by the former marriage. The wife died in 1806, leaving a son and a daughter, both very young. The daughter attained twenty-one, and married in 1824. The father died in April, 1859. The Court of Chancery, in Ireland, had held that the principal sum of 15,000*l.*, though the right to it vested on the daughter marrying, could not be raised during the life of the father, but declared interest on that sum to have become payable from the date of her marriage. The decree of the Court of Chancery was reversed, and the cause remitted with directions that interest did not become payable till the death of the father. Ibid.

(*b*) *By Statute, 3 & 4 Will. 4. c. 42.*

A letter of application for a loan until a day named therein, which does not shew an obligation to pay on the face of it, is not "an instrument by virtue of which the debt is payable at a certain time," within the meaning of the 3 & 4 Will. 4. c. 42. s. 28. *Taylor* v. *Holt*, 34 Law J. Rep. (N.S.) Exch. 1; 3 Hurls. & C. 452.

(B) RATE OF.

There is no general rule as to the rate of interest the Court will allow on repayment of consideration money, expressed in an absolute assignment, which is treated only as a security for such consideration money; and in a case where the assignee of a reversionary interest in a trust fund was the solicitor of the assignor, and also solicitor to the trust estate, and there was evidence of the assignment having been for an undervalue, the Court allowed interest at 5*l.* per cent. *In re Unsworth's Trusts*, 2 Dr. & S. 337.

## INTERPLEADER.

### *1.—INTERPLEADER, AT LAW.*

(A) WHEN GRANTED.
(B) EFFECT OF VERDICT.

### *2.—INTERPLEADER, IN EQUITY.*

(A) BILL FOR, WHEN SUSTAINABLE.
(B) PRACTICE IN SUITS.

### *1.—INTERPLEADER, AT LAW.*

(A) WHEN GRANTED.

The defendant had contracted with the plaintiff for the completion of some building works by the latter. The plaintiff did the work, and received part payment. Before the residue due under the contract was paid, C claimed the money from the defendant, alleging that the plaintiff was merely his agent in making the contract:—Held, that the defendant, who was willing to pay the money to the right party, was entitled to relief, probably under the old Interpleader Act, 1 & 2 Will. 4. c. 58, but at all events, under section 12. of the Common Law Procedure Act, 1860, which enables the Court or a Judge to direct an interpleader issue, "though the titles of the claimants to the money, &c. have not a common origin, but are adverse to and independent of one another." *Meynell* v. *Angell*, 32 Law J. Rep. (N.S.) Q.B. 14.

The defendant was intrusted by the plaintiff with furniture, &c. to sell for him by auction, and the defendant having sold, and between 300*l.* and 400*l.* of the proceeds being still in his hands, the defendant received a notice from G that she claimed the goods. An action having been brought by the plaintiff against the defendant, to recover the balance in his hands, the defendant sought to deduct his charges for commission, &c., and asked for an interpleader order between the plaintiff and G as to the residue. G being willing to allow the defendant his charges, and to take the issue,—Held, that an order as prayed might be made (if not under the 1 & 2 Will. 4. c. 58.) under section 12. of the Common Law Procedure Act, 1860. *Meynell* v. *Angell* approved. *Best* v. *Hayes*, 32 Law J. Rep. (N.S.) Exch. 129; 1 Hurls. & C. 718.

An equitable claim is not the subject of an interpleader summons. *Hurst* v. *Sheldon*, 13 Com. B. Rep. N.S. 750.

W, by will, gave real and personal chattels (a colliery and implements) to his daughter, L B, a married woman (the plaintiff), for life, for her sole and separate use, appointing her executrix. The whole of the colliery business came into her possession (part under the will and part under a conveyance from a third person), and she carried it on as she alleged, for her own benefit, assisted by her husband. Some of these chattels, which were used in the colliery, having been seized by C, the now defendant, an execution creditor of her husband, under a judgment revived against him, the present issue was directed to try whether the chattels so seized were the property of the now plaintiff as against the now defendant. At the trial, the Judge left to the jury to say whether the plaintiff really carried on the business on her own account, or whether it was her husband's. The jury having found a verdict for the plaintiff, the Court discharged a rule obtained to set it aside. *Bird* v. *Crabb*, 30 Law J. Rep. (N.S.) Exch. 318.

(B) EFFECT OF VERDICT.

The plaintiff S had been married to B for eighteen years, and while living apart from him had bought, at different times, with money partly obtained from him and partly earned by herself, articles of household furniture, some before and some after the 6th of December 1860, on which day a decree *nisi* for a divorce for adultery proved to have been committed by her, in 1857, with G, had been pronounced, and which decree was made absolute on the 20th of March 1861. This furniture was placed by her in G's house. H, the defendant, had been retained by G, the co-respondent in the divorce suit, to appear for him as attorney, and had received from G a bill of exchange for his costs. This bill having been dishonoured, H issued a writ, got judgment and levied execution on the household furniture above mentioned, then being in G's house. On an interpleader

summons, in the cause of *H* v. *G*, the issue was drawn up as follows:—"Whereas S S (the present plaintiff's maiden name) affirms and H F H (the present defendant) denies that the goods and chattels seized by the sheriff, under a certain writ of *fi. fa.* against the goods of T G, were at the time of the delivery, &c. the goods and chattels of the said S S. And the Court," &c. On the trial of this issue, the jury found a verdict for the plaintiff as to all the goods:—The Court refused a rule for a new trial, holding that the defendant having consented to the issue being tried in that form, and the verdict having been found in the plaintiff's favour, the defendant ought not now to be allowed to set up the husband's title, whatever it might be, as against his wife, to deprive the plaintiff of the verdict, and refused to enter into the consideration of the plaintiff's title, as a married woman against her husband, or as affected by the decrees *nisi* and absolute for the divorce. *Shingler* v. *Holt*, 30 Law J. Rep. (N.S.) Exch. 322; 7 Hurls. & N. 65.

*Quære*—Whether, on an interpleader issue, equitable titles can be admitted? Ibid.

## *2.—INTERPLEADER, IN EQUITY.*

### (A) Bill for, when sustainable.

Where a plaintiff in an interpleader suit had, previously, set up a claim of lien, and had pleaded it in defence to an action at law,—Held, that there was no bar to an interpleader order being made on the terms of the plaintiff withdrawing his plea and paying the costs at law and in equity up to the time of such withdrawal. *Jacobson* v. *Blackhurst*, 2 Jo. & H. 486.

A mere stakeholder is justified, if there be the slightest doubt or risk arising from conflicting claims, in calling upon the person really interested on either side to indemnify him against such risk, and if he refuse or neglect to do so, in filing a bill of interpleader. *Nelson* v. *Barter*, 2 Hem. & M. 334.

An owner of an estate subject to a charge concerning which conflicting claims arose, was held entitled to file a bill in the nature of interpleader against the claimants to the money charged. *Vyvyan* v. *Vyvyan*, 31 Law J. Rep. (N.S.) Chanc. 158; 30 Beav. 65.

### (B) Practice in Suits.

The rule requiring an affidavit of no collusion to be annexed to a bill of interpleader is sufficiently complied with if the bill and an affidavit of no collusion, stating also other facts, are handed to the proper officer together; and a demurrer filed with notice that such an affidavit had been filed was, upon appeal (affirming the decision of *Romilly, M.R.*), overruled, with costs. *Jones* v. *Shepherd*, 30 Law J. Rep. (N.S.) 404 *(sub nom. Shepherd* v. *Jones)*; 3 De Gex, F. & J. 56.

## INTERROGATORIES.

[See Practice, at Law.]

## JOINT TENANTS.

Several legatees entitled to a sum of money as joint-tenants in remainder expectant on the decease of a tenant for life, joined in mortgaging the share of one of them to the trustee of the fund, in consideration of an advance; and they jointly and severally covenanted with the trustee that if the money advanced should be more than the mortgaged share, the covenanting parties respectively, and their respective heirs, executors and administrators, would not demand from the trustee more than he should have in hand without reckoning the sum advanced, and would indemnify him against all costs, damages, &c. in consequence of the advance so made:—Held, that this amounted to a severance of the joint tenancy as regarded all the shares. *Williams* v. *Hensman*, 30 Law J. Rep. (N.S.) Chanc. 878; 1 Jo. & H. 546.

How far an application by a joint tenant to the trustee of the fund for payment of his share will operate as a severance—*quære*. Ibid.

G, out of her own money, purchased fifty shares in a banking company, and caused them to be transferred into the names of herself and L. The dividends were, upon an authority signed by G and L, paid to the separate account of G at the bank; G also sold some of the shares, and G and L joined in the transfer to the purchaser. G died, leaving L surviving. *Romilly, M.R.*, in a suit between the representatives of G and of L, decided that the transfer passed a complete legal title; that it created a joint tenancy; and that L, by survivorship, was absolutely entitled to the shares and to payment of the dividends which had accrued since the death of G:—Held, on appeal, (affirming the decree)—that the legal right to the shares vested in L by survivorship, and *(dubitante Knight Bruce, L.J.)* that there was no resulting trust in L in favour of G. *Garrick* v. *Tayler*, 30 Law J. Rep. (N.S.) Chanc. 211; 29 Beav. 79: on appeal, 31 Law J. Rep. (N.S.) Chanc. 68.

The several receipts by joint tenants of a portion of a trust fund do not destroy the joint tenancy as to the remainder of the fund. *Leak* v. *Macdowall*, 32 Beav. 28.

A testator gave the residue of his real and personal estate to his nephews and nieces living at his death. But if any should be then dead their offspring were to be considered to stand in the place of their parents and to take "the same benefit":—Held, that though the nephews and nieces took as tenants in common, their offspring took as joint tenants. Ibid.

## JUDGMENT.

[The law relating to future judgments, statutes, and recognizances, amended by 27 & 28 Vict. c. 112.]

(A) Satisfaction.
(B) Plea in Bar, of Judgment recovered.
(C) Of Non Pros. by one of several Defendants.
(D) Non obstante Veredicto.
(E) Setting aside.
(F) Charge upon Lands.
  (*a*) *When charged and upon what Property.*
  (*b*) *Priorities of.*
  (*c*) *Under* 27 *&* 28 *Vict. c.* 112.

(G) PRIORITY OF JUDGMENT CREDITOR IN ADMINISTRATION OF ASSETS.

(A) SATISFACTION.

A plaintiff upon signing judgment registered it in the Common Pleas pursuant to statute 1 & 2 Vict. c. 110. He afterwards took the defendant in execution upon a *ca. sa.*, and the defendant obtained his discharge under the Insolvent Act. Before the expiration of five years the plaintiff re-registered the judgment. The mortgagee of leasehold property of the defendant, acquired after his insolvency, contracted to sell it under a power of sale, but the purchaser refused to complete by reason of the re-registered judgment. The mortgagee applied to this Court, for an order on the plaintiff to attend the Master of the Common Pleas and consent to an entry on the register that the defendant was taken in execution by the plaintiff on the judgment:—Held, that this Court had no power to make the order. *Hallett* v. *Dyne, ex parte Rolls*, 33 Law J. Rep. (N.S.) Exch. 86; 2 Hurls. & C. 696.

(B) PLEA IN BAR, OF JUDGMENT RECOVERED.

Where the recovery of judgment by one of several joint-contractors in an action against him is pleaded by the others, as a defence to a subsequent action against them in respect of the same matter, the plea, to be good, must shew that the judgment was obtained on grounds of defence open to all the joint-contractors. *Phillips* v. *Ward*, 33 Law J. Rep. (N.S.) Exch. 7; 2 Hurls. & C. 717.

(C) OF NON PROS. BY ONE OF SEVERAL DEFENDANTS.

A plaintiff, after having issued a joint writ of summons against three defendants, all of whom jointly appeared, declared against two only; whereupon the third defendant gave the plaintiff notice to declare, and then signed judgment of *non pros.* as against himself:—Held, that the judgment was regular. *Bancroft* v. *Greenwood*, 32 Law J. Rep. (N.S.) Exch. 154; 1 Hurls. & C. 778.

(D) NON OBSTANTE VEREDICTO.

Where the declaration is bad to which the defendant pleads bad pleas, the plaintiff cannot have judgment *non obstante veredicto*. *Leigh* v. *Lillie*, 30 Law J. Rep. (N.S.) Exch. 25; 6 Hurls. & N. 165.

(E) SETTING ASIDE.

The Court set aside a judgment signed against a married woman (sued as a *feme sole*), but without costs, there being some doubt upon the affidavits whether she had not, when she contracted the debt with the plaintiff, held herself out as being unmarried. *Wilson* v. *Hollings*, 11 Com. B. Rep. N.S. 783.

(F) CHARGE UPON LANDS.

(*a*) *When charged and upon what Property.*

Where a person is sued as executor, and allows judgment to go against him by default, such judgment is an admission of assets of his testator, and, as such, binds his own assets, real and personal; and, if registered, is entitled to priority over a judgment subsequently registered against the executor, and obtained in respect of one of his own proper debts. *In re Higgins's Trusts*, 30 Law J. Rep. (N.S.) Chanc. 405; 2 Giff. 562.

Real estate, which was placed under the jurisdiction of the Court, by the remainderman, who charged the tenant for life with not keeping the property in repair, was sold, subject to the prior estate by the plaintiff in that suit, to one who had notice of the suit. Two days prior to the sale, however, a decree had been made, whereby the vendor was ordered to pay the costs of such suit, but the decree was not registered under 1 & 2 Vict. c. 110. s. 19, until after the sale. It appeared that the real estate which had been sold was the only property possessed by the vendor, and that the sale had been effected in order to enable his solicitor to obtain payment of his costs of the suit, and that by that transaction, the person whose costs of the suit had been ordered to be paid was deprived of them. Upon a bill by such last-mentioned person against the vendor, the purchaser, and the vendor's solicitor, seeking to have the property sold made liable to the costs which had been ordered to be paid,—it was held by one of the Vice Chancellors, that the real estate which had been sold remained subject in the hands of the purchaser to the above costs which had been ordered to be paid; and the vendor, the purchaser, and the vendor's solicitor, were ordered to pay such costs; and in default, it was ordered that the costs should be raised and paid out of the real estate sold to the purchaser; but, upon appeal, this decree was reversed, and the bill was dismissed with costs. *Nortcliffe* v. *Warburton*, 31 Law J. Rep. (N.S.) Chanc. 777.

An order of the Court of Probate directing the payment of a sum of money does not by being registered with the senior Master of the Court of Common Pleas at Westminster constitute a valid charge on land. *Pratt* v. *Bull*, 32 Law J. Rep. (N.S.) Chanc. 144; 1 De Gex, J. & S. 141; 4 Giff. 117.

Under the 1 & 2 Vict. c. 110. s. 13, a judgment debt against a legatee is a charge upon property mortgaged to the testator to the extent of the legatee's interest therein. *Avison* v. *Holmes*, 30 Law J. Rep. (N.S.) Chanc. 564; 1 Jo. & H. 530.

A judgment creditor within a year after entering up judgment, without previously issuing an *elegit* filed a bill against a prior mortgagee from the judgment debtor, and the judgment debtor seeking to redeem the former and foreclose the latter,—Held, that the suit was not maintainable. *Godfrey* v. *Tucker*, 33 Law J. Rep. (N.S.) Chanc. 559; 33 Beav. 280.

The judgment creditor afterwards got in the mortgage, and maintained his bill, asking for an account and payment of the principal and interest due both on the judgment debt and mortgage, or, otherwise, for enclosure:—Held, that he could not sustain the bill by this new title to sue, and that it must be dismissed, with costs. Ibid.

(*b*) *Priorities of.*

The 13th section of the 1 & 2 Vict. c. 110, giving to a judgment creditor the same remedies in equity as if the debtor had power to charge the hereditaments, and had, by writing, agreed to charge the

same with the judgment debt and interest, does not make the judgment creditor a purchaser, and a subsequent judgment creditor will not be affected by notice thereof, unless it is duly registered. *Benham* v. *Keane*, 31 Law J. Rep. (N.S.) Chanc. 129; 3 De Gex, F. & J. 318.

The 1 & 2 Vict. c. 110. does not repeal the Middlesex Registry Act, 7 Anne, c. 20, but the two are to be read together; and a judgment registered in the Common Pleas is no charge against land in Middlesex until entered on the Middlesex register under the latter act. Therefore, where a judgment creditor, having notice of a prior judgment registered in the Common Pleas, but not in Middlesex, registered his judgment in Middlesex before the earlier judgment was so registered, he was held, by *Wood, V.C.*, entitled to priority, and this was affirmed on appeal to the Lords Justices. Ibid.

*Secus* as to a mortgagee having such notice. Ibid.

When a creditor has once registered his judgment in the Common Pleas, his rights, as against a prior judgment creditor, are not affected by his neglect to re-register; and this circumstance will not prevent his claiming priority over the earlier judgment by reason of his being first on the Middlesex register. Ibid.

The 2 Vict. c. 11, which makes judgments not registered every five years null and void against lands, &c., as to purchasers, mortgagees and creditors, applies to all purchasers, mortgagees and creditors deriving title through the debtor, whether directly from him or not. Ibid.

Therefore, where a purchaser with notice of a judgment debt then being on the register, afterwards mortgaged the estate, and at the date of the mortgage five years had elapsed without re-registration of the judgment, it was held, by *Wood, V.C.*, and affirmed on appeal to the Lords Justices, that the mortgagee was not affected thereby. Ibid.

A judgment registered under the Yorkshire Registry Act, and not under the 1 & 2 Vict. c. 110, will retain its priority over a judgment subsequently obtained, and registered both in the county and under the 1 & 2 Vict. c. 110. *Neve* v. *Flood*, 34 Law J. Rep. (N.S.) Chanc. 89; 33 Beav. 666.

A testator directed his real estates to be sold and the income of the proceeds to be divided between his sons for their lives. Before sale of the property and subsequently to the passing of 23 & 24 Vict. c. 38, a creditor obtained judgment against one of the sons and registered the same in the Common Pleas, but did not issue execution:—Held, that the judgment creditor must be postponed to subsequent judgment creditors and incumbrancers who had obtained charging orders on the proceeds of sale. *Thomas* v. *Cross*, 34 Law J. Rep. (N.S.) Chanc. 580; 2 Dr. & S. 423.

*Semble*—That the interest of the son was not an "interest in land" within the meaning of the 1 & 2 Vict. c. 110. s. 13. Ibid.

### (c) *Under 27 & 28 Vict. c. 112.*

The provision of the 27 & 28 Vict. c. 112. s. 4, enabling a judgment creditor to whom land has been delivered in execution to obtain a summary order from the Court of Chancery for the sale of his debtor's interest in the land, applies only where the judgment has been entered up after the passing of the act. *In re the Isle of Wight Ferry Co.*, 34 Law J. Rep. (N.S.) Chanc. 194.

A judgment creditor, who had issued execution upon his judgment, which was entered up after the passing of 27 & 28 Vict. c. 112, filed his bill against prior mortgagees with power of sale, and the mortgagor, who was the judgment debtor, for redemption or foreclosure, and for an injunction to restrain the mortgagees from paying to the mortgagor the surplus of the proceeds of the mortgaged estate which might remain after paying the mortgage-money. The Court, upon an interlocutory application, granted an injunction to the above effect; and upon the hearing of the cause made a decree for redemption against the mortgagees, and for redemption or foreclosure against the mortgagor. *Thornton* v. *Finch*, 34 Law J. Rep. (N.S.) Chanc. 466; 4 Giff. 515.

*Semble*—That the 1st section of 27 & 28 Vict. c. 112. does not apply to an equity of redemption, inasmuch as such an interest in land cannot be delivered in execution. Ibid.

### (G) Priority of Judgment Creditor in Administration of Assets.

The 23 & 24 Vict. c. 38. s. 4. does not operate retrospectively. Therefore, where a judgment was registered in May 1840 against a debtor who died in 1846, and was not re-registered within five years before his death,—Held, in a suit for administering the estate of the debtor, that the judgment creditor was not deprived of his right to priority over the creditors of lower degree. *Evans* v. *Williams*, 34 Law J. Rep. (N.S.) Chanc. 661; 2 Dr. & S. 324.

The 23 & 24 Vict. c. 38. s. 3, providing that unregistered judgments shall have no preference in the administration of assets, does not apply to judgments obtained against a personal representative; and consequently such judgments, if obtained before decree, must, though not registered until after decree, be paid in preference to simple contract debts, and in order of priority according to the dates of their being entered up. *In re Rigby; Jennings* v. *Rigby*, 33 Law J. Rep. (N.S.) Chanc. 149; 33 Beav. 198.

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## JURISDICTION.

[See Justice of the Peace—Rate—Sessions.]



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### (A) Of the Court of Assize.

The Court of Assize is a superior Court, having authority to issue a general warrant of commitment for contempt. *Ex parte Fernandez*, 30 Law J. Rep. (N.S.) C.P. 321; 10 Com. B. Rep. N.S. 3.

A witness was fined and committed to prison for

six months by a Court of Assize for contempt in not answering a question, and the warrant of commitment (which was headed "The Queen *v.* C. Yorkshire, to wit. At the assizes, held at &c. before two of Her Majesty's Justices assigned to take the said assizes according to the statute, &c.") stated the contempt, but did not set out the question, or state that a jury had been sworn:—Held, first, that the commitment for a time certain was no excess of jurisdiction; secondly, that it was no ground of objection that the warrant did not state specifically that a jury had been sworn, it appearing from the facts stated therein that the proceedings took place upon a trial before a jury; and thirdly, that it was no ground of objection that the question was not set out. Per *Willes, J.*—It was not for the witness, but the Judge to determine whether the question was one which the witness was bound to answer. *Quære*, per *Byles, J.*—Whether there was any necessity for a warrant. Ibid.

### (B) OF THE COURT OF CHANCERY.

#### (*a*) *In general.*

The jurisdiction of this Court to administer the subsequently acquired property of an insolvent is not ousted by the operation of 1 & 2 Vict. c. 110. *Galsworthy* v. *Durrant*, 30 Law J. Rep. (N.S.) Chanc. 402; 29 Beav. 276.

This Court has jurisdiction to entertain a bill at the suit of the Commissioners of Sewers appointed under 23 Hen. 8. c. 5, notwithstanding that such Commissioners are a court of record. *Crossman* v. *the Bristol and South Wales Union Rail. Co.*, 1 Hem. & M. 531.

The plaintiff filed a bill for an injunction against the Secretary-at-War, as an officer of the Crown. The defendant, on the ground that the plaintiff's remedy was by petition of right and not by bill, put in no appearance, but raised the question of jurisdiction. The plaintiff, after the usual time had expired, moved for leave to enter an appearance for the defendant:—Held, that the Court could not recognize the right of any subject of the Crown to refuse to appear. The question of jurisdiction should be argued after appearance, upon demurrer or otherwise. Motion granted. *Felkin* v. *Lord Herbert*, 30 Law J. Rep. (N.S.) Chanc. 604; 1 Dr. & S. 608.

Although, in the lifetime of a tenant for life, the Court has no jurisdiction upon a special case, to declare whether an interest, limited in remainder, is vested, or void for remoteness, yet it is competent for the Court to declare whether a person claiming in remainder takes such an interest in the property as to entitle him to file a bill to have it secured for his benefit. *Bell* v. *Cade*, 31 Law J. Rep. (N.S.) Chanc. 383; 2 Jo. & H. 122.

The Court of Chancery, in the exercise of its ordinary equitable jurisdiction, can entertain a suit against a committee of a lunatic's estate, asking for an account of his dealings therewith during the period of his committee-ship. *Scammell* v. *Light*, 32 Law J. Rep. (N.S.) Chanc. 53; 4 Giff. 127.

Where, therefore, persons claiming under the will of a deceased lunatic, made prior to his lunacy, instituted a suit against the committee of his estate, whom he had appointed as his executor, alleging fraudulent dealings on the part of the committee with the estate of the lunatic during his committee-ship, and praying for the usual administration decree, and for an account of his dealings with the lunatic's estate during such committee-ship, a demurrer by the committee to so much of the bill as asked for the account as last mentioned, upon the ground that the Court of Chancery had not jurisdiction to take such account, and that it should be taken in lunacy, was overruled. Ibid.

The jurisdiction of the Court of Chancery under the Trustee Relief Act does not extend beyond the fund actually paid into court; and the Court cannot, upon petition under that act, order a trustee to refund moneys retained by him for costs. *In re Barber's Will*, 32 Law J. Rep. (N.S.) Chanc. 709.

The ordinary jurisdiction of the Court of Chancery to set aside an award is not ousted by the powers conferred by the Common Law Procedure Act, and the Bankruptcy Act, 1849, of making every agreement to refer a rule of Court; a Court of equity is not bound, in a case where no agreement exists to make the submission a rule of Court, to adopt by analogy the rules introduced by the common law Courts as to the time for setting aside awards. *Smith* v. *Whitmore*, 33 Law J. Rep. (N.S.) Chanc. 713; 1 Hem. & M. 576; 2 De Gex, J. & S. 297.

Where a bill is not framed to establish a will and the heir does not dispute it,—*Semble*, that the Court has no jurisdiction to declare against the heir as a defendant the construction of a strictly legal devise, as regards the quantum of the subject-matter. But, if the heir elects to be dismissed, the Court will make such a declaration for the guidance of the trustee. *Stanley* v. *Stanley*, 2 Jo. & H. 491.

The Court has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But, where by the terms of an agreement and the frame of the pleadings the plaintiff, an artist seeking restitution of a picture, had in effect put a fixed price upon it,—Held, that damages would be an adequate remedy, and that there was no jurisdiction in a Court of equity to interfere. *Dowling* v. *Betjeman*, 2 Jo. & H. 544.

The Court of Chancery has jurisdiction to entertain the suit of an insolvent debtor to set aside a sale alleged to have been collusively made under the insolvency, notwithstanding he may not have obtained a revesting order or an order to annul the proceedings. *Troup* v. *Ricardo*, 34 Law J. Rep. (N.S.) Chanc. 91.

A bill was filed by T (against whom a vesting order in insolvency had been obtained, but all whose debts had been fully discharged) against a mortgagee from him, the assignees under his insolvency, and certain purchasers of the mortgaged property, alleging that by collusion between the mortgagee and the assignees the former was enabled to establish a larger claim than he was entitled to, and also that by collusion between the mortgagee, the assignees, and purchasers, the mortgaged property had been sold to the latter at a considerable undervalue, and praying that an account might be taken of what was due on the mortgage, and that the sale might be set aside. No revesting order or order to annul the proceedings in the insolvency had been obtained; but the bill alleged that an application, by the plaintiff, for such an order to the Commissioner in Insolvency had been refused, except upon the terms of his con-

firming the acts complained of. Upon demurrer, by the purchasers, for want of equity and multifariousness,—Held, by the Lord Chancellor (reversing the decision of the Master of the Rolls), that the demurrer must be overruled. Ibid.

The jurisdiction of the Court to enforce a trust attaches equally upon ecclesiastical property affected thereby as it would upon lay property similarly circumstanced — per *Turner, L.J. The Attorney General* v. *the Master and Co-brethren of the Hospital of St. John, Bedford*, 34 Law J. Rep. (N.S.) Chanc. 441.

The Court of Chancery cannot entertain an objection that an order was made by the Lords Justices in Lunacy in the absence of proper parties. *Harvey* v. *Trenchard*, 34 Beav. 240.

In December 1859, M J G eloped from her husband, J H G, there being at that time two children of the marriage. Proceedings for obtaining a divorce were immediately commenced by J H G; a decree *nisi* was pronounced on the 13th of February 1861, and made absolute on the 22nd of May 1861. On the 4th of May 1861, M J G was delivered of a full-grown male child. In order to determine the status of this child, J H G, in January 1862, vested 2,000*l.* reduced annuities, in trustees, upon trust for "all and every the children then living of the marriage of J H G and M J G," and a suit was instituted seeking that the rights of the parties interested under this settlement might be declared, and the trusts of the settlement might be carried out under the direction of the Court:—Held, that although the real object of the settlor might be, and probably was, to obtain a decision from the Court that the child in question was illegitimate, and although the decision of the Court might affect property of far greater value, those circumstances were not sufficient to warrant the Court in withholding the exercise of its ordinary jurisdiction. *Gurney* v. *Gurney*, 32 Law J. Rep. (N.S.) Chanc. 456; 1 Hem. & M. 413.

A suit such as that above mentioned is not properly a fictitious suit, but is rather analogous to the class of cases in which a fund is settled on an infant with the view of founding an application to the Court respecting the custody of the infant's person. Ibid.

*Semble*—That if the settlement had been made by a mere stranger with a malicious or improper motive, the Court could have declined to exercise jurisdiction. Ibid.

The Court will not entertain a suit for the administration of a trust which has been created for the purpose of obtaining a trial, in an indirect manner, of the question of legitimacy or illegitimacy of an infant—(per *Westbury, L.C.*). *Cooke* v. *Cooke*, 34 Law J. Rep. (N.S.) Chanc. 459; *anon.* 2 Hem. & M. 124.

*Gurney* v. *Gurney* (1 Hem. & M. 413; 32 Law J. Rep. (N.S.) Chanc. 456) dissented from. Ibid.

In 1863 a sum of 1,000*l.* stock was settled in trust for the children or child of the marriage of W R C C with H E T, and in default of any such child, in trust for the benefit of C E S C and his children. At the date of the settlement the marriage had been dissolved, and there was one child, whose legitimacy it was the avowed object of the settlement to try, by means of a suit for carrying out the trusts thereby created. C E S C then filed a bill against the child and the trustee of the settlement praying that the trusts of the settlement might be carried into execution, and that it might be declared that there was no child of the marriage. The child disclaimed all interest in the trust fund; and it appearing that the settlor had no interest in the question of legitimacy or illegitimacy, and that neither W R C C nor H E T desired to raise the question, *Wood, V.C.*, distinguishing the case from that of *Gurney* v. *Gurney*, dismissed the bill with costs; and upon appeal *Westbury, L.C.*, affirmed the decree, expressing at the same time his dissent from the principles and reasoning on which the decision in *Gurney* v. *Gurney* was founded. Ibid.

The Master of the Rolls declined to direct a writ of prohibition to issue to the Court of Chancery of the County Palatine of Lancaster in respect of an order for taxation, his Honour being of opinion that the proper course was to appeal to the appellate Court constituted by the 17 & 18 Vict. c. 82. *Ex parte Williams*, 34 Beav. 371.

*(b) Remedy at Law or in Equity.*

Where an action at law has been actually commenced for the purpose of determining a legal right, the Court of Chancery will not, upon a bill, filed after the commencement of such action, seeking relief, the title to which is dependent upon the legal right, assume as of course exclusive jurisdiction under the Chancery Regulation Act, 1862, to restrain the proceedings in the action. *Curlewis* v. *Carter*, 33 Law J. Rep. (N.S.) Chanc. 369.

The Court of Chancery has not jurisdiction to entertain a bill filed by an heir-at-law against a devisee to set aside a will on the ground of imbecility on the part of the testator, and of the exercise upon him of undue influence, no obstacles existing to prevent the heir-at-law from bringing an ejectment. *Jones* v. *Gregory*, 33 Law J. Rep. (N.S.) Chanc. 679; 2 De Gex, J. & S. 83.

On questions of account, Courts of equity and Courts of law possess concurrent jurisdiction, and the decision as to the proper tribunal must be governed by considerations of convenience. *Shepard* v. *Brown*, 4 Giff. 208.

In building contracts this Court interferes in two cases: first, where there is collusion between the employed and the architect to injure the contractor; and secondly, where the accounts are too complicated to be taken at law. If neither of these exist, the remedy of the contractors is at law. *Bliss* v. *Smith*, 34 Beav. 508.

*(c) In respect of Property out of the Jurisdiction.*

A suit, by a plaintiff in England, against defendants, also residing in England, to enforce a lien on real estate in Prussia, can only be sustained by special circumstances arising out of the dealings between the parties; but where no privity existed between the plaintiff and the defendants, and where the principal parties were Prussians, and not amenable to the jurisdiction of the Court, the bill was dismissed. *Norris* v. *Chambres*, 30 Law J. Rep. (N.S.) Chanc. 285; 29 Beav. 246; 3 De Gex, F. & J. 583.

If a plaintiff in this court makes out a case which entitles him to a declaration of lien upon the real estate of a defendant out of the jurisdiction, this

Court will make it, and in some cases will grant a receiver; but it will leave the plaintiff to make it available or not, as he can, by means of the foreign tribunals. Ibid.

The Courts of this country will assist foreign tribunals to unravel complications; and they will, so far as the law allows, and so far as their jurisdiction extends, carry into effect the judgments of foreign Courts when legally brought under their cognizance. Ibid.

The plaintiff, being in England, filed a bill for an account against the executors of a deceased partner, some of whom were in England, but acting in concert with the others, who were in Jamaica; the partnership property being also in Jamaica:—Held, upon a plea to the jurisdiction by the executors resident in Jamaica, that the suit was properly instituted in this country. *Hendrick* v. *Wood*, 30 Law J. Rep. (N.S.) Chanc. 583.

The fiction that the Queen is at all times present in all parts of her dominions does not give jurisdiction to the Courts in this country, acting *in personam*, to entertain a petition of right in respect of lands situate in a colony, and vested in Her Majesty for the purposes of the province by an act of the provincial legislature. *Holmes* v. *Regina (the Petition of Right of James Manger Holmes and others)*, 31 Law J. Rep. (N.S.) Chanc. 58; *sub nom. In re Holmes*, 2 Jo. & H. 527.

A, resident in England, and the sole member of a Liverpool firm, entered into a partnership with B and C, residents in Hayti, in a business carried on at Hayti. The Liverpool firm acted as the agents of the Haytian firm. B was admitted as a partner in the Liverpool firm, C died, and the winding up of the Haytian firm was committed by agreement to A and B. Then A died, leaving B sole survivor in each firm. B and the Haytian legal representative of C engaged in cross-suits in Hayti in which certain settled accounts were established. The representative of A, whose assets were all in England, was not a party to the Haytian suit:—Held, on a bill filed by the administrator of C in England, that there was no jurisdiction in the Court of Chancery to wind up the partnership in Hayti and to take the accounts of that firm, and of the agency of the Liverpool firm; and decree accordingly. *Maunder* v. *Lloyd*, 2 Jo. & H. 719.

Held also, that the law of Hayti was to regulate the transactions of the Haytian firm. Ibid.

A fund belonging to foreigners out of the jurisdiction was by arrangement among them sent by A, one of their number, to English agents for distribution among the persons entitled. A having endeavoured to get back the fund and misapply it, one of the foreigners interested filed a bill to restrain the misapplication and for the administration of the fund. A plea to the jurisdiction by the English agents was disallowed, although the fund was not so invested as to enable the Court to order service on the defendants abroad. *The Central Railroad and Banking Co. of Georgia* v. *Mitchell*, 2 Hem. & M. 452.

### (d) *Over Persons out of the Jurisdiction.*

Leave was given to serve an administration summons (relating to stock and shares in England) on a defendant abroad. *Cohen* v. *Alcan*, 1 De Gex, J. & S. 398.

The power of the Court to direct process to be served on a defendant out of the jurisdiction, and to proceed upon such service as if it had been made within the jurisdiction, is confined entirely to such suits as answer the description contained in the 2 Will. 4. c. 33. and the 4 & 5 Will. 4. c. 82; and the language of the 7th rule of the 10th Consolidated Order is *ultra vires* so far as it relates to suits which do not answer that description. *Cookney* v. *Anderson*, 32 Law J. Rep. (N.S.) Chanc. 427; 1 De Gex, J. & S. 365; 31 Beav. 452; see also *Samuel* v. *Rogers*, 1 De Gex, J. & S. 396. *Foley* v. *Maillardet*, 33 Law J. Rep. (N.S.) Chanc. 335; 1 De Gex, J. & S. 389.—(*Cookney* v. *Anderson* and *Foley* v. *Maillardet* have since been overruled by *Drummond* v. *Drummond*, 35 Law J. Rep. (N.S.) Chanc. 780.)

## (C) OF THE COURT OF SESSION.

The Court of Session has no power to alter, vary or discharge any order of this Court made under the jurisdiction of the Great Seal, which is as much the Great Seal of Scotland as of England. *The Marquess of Bute* v. *Stuart*, 2 Giff. 582.

## (D) IN RESPECT OF FOREIGN SOVEREIGNS AND THEIR AMBASSADORS.

Courts of law cannot take cognizance of acts of power exercised by governments in matters of state arising out of war. But they will preserve the private rights of sovereign princes, if by so doing the sovereign acts of the State are not interfered with. *Veer Rajundur Wadeer* v. *the East India Co.*, 30 Law J. Rep. (N.S.) Chanc. 226; *sub nom. Rajah of Coorg* v. *the East India Co.*, 29 Beav. 300.

If a foreign power takes prisoner an enemy, and gets possession of documents establishing his right to a debt due from another to him in his private capacity, the prisoner is entitled to relief; and the circumstance of the foreign power being also the debtor will not alter the right. Ibid.

A tributary prince, in his public character held a part of the funded debt of his paramount sovereignty. He did acts which brought on a war, in which he was deposed by the paramount sovereignty, and taken prisoner, and his property confiscated; and the notes which represented such part of the funded debt subsequently came into the hands of the paramount power, and were treated as forfeited. Upon a bill by the deposed prince,—Held, that this Court could not interfere with the sovereign and political acts exercised by the paramount sovereignty. Ibid.

The Court will, at the instance of a foreign sovereign at amity with this country, protect the property to which he is entitled as sovereign, or of his subjects, being represented by him, where a damage to such property is done or threatened by persons resident within the jurisdiction of the Court, and such injury is alleged in the bill. *The Emperor of Austria* v. *Day*, 30 Law J. Rep. (N.S.) Chanc. 690; 3 De Gex, F. & J. 217; 2 Giff. 628.

Where, therefore, certain persons resident in this country had manufactured documents which purported to be the notes of a foreign state, the Court, upon a bill filed by the sovereign of that state, alleging (among other things) that the introduction of such notes into it would cause great detriment to his sub-

jects, directed the manufacturers to deliver up to be destroyed the notes and the plates from which the notes had been manufactured, and granted an injunction to restrain such persons from manufacturing documents purporting to be notes of that state. Ibid.

*Semble*—Per *Turner, L.J.*, differing from *Stuart, V.C.*, the Court will not interfere to protect the invasion of a mere sovereign right of a foreign sovereign. Ibid.

By *Lord Campbell, L.C.*, and *Knight Bruce, L.J.*, and *Turner, L.J.*, overruling *Stuart, V.C.*, the Court will not interfere to prevent the use in this country of the royal arms of a foreign state. Ibid.

Although the Courts in this country cannot make an order against a foreign ambassador who does not submit himself to the jurisdiction, yet the Court of Chancery will restrain a third party from handing over to him a fund the right to which is in dispute, notwithstanding his title to the fund may be absolute at law. *Gladstone* v. *Musurus Bey*, 32 Law J. Rep. (N.S.) Chanc. 155; 1 Hem. & M. 495.

By a concession from the Turkish Government certain persons were authorized to furm a bank, to be called the Bank of Turkey, with the sole privilege of issuing paper-money and bank-notes in Turkey. Shortly afterwards, and before the Bank of Turkey had commenced business, the Turkish Government granted a similar concession to the directors of the Ottoman Bank. A bill was filed by the Bank of Turkey against the Ottoman Bank and the Sultan, seeking a declaration of the rights of the Bank of Turkey, and an injunction to restrain the Ottoman Bank from issuing paper-money or bank-notes in Turkey:—Held, on demurrer, that the Court has no jurisdiction to interfere with the acts of a foreign sovereign, who, having entered into a contract with British subjects, makes a grant in derogation of that contract, nor to restrain British subjects from doing in a foreign country whatever they are authorized to do by the sovereign power there. *Gladstone* v. *the Ottoman Bank*, 32 Law J. Rep. (N.S.) Chanc. 229; 1 Hem. & M. 505.

## JURY.

[Greater facilities for summoning persons to serve on juries, and for other purposes relating thereto, provided by the Juries Act, 1862 (25 & 26 Vict. c. 107.]

### *Discharge of Jury.*

On the trial of an information by the Attorney General for bribery, a material witness for the prosecution refused to answer a question put to him; and the Judge, holding that he was bound to answer it, adjudged him guilty of contempt; and thereupon, and for no other reason, at the request of the counsel for the prosecution, the defendant objecting, the Judge discharged the jury. The above facts having been entered on the record, the defendant moved for judgment *quod eat sine die*, and that all further proceedings on the information be stayed. The Court discharged the rule (per *Wightman, J., Crompton, J.* and *Blackburn, J.*) on the ground that, assuming the discharge of the jury under the circumstances stated on the record to have been improper, the defendant was not entitled to judgment or to a stay of jury process: *Cockburn, C.J.*, inclining to the same opinion, but holding that in a case of doubt the Court ought not to interfere. *The Queen* v. *John Barff Charlesworth*, 31 Law J. Rep. (N.S.) M.C. 25; 1 Best & S. 460.

*Semble*—That the discharge of the jury is a matter of practice in the discretion of the Judge; but that the power ought not to be exercised without very strong reasons. Ibid.

*Semble*, by *Wightman, J.* and *Crompton, J.* that the discharge of the jury in the present case was improper: By *Blackburn, J.*, that it was right: *Cockburn, C.J.*, inclining to the latter opinion. Ibid.

The Court refused to allow the defendant to add a plea *puis darrein continuance*, stating the above facts; on the ground that this would be to allow double pleading, and also because, the facts being set out on the record, the defendant could take advantage of them. Ibid.

### *Direction to Reconsider Verdict.*

A Judge is not bound to receive the first verdict which the jury give. He may direct them to reconsider it. The verdict which the jury ultimately return is the true verdict to be recorded. *R.* v. *Meany*, 32 Law J. Rep. (N.S.) M.C. 24; 1 L. & C. 213.

## JUSTICE OF THE PEACE.

[See RATE.]

[The law relating to the Jurisdiction of Justices residing or being out of the county for which they are Justices amended by 26 & 27 Vict. c. 77.—The law relating to the mitigation of penalties amended by 27 & 28 Vict. c. 110.]

(A) JURISDICTION AND DUTY.
- (*a*) *In general.*
- (*b*) *Convictions.*
- (*c*) *Ouster of Jurisdiction.*

(B) RULE TO COMPEL ISSUE OF DISTRESS WARRANT.

(C) APPEAL FROM, UNDER 20 & 21 VICT. c. 43.
- (*a*) *When it lies.*
- (*b*) *Notice of Appeal.*
- (*c*) *Transmission of Case to the Court.*
- (*d*) *Costs.*
- (*e*) *Practice: Right to begin.*

### (A) JURISDICTION AND DUTY.

#### (*a*) *In general.*

That part of the sea-shore which lies between high and low water-mark is within and part of the adjoining county, so that the Justices of the county have jurisdiction to take cognizance of offences committed thereon, whether the land be covered with water or not at the time the offences shall be committed. *Embleton* v. *Brown*, 30 Law J. Rep. (N.S.) M.C. 1; 3 E. & E. 234.

The 13th section of the 7 & 8 Geo. 4. c. cviii. empowers certain persons to make a rate upon the owners of Stratford Abbey Lands; and section 15. empowers a Justice, on proof of demand and refusal to pay, to enforce payment by distress-warrant; section 16. requires the warrant to be directed to the collector; section 36. gives power of appeal against

the rate to any person claiming exemption on the ground that the lands rated are not abbey lands; and by section 42. the decision of the Quarter Sessions on appeal is final. The plaintiff having been rated and refused to pay, D, a Justice, issued a distress-warrant directed to S, the collector, who executed it. The plaintiff sued D and S in trespass, and the jury found that the land, in respect of which the rate was made, was not abbey land:—Held, first, that the plaintiff was not bound to appeal to the Sessions, but might try the validity of the rate by an action of trespass; secondly, that D had acted without jurisdiction, and was liable in such action, and not protected by the 11 & 12 Vict. c. 44; thirdly, that S being the person to whom the warrant was directed (7 & 8 Geo. 4. c. cviii. s. 16), and who was required to execute it, was an officer of the law, and protected by the 24 Geo. 2. c. 24. s. 6. *Pedley* v. *Davis*, 30 Law J. Rep. (N.S.) C.P. 374; 10 Com. B. Rep. N.S. 492.

If an assistant overseer apprehend a man for leaving his wife and children chargeable to the parish, and, by direction of the parish officers, bring him before a magistrate and charge him with such desertion, the magistrate is not justified in refusing to entertain the charge because the proceedings have been taken without the direction of the board of guardians. *R.* v. *Mirehouse*, 32 Law J. Rep. (N.S.) M.C. 90.

Where, by an act of parliament, power is conferred upon Justices to issue a distress warrant, "if they shall think fit," they must not refuse to issue it merely because they think the act of parliament does an injustice in giving such power in the particular case. Therefore, where the overseer of a parish, which had been an extra-parochial place but had been duly annexed to a union, was ordered by the board of guardians of the union to pay certain money towards the common fund, and he refused to pay such money,—Held, that Justices could not refuse to issue their warrant, under the 2 & 3 Vict. c. 84. s. 1, to distrain the goods of the overseer, merely because they thought it unjust that such extra-parochial place should be compelled to contribute to the common fund of the union. *R.* v. *Boteler*, 33 Law J. Rep. (N.S.) M.C. 101.

The appellants were apprehended and charged before Justices with setting fire to the letters in a pillar letter-box. Witnesses were examined in support of the charge, and the appellants were remanded on bail to appear again before the Justices. They did so appear and were represented respectively by attorneys, and were informed that they would be charged under section 52. of 24 & 25 Vict. c. 97; and the attorneys were asked whether the appellants would plead guilty to such charge, or whether further evidence should be offered in support of the same. In answer to this they told the attorney for the prosecution that he must go on and prove his case, whereupon other witnesses were called and examined and cross-examined. After the case was closed, the attorneys for the appellants objected that the Justices had no jurisdiction, inasmuch as there was no information on oath, and the appellants were not found committing the offence, and therefore were not legally in custody. The Justices, however, committed the appellants:—Held, that they had jurisdiction to do so. *Turner* v. *the Postmaster General*, 34 Law J. Rep. (N.S.) M.C. 10; 5 Best & S. 756.

### (b) *Convictions.*

Where a complaint of a criminal nature is made before Justices, which, upon the evidence, amounts to an offence not within their jurisdiction to determine, it is their duty either to dismiss the complaint, or commit the person charged for trial by a jury. And where an information charged a man with unlawfully assaulting and abusing a woman, and the only evidence was that of the woman, who swore to a rape, it was held the Justices ought either to have committed the prisoner for trial, or, if they disbelieved the woman, to have dismissed the case; and that they were not justified in convicting the man, under the 16 & 17 Vict. c. 30, of an aggravated assault. *In re Thompson*, 30 Law J. Rep. (N.S.) M.C. 19; 6 Hurls. & N. 193.

The prisoner had been convicted by Justices, under the 9 Geo. 4. c. 31. and the 16 & 17 Vict. c. 30, of an aggravated assault, upon the information and complaint of a woman, charging that he did unlawfully assault and abuse her. It appeared, on affidavits, that upon the evidence the charge was one of rape. Upon a rule *nisi* for a *habeas corpus ad subjiciendum*,—Held, per *Pollock, C.B.* and *Wilde, B.*, that the offence charged was not an assault of an aggravated nature, within the 16 & 17 Vict. c. 30; but an assault involving a statutory offence of a distinct character, over which the Justices had no jurisdiction, and that the writ ought to issue. Per *Bramwell, B.* and *Channell, B.*, that there was nothing in the information and complaint to prevent the Justices entertaining a charge of assault, and that the charge being within their jurisdiction, they were at liberty to exercise it, and convict of an aggravated assault, if they thought upon the evidence that an offence, and not a felony, had been committed; and that the writ ought not to go. Ibid.

It is the duty of Justices summarily convicting to cause the conviction to be lodged with the clerk of the peace, pursuant to section 14. of the 11 & 12 Vict. c. 43, and on proof of neglect to do so in any particular instance, proceedings may be had against them; but the clerk to the Justices, being only their servant, a *mandamus* cannot be granted to compel him to lodge all the convictions which have been made by the Justices during a certain period. *Ex parte Hayward*, 32 Law J. Rep. (N.S.) M.C. 89; 3 Best & S. 546.

Upon the hearing of an information for an assault, the Justices have jurisdiction to convict the defendant of that offence, although evidence be given which, if true, would prove that not only had the complainant been assaulted, but that a rape had been committed upon her. *Wilkinson* v. *Dutton*, 32 Law J. Rep. (N.S.) M.C. 152; 3 Best & S. 821.

### (c) *Ouster of Jurisdiction.*

Upon a summary proceeding before Justices their jurisdiction is not ousted by the *bona fid* claim of a right which cannot exist at law. Therefore, on the hearing of an information, under the 24 & 25 Vict. c. 96. s. 24, for "unlawfully and wilfully" fishing in a non-navigable river, being the private fishery of another, a claim on the part of the defendant as one of the public to fish in the river does not oust the Justices of jurisdiction, as such a right cannot possi-

bly be acquired. *Hudson* v. *M'Rae*, 33 Law J. Rep. (N.S.) M.C. 65.

On such an information, the *bona fide* belief of the defendant that he had a right to fish does not prevent his being convicted, a guilty mind not being a necessary ingredient to constitute the offence. Ibid.

(B) RULE TO COMPEL ISSUE OF DISTRESS WARRANT.

Where magistrates have convicted of penalties on matters within their jurisdiction, and the convictions are regular in form, and there is no legal reason shewn why the parties convicted have not paid the penalties, the Court will feel bound to grant a rule under the statute 11 & 12 Vict. c. 44. s. 5, to the magistrates to issue warrants to levy the amounts, and have no discretion to refuse to do so on the ground of some supposed hardship in the number of the convictions or the amount of the costs. *In re Hartley*, 31 Law J. Rep. (N.S.) M.C. 232.

(C) APPEAL FROM, UNDER 20 & 21 VICT. C. 43.

(*a*) *When it lies.*

Under two local acts of parliament, by which the rates of a parish were regulated, an appeal was given against any rate to the next Quarter Sessions, and it was to be enforced by summons before two Justices, who were to order the payment, and (if necessary) grant a warrant of distress, if the person summoned "did not prove to them that he was not chargeable with or liable to pay such rate":—Held, that this only gave the Justices a power similar to that in enforcing a poor-rate, and that they had no jurisdiction to inquire into the validity of a rate good on the face of it, and that they had no jurisdiction to "determine" anything "in a summary way," within the meaning of the 20 & 21 Vict. c. 43, so as to give them power to state a case under that act. *Ex parte May*, 31 Law J. Rep. (N.S.) M.C. 161; 2 Best & S. 426.

(*b*) *Notice of Appeal.*

If notice of appeal under the statute 20 & 21 Vict. c. 43. s. 2. be not given to the respondent before the case is lodged in court, the case will be struck out. It is not sufficient to post the notice of appeal to the respondent within the three days allowed for lodging the case, if it does not reach the respondent until the day after the case is transmitted to the office. *Ashdown* v. *Curtis*, 31 Law J. Rep. (N.S.) M.C. 216.

(*c*) *Transmission of Case to the Court.*

A case stated and signed by the Justices under the statute 20 & 21 Vict. c. 43, and delivered to the appellant, becomes wholly inoperative, and no appeal can be had upon it, unless the appellant transmit it to the Court within three days after he has received it from the Justices. If after the expiration of the three days the case remain in the appellant's hands, and he take it back to the Justices, the Justices have no power of amending it; and although they do so in fact, the appellant does not gain a further period of three days from the date of the amendment for transmitting the case to the Court. *The Local Board of Gloucester* v. *Chandler*, 32 Law J. Rep. (N.S.) M.C. 66.

The provision in the 20 & 21 Vict. c. 43. s. 2, as to transmitting a case stated by Justices to the Court, within three days after receiving the case, applies when the attorney for the appellant sends the case to his London agent, for the purpose of being lodged in court, but the agent retains it in his office by mistake, and thus prevents it from being actually lodged in court within the three days. *Banks* v. *Goodwin*, 32 Law J. Rep. (N.S.) M.C. 87; 3 Best & S. 548.

*Quære*, if it be sent by post in due course and does not reach court in time. Ibid.

G, an attorney in a county town, instructed by the London attorneys of the party interested, attended to resist a summons before Justices in the county town. The Justices decided against the party, who, being dissatisfied, sent the Justices a written notice demanding a case to be stated under the statute 20 & 21 Vict. c. 43. The Justices stated the case and sent it to G on Thursday, who the next day forwarded it to the London attorneys. The latter deposited the case in the office of the Court on the Monday following:—Held, that G had presumably authority to receive the case for the appellant, and that as the case had not been transmitted to the Court within three days after it had been received, the provisions of the 2nd section of the abovementioned statute had not been complied with, and consequently that the appeal must be struck out. *Pennell* v. *the Churchwardens of Uxbridge*, 31 Law J. Rep. (N.S.) M.C. 92.

(*d*) *Costs.*

The successful party in an appeal from Justices in Petty Sessions under the 20 & 21 Vict. c. 43, if allowed costs by the Court, is entitled to the costs of preparing and amending the case, beyond the fees allowed to the Justices' clerk by section 3. and Schedule (A). *Glover* v. *Booth*, 31 Law J. Rep. (N.S.) M.C. 270; 2 Best & S. 807.

A local board of health applied to Justices to enforce payment from S of the expenses of certain works which they had lawfully required S to do, and which on his default they themselves had done. The Justices, on an objection taken by S, declined to order payment. The local board thereupon appealed to the Court of Queen's Bench against the decision of the Justices. S did not take any part in the stating of the case, nor did he appear to argue in the Court of Queen's Bench. That Court, after hearing the appellants, decided in their favour:—Held, that the respondent, though he did not appear, was liable to the costs of the appeal. *The Wednesbury Local Board* v. *Stephenson*, 33 Law J. Rep. (N.S.) M.C. 111.

(*e*) *Practice: Right to begin.*

On a case stated by way of appeal from Justices, the party in support of the complaint below is entitled to begin—*Jones* v. *Taylor* confirmed. *Ellis* v. *Kelly*, 30 Law J. Rep. (N.S.) M.C. 35; 6 Hurls & N. 222.

## LANDLORD AND TENANT.

[See Lease—Nuisance—Use and Occupation.]



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### (A) The Tenancy.

#### (a) *Tenancy at Will.*

The plaintiff took, and was let into possession of land, for the purpose of building according to a plan agreed upon, and at a rent fixed, without any agreement in writing, and without any parol agreement for a lease for a term of years, after which the plaintiff expended a considerable sum in buildings according to the plan, and continued in possession for several years and duly paid the rent verbally fixed. The defendant, as landowner, having brought an action of ejectment, insisted that the plaintiff was merely tenant at will:—Held, that the plaintiff was entitled to an injunction and to relief in equity. *Thornton* v. *Ramsden*, 4 Giff. 519.

The bill prayed, in the alternative, for a lease or for compensation. A private act of parliament having authorized leases for a certain duration and on certain specific terms to be granted, in cases nearly similar, where there was no written agreement, and it having been the usage on the estate to double the rent when a lease was executed, the Court decreed a lease to the plaintiff, according to the act of parliament and at the double rent. Ibid.

#### (b) *Tenancy from Year to Year.*

A tenant from year to year of houses destroyed by fire insuring is not limited in his claim on the insurance company to the extent of his interest in the property insured. *Simpson* v. *the Scottish, &c. Insur. Co.*, 32 Law J. Rep. (N.S.) Chanc. 329; 1 Hem. & M. 618.

Per *Wood, V.C.*, where a tenancy from year to year is determinable upon six months' notice to quit, a notice given six lunar months prior to the expiration of the year is sufficient to determine the tenancy. *Rogers* v. *the Dock Co. at Kingston-upon-Hull*, 34 Law J. Rep. (N.S.) Chanc. 165.

#### (c) *Demise by one Joint Tenant to another.*

One or two joint-tenants may demise his or their portion to another, so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear. Thus, three co-executors may agree that one shall hold land, devised to them in trust, at a fixed rent, and if the rent falls into arrear, he may be distrained upon in respect of it. *Cowper* v. *Fletcher*, 34 Law J. Rep. (N.S.) Q.B. 187; 6 Best & S. 464.

*Semble*, also, that when he has taken possession and has paid rent, he would be estopped from denying their right to distrain. Ibid.

#### (d) *Surrender.*

A mortgagor before mortgage let a farm to P as tenant from year to year. After the mortgage, P let the defendant into possession in his stead, and informed the mortgagor of the fact, and the mortgagor subsequently received the rent from the hands of the defendant:—Held, that the tenant's term was still in P, there being no effectual surrender, and consequently that the mortgagee could not maintain ejectment against the defendant without a notice to quit. *Cadle* v. *Moody*, 30 Law J. Rep. (N.S.) Exch. 385.

A tenant from year to year, at a rent payable quarterly under the terms of a written agreement, having ceased to occupy the premises held by him in the middle of a quarter, tendered the key to his landlord; this the landlord refused to accept; but the tenant having left it behind him, the landlord in the course of the ensuing quarter made use of it to obtain access to the premises, and he also placed up a board on the premises stating that they were to let. In the following quarter he painted out the defendant's name, which was over the door of the premises, and cleaned and repaired them:—Held, in an action brought by the landlord to recover the rent for the last two quarters, that he was not entitled to maintain such an action, for that there had been a surrender of the premises by operation of law, by agreement between the parties, followed by a taking possession on the part of the landlord. *Phené* v. *Popplewell*, 31 Law J. Rep. (N.S.) C.P. 235; 12 Com. B. Rep. N.S. 334.

#### (e) *Notice to Quit.*

The defendant became tenant to the plaintiff of a public-house on a verbal agreement, at the rent paid by the outgoing tenant N, and having purchased the goodwill, fixtures, &c. of N, entered into possession on the 7th of September 1858. On the 19th of October the plaintiff called for his Michaelmas rent, which the defendant paid, having received part of it from N, and the plaintiff gave the defendant a receipt as for rent due from N. The defendant paid the Christmas quarter, and the plaintiff gave him a receipt as for rent due from him (the defendant). On the 24th of March the plaintiff gave the defendant notice to quit "on the 29th day of September next, provided your tenancy originally commenced at that time of the year; or otherwise that you quit and deliver up possession at the end of the year of your tenancy, which shall expire next after the end of one half-year from the time of your being served with this notice." The plaintiff received his rent at Christmas 1859, and on the 9th of December served the defendant with notice to quit on the 24th of June then next (Midsummer). Evidence was given on behalf of the plaintiff, that when the defendant was served with this second notice, he did not then object that his tenancy was a Michaelmas, and not a Midsummer tenancy; but said that the plaintiff

might have the house if he paid him a compensation for the fixtures and goodwill. There was other evidence tendered, and contradictory evidence given as to the terms of the verbal agreement for the tenancy, and no evidence as to the time of the commencement or expiration of the tenancy of N, or of any of the preceding tenants of the same premises. At the trial of an ejectment to recover possession of the premises, the Judge having withdrawn from the jury all the evidence, excepting the statement made by the defendant when served with the second notice to quit, and the jury having found a verdict for the plaintiff, the Court *(dissentiente Martin, B.)* made absolute a rule for a new trial. Per *Bramwell, B.*, there was evidence of a tenancy ending at Michaelmas. Per *Wilde, B.*, it was a question for the jury when the tenancy began, and all the evidence which bore upon that question ought to have been left to them. Per *Martin, B.*, there was no evidence that the tenancy commenced at Michaelmas; and the only question for the jury was, whether, from the defendant's admission when served with the second notice to quit, they could infer that the original tenancy had commenced at Midsummer. *Walker* v. *Godé*, 30 Law J. Rep. (N.S.) Exch. 172; 6 Hurls. & N. 594.

Tenants of parish lands at 12*s.* an acre disputed their liability to pay more than 4*s.* an acre for the lands, on the ground that there had been an agreement with the overseers to reduce the rent to 4*s.* At a vestry meeting on the subject, at which most of the tenants were present, one of them said that the land was theirs at 4*s.* an acre:—Held, to be no disclaimer so as to dispense with giving the tenants a proper notice to quit. *Hunt* v. *Allgood*, 30 Law J. Rep. (N.S.) C.P. 313; 10 Com. B. Rep. N.S. 253.

*Semble*—That a yearly tenancy might be implied from the circumstances under which the parties had held. Ibid.

The defendant, who had been a weekly tenant of a cottage to one M up to M's death, paid rent for a short time afterwards to a person who claimed under a supposed devise by M, but he ceased to do so on receiving notice of the plaintiffs' claim to the cottage, as the heirs-at-law of M; and when he was applied to for rent by the plaintiffs' agent, the defendant said he would pay no more rent till he knew who was the proper owner:—Held, that the defendant's tenancy, being a weekly tenancy, could not be determined without some notice, and that what was said by the defendant to the plaintiffs' agent did not amount to a disclaimer so as to dispense with giving notice. *Jones* v. *Mills*, 31 Law J. Rep. (N.S.) C.P. 66; 10 Com. B. Rep. N.S. 788.

*Quære*—What notice is required in the case of a weekly tenancy. Ibid.

*Semble*, per *Williams, J.*—a week's notice. Ibid.

### (*f*) *Eviction.*

The rent of four houses demised for a term of years being in arrear, and the lessee having assigned his lease, and two of the houses being unoccupied, the lessor took possession of those two, first, by putting a police constable in charge of them, and, subsequently, by putting a person in possession under a parol agreement to grant a lease of the four houses as soon as possession of the two others was obtained. The lessor, some months afterwards, distrained on the goods of the persons in possession of the two other houses, and, no sufficient distress being found in them, brought ejectment under a clause in the lease for re-entry. At the time of the distress no search was made in the houses taken possession of by the lessor, but they were devoid of goods at the time the police constable entered:—Held, that the taking possession of the unoccupied houses did not amount to an eviction, and that there was evidence of no sufficient distress. *Wheeler* v. *Steverson* or *Stevenson*, 30 Law J. Rep. (N.S.) Exch. 46; 6 Hurls. & N. 155.

## (B) CONTRACTS.

### (*a*) *For quiet Enjoyment.*

There is a contract for quiet enjoyment implied in a demise of a tenement. So held, on the authority of *Bandy* v. *Cartwright*. A declaration for a breach of such contract must allege an eviction by a person claiming title paramount. *Hall* v. *the City of London Brewery Co. (Lim.)*, 31 Law J. Rep. (N.S.) Q.B. 257; 2 Best & S. 737.

In an agreement,—by which A agrees to let and P to take premises for a year certain, and thence from year to year, and A agrees, when required by P, to grant a lease for the remainder which shall then be unexpired of the term and interest of him A, wanting ten days,—the implied promise for quiet enjoyment is limited to the duration of A's interest; and P can maintain no action against A for damages consequent on A's reversioner intervening after the commencement of the tenancy from year to year. *Penfold* v. *Abbott*, 32 Law J. Rep. (N.S.) Q.B. 67.

### (*b*) *For Repairs.*

In November 1858, the defendant, being in occupation by himself and his under-tenants of premises in the city of London belonging to the plaintiff, agreed to take them, as yearly tenant to the plaintiff, for the term of four years, rent to be paid quarterly, on the usual quarter-days; and the agreement contained a condition binding the defendant, "if the plaintiff made good the floor of the warehouse, &c. within twenty-eight days of the date of the agreement, but if not done, the agreement to be void." The plaintiff, within the twenty-eight days, did some insufficient repairs; and in April, 1859, the floor gave way, whereupon the defendant informed the plaintiff of it; but the latter took no notice, and the defendant's under-tenants applied to the Commissioners of Sewers, which resulted in an order being made on the 12th of May, under the 73rd section of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), for the repair of the floor. The plaintiff, at the end of April, had informed the defendant that he was about to pull the premises down, and offered to assist him to remove his things; but nothing was done until the end of May, when, in compliance with the above order, the plaintiff repaired the floor. The execution of the repairs compelled the defendant's under-tenants to quit, and they, in consequence, refused to pay him rent; and he himself was interrupted in his business, and sought other premises, to which he removed on the 15th of June; and on the morning of the 23rd he finally vacated the premises, and delivered up the key to the plaintiff, who then accepted it, and in a few days afterwards entered, and pulled the premises down.

The defendant paid rent up to Lady-day, 1859; and the plaintiff, in an action on the agreement, and for use and occupation, sought to recover the quarter's rent due on the following 24th of June:—Held, per *Erle, C.J.*, *Willes, J.* and *Byles, J. (hæsitante Williams, J.)*, that the plaintiff was not entitled to recover. That the effect of the condition of the agreement was to give the tenant, if the repairs were not done within the twenty-eight days, a reasonable time within which to elect to avoid the contract, and that the facts shewed that he had elected to avoid the contract within a reasonable time. Also, that there was evidence of a mutual agreement to put an end to the tenancy before the 24th of June, and to any claim by the landlord for the rent due on that day. *Furnivall* v. *Grove*, 30 Law J. Rep. (N.S.) C.P. 3; 8 Com. B. Rep. N.S. 496.

*Quære*—Whether the facts amounted to a surrender by operation of law, or an eviction. Ibid.

The defendant was lessee of a house, and the plaintiff one of the reversioners and lessors. Before the end of the lease the lessors agreed verbally with M that he should have a lease, to commence at the end of that of the defendant, the house to be pulled down by M and new premises built by him. The defendant left the house out of repair at the end of the lease. M afterwards entered, and some time after that the verbal agreement was put into writing, and the house pulled down. The plaintiff brought an action against the defendant on a covenant in his lease for not keeping and yielding up the house in good repair:—Held, that the jury were not compelled to give only nominal damages. *Rawlings* v. *Morgan*, 34 Law J. Rep. (N.S.) C.P. 185; 18 Com. B. Rep. N.S. 776.

### (c) *As to Receipt of Rent by Agent.*

By lease under seal B demised premises to V for fourteen years, at a yearly rent, which V covenanted to pay to B. The lease contained the following clause: "The landlord further agrees and orders that R K, or his appointed agent, is to receive all rents from the tenant at all times when it becomes due during the said term hereby granted, and his receipt to be a full and sufficient discharge from all liabilities thereof." R K was not a party to the deed, and there was nothing to shew that R K had any interest, or that it was to the tenant's advantage that the rent should be paid to R K:—Held, that the clause only amounted to a bare authority or appointment of R K as agent to receive the rent, and was therefore revocable by the landlord. *Venning* v. *Bray*, 31 Law J. Rep. (N.S.) Q.B. 181; 2 Best & S. 502.

### (d) *Underletting.*

The following words in an agreement for letting do not create a condition: "The said A (the tenant) hereby agrees that he will not underlet the said premises without the consent in writing of the landlord." *Shaw* v. *Coffin*, 14 Com. B. Rep. N.S. 372.

## (C) DISTRESS FOR RENT.

The plaintiff entered into an agreement with M that a valid lease in law should be forthwith prepared, to be duly executed by the plaintiff and M of a house and premises, to the plaintiff, to hold for the term of three years, at the yearly rent of 84*l*. The agreement specified how the rent should be paid, and what covenants should be contained in the lease, and then contained this clause, "And it is hereby mutually agreed that these presents shall operate as an agreement only, and that until a lease shall be executed, the rents, covenants and agreements agreed to be therein reserved and contained, shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed." The plaintiff entered upon the premises, and remained till rent became due, when he fraudulently conveyed away his goods and effects:—Held, that a tenancy was created, which gave M a right to distrain the goods, and, consequently, to follow after and take possession of them at the place they were taken to. *Anderson* v. *the Midland Rail. Co.*, 30 Law J. Rep. (N.S.) Q.B. 94; 3 E. & E. 614.

T, being tenant at will at a yearly rent, died leaving rent in arrear, the next day the lessor distrained on the premises, which were then occupied by T's servant; his widow came into occupation the day after, and subsequently took out administration to her husband:—Held, that the distress was not justified under the 8 Ann. c. 14. ss. 6, 7, as it was not made "during the possession of the tenant from whom the rent became due." *Turner* v. *Barnes*, 31 Law J. Rep. (N.S.) Q.B. 170; 2 Best & S. 435.

*Semble*—That *Walker* v. *Giles* is still law as to the construction to be put upon similar deeds. Ibid.

Where a landlord to whom rent is due for a house enters the house in a way which is unlawful, and seizes and takes possession of the goods in the house as a distress for the rent, he is liable in trespass, and the value of the goods is the measure of damages which the tenant is entitled to recover. *Attack* v. *Bramwell*, 32 Law J. Rep. (N.S.) Q.B. 146; 3 Best & S. 520.

## (D) HOLDING OVER.

### (a) *Effect of, in general.*

In an ejectment by the assignee of a lessee of a term against the assignee of a sub-lessee of the same term, less ten days, holding over after the expiration of his term, the writ was issued before the expiration of the claimant's term, but at the time of the trial both claimant's and defendant's term had expired; there was no affirmative evidence that the claimant had no other title besides the term which had expired, or that he did not continue as tenant by sufferance to his superior landlord:—Held, that the defendant ought to have given up possession at the expiration of his term, and was estopped from disputing the claimant's title, which, except as against his superior landlord, must be taken to be good, and that the claimant was entitled to a writ of possession under the provisions of the statute 15 & 16 Vict. c. 76. s. 180. *Gibbins* v. *Buckland*, 32 Law J. Rep. (N.S.) Exch. 156; 1 Hurls. & C. 736.

Where a tenant is allowed to hold over after the expiration of his lease, it is a question of fact for the jury on what terms he continues to hold. *Oakley* v. *Monck*, 34 Law J. Rep. (N.S.) Exch. 137; 3 Hurls. & C. 706. (Afterwards affirmed in the Ex. Ch., 35 Law J. Rep. (N.S.) Exch. 87.)

Where a tenant for life granted a lease, containing (among others) a covenant that the lessor should, at the expiration of the term, pay and allow for all

fruit-trees upon the premises planted by the lessee at a fair valuation, and at the expiration of the term the lessee held over as tenant from year to year, and on the death of the tenant for life the tenant from year to year continued the occupation of the land, paying the same rent to the remainderman, the latter being ignorant of the existence of the covenant,—Held, that the receipt of rent by the remainderman, under the circumstances, was no evidence of a holding over under the terms of the lease. Ibid.

(*b*) *Double Value.*

To enable a landlord to recover double value, under the statute 4 Geo. 2. c. 21, the holding over by the tenant must be contumacious. A holding over under a mistaken belief that a third person, who claimed the reversion, is entitled, is not sufficient to support the action, even although the tenant was let into possession by the landlord, and the third person does not claim through him, but adversely. *Swinfen* v. *Bacon*, 30 Law J. Rep. (N.S.) Exch. 33; 6 Hurls. & N. 184.

The defendant, who was tenant of a farm to S, attorned on the death of the latter and paid rent to the plaintiff, who claimed under S's will, and retook the farm from her from year to year, at a fresh rental, and paid half-a-year's rent, due at Michaelmas, 1855. The testator's heir-at-law filed a bill, impeaching the will, and upon the trial of the issue of *devisavit vel non*, in which the now plaintiff was plaintiff, and the heir-at-law was defendant, a compromise was arranged, contrary to the plaintiff's instructions, by the terms of which the plaintiff was to convey the estate to the heir-at-law. The plaintiff refused to comply, and a rule for an attachment was obtained, but subsequently discharged. The heir-at-law demanded the rent from the now defendant, who, although desired by the plaintiff not to do so, paid the rent due at Lady-day, 1856, to the heir-at-law. At Michaelmas the plaintiff gave the defendant notice to quit at Lady-day, 1857, and in December, 1856, distrained for a year's rent. The defendant replevied, and the action remained undisposed of. The defendant did not quit at Lady-day, 1857, and the plaintiff thereupon gave notice that she should claim double rent, being double the value. The defendant took no notice of it, but continued in possession. The Court of Chancery having directed the same issue to be retried, the plaintiff, in November, 1857, distrained for half-a-year's rent, due at Lady-day, but it was withdrawn under an injunction; and one and a half year's rent, due at Lady-day, was paid into the Court of Chancery. At the second trial, in March, 1858, the plaintiff obtained a verdict, and the will was established. In February, 1859, the defendant tendered to the plaintiff the rent which had accrued due since the payment into court. The amount so paid in was subsequently, by order of the Court, paid to the plaintiff. The defendant quitted at Lady-day, 1859, and the plaintiff brought an action for two years' double value, from Lady-day, 1857. Upon a special case, stating the above facts,—Held, that there was not such a wilful holding over as entitled the plaintiff to recover. Ibid.

B, a tenant to S, after the death of S, accepted a fresh term from his devisee. He afterwards found that the heir-at-law of S disputed the will, and from the circumstances of the case he reasonably and *bona fide* believed that the devisee had no title, and that the land belonged to the heir-at-law. B thereupon refused to pay rent to the devisee, who gave him notice to quit. As B did not quit at the expiration of his term, the devisee, who had made out her title to be good, brought an action against B under the statute 4 Geo. 2. c. 28. s. 1, for double value for wilfully holding over:—Held, that the action was not maintainable, for in order to come within the statute the holding over must be with the consciousness on the part of the tenant that he has no right to retain possession. *Swinfen* v. *Bacon*, 30 Law J. Rep. (N.S.) Exch. 368; 6 Hurls. & N. 846.

(E) Fixtures.

Greenhouses built in a garden and constructed of wooden frames fixed with mortar to foundation walls of brickwork,—Held, to be fixtures and not removable by the occupier who built them. *Jenkins* v *Gething*, 2 Jo. & H. 520.

A boiler built into the masonry of the greenhouse also held to be irremovable; but the pipes of a heating apparatus which were connected with the boiler by screws held to be removable. Ibid.

## LAND IMPROVEMENT ACTS.

[The law relating to the drainage of land for agricultural purposes amended by "The Land Drainage Act, 1861" (24 & 25 Vict. c. 133).—"The Improvement of Land Act, 1864" (27 & 28 Vict. c. 114).

## LANDS CLAUSES CONSOLIDATION ACT.

[See Company—Railway.]

(A) Compulsory Powers of purchasing and taking Land.
- (*a*) *When the Powers arise.*
- (*b*) *When Contract of Purchase complete.*
- (*c*) *Intersected Lands.*
- (*d*) *Part of House or Manufactory.*
- (*e*) *Land taken for Purposes ultra Vires.*
- (*f*) *Taking Possession and Right to Possession.*
- (*g*) *Purchase-Money and Compensation under Sections* 18. *and* 63. *for Land taken.*

(B) Compensation.
- (*a*) *For what Damage and in respect of what Interest.*
  - (1) *In general.*
  - (2) *Lands injuriously affected.*
  - (3) *Injury to Right of Shooting Game.*
- (*b*) *To Tenant from Year to Year.*
- (*c*) *Powers of Jury and Arbitrator.*
  - (1) *Jurisdiction generally.*
  - (2) *Arbitrator's Award.*
- (*d*) *Assessment of Damages.*
  - (1) *Contingent Damage.*
  - (2) *When conclusive.*
- (*e*) *Notice of Claim; Nature of Interest.*
- (*f*) *Offer of, and Costs.*

(C) Application of Compensation Money.
- (*a*) *Building.*
- (*b*) *Payment to Trustees.*
- (*c*) *Costs of Petition for Investment or Payment.*

(D) Superfluous Lands.
(E) Conveyance.
(F) Costs.

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(A) Compulsory Powers of purchasing and taking Land.

(*a*) *When the Powers arise.*

The 16th and 17th sections of the Lands Clauses Consolidation Act, requiring the whole capital to be subscribed, and a certificate obtained from Justices to that effect before proceeding to take lands compulsorily, do not apply to the case of a branch railway authorized to be made by an already existing company. *Weld* v. *the South-Western Rail. Co.*, 33 Law J. Rep. (N.S.) Chanc. 142; 32 Beav. 340.

It is not necessary, in order to entitle a railway company to take land for the purpose of their works, that the particular works should appear on the deposited plan. It is sufficient that the land should be within the limits of deviation delineated on the plan. Ibid.

(*b*) *When Contract of Purchase complete.*

If the legislature prescribes formalities to be observed by parties contracting *inter se*, and one of them endeavours to avail himself of the want of such forms to postpone or avoid the completion of a contract entered into, the Court will itself ascertain whether the intentions of the legislature have, in substance, been complied with; and if they have, it will carry the contract into effect. *Sir Edward Baker* v. *the Metropolitan Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 7; 31 Beav. 504.

Public companies having power to purchase land cannot contract for its purchase, and insist upon a custom to defer its completion to the extreme period of time allowed them for the taking of land and the completion of their works. No such custom exists, but they are bound to complete their contract within a reasonable time. Ibid.

A railway company entered into a contract with a tenant for life, who appointed a surveyor under 8 & 9 Vict. c. 18. s. 9. The company would neither appoint their valuer, nor complete the contract. The Court directed an inquiry, in a suit for specific performance, whether the price agreed upon was reasonable and proper. Ibid.

(*c*) *Intersected Lands.*

The expression "such land" in the 94th section of the Lands Clauses Consolidation Act, 1845, referring to intersected lands, is not restricted to intersected lands situate in a town, but applies to all intersected lands, whether so situate or not. *The Eastern Counties and the London and Blackwall Rail. Cos.* v. *Marriage* (House of Lords), 31 Law J. Rep. (N.S.) Exch. 73; 9 H.L. Cas. 32.

(*d*) *Part of House or Manufactory.*

The word "house" in the 92nd section of the Lands Clauses Consolidation Act, 1845, comprises all that would pass by the grant of a messuage, which includes not only the curtilage, but also the garden, and all that is necessary to the enjoyment of the house, if within one ambit, whether attached to the main building or not, and though purchased subsequently to the erection of the main building. Therefore, where the governors of an ancient hospital purchased additional land, on part of which a new wing was built and the rest was laid out in a garden for the use of the entire hospital, it was held that a railway company was not entitled to take any part of the newly-acquired premises without purchasing the whole hospital. *The Governors of the Hospital of St. Thomas* v. *the Charing Cross Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 395; 1 Jo. & H. 400.

Whether trustees of a charity are capable of making a valid alienation of the charity land—*quære*. Ibid.

*Semble*—The promoters of an undertaking, purchasing under their compulsory powers a part of a house from persons under a disability to sell, cannot avail themselves of such disability to avoid purchasing the whole house if required so to do. Ibid.

The lands required for the purposes of the act referred to in the 6th section of the Lands Clauses Consolidation Act comprise not only the lands required to be used for the purpose of the undertaking, but also the lands which, under the 92nd section, the promoters may be required to take. Ibid.

A railway company gave notice to the plaintiff that they should require to take a part of his workshop for the purposes of their railway. The plaintiff gave a counter notice, under the 92nd section of the Lands Clauses Consolidation Act, that the company must take the whole of the premises. The company, however, took possession of only a part, and paid into court the ascertained value of that portion only:—Held, that the company were bound to pay into court the value of the whole premises, and could not be allowed to take possession of part, paying only for that part. *Giles* v. *the London, Chatham and Dover Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 603; 1 Dr. & S. 407.

A landowner having received notice from a railway company to treat for the sale of part of his premises, does not, by offering to sell that part at a price named by him, preclude himself, if the company decline the offer, from requiring them to take the whole under the 92nd section of the Lands Clauses Consolidation Act. *Gardner* v. *the Charing Cross Rail. Co.*, 31 Law J. Rep. (N.S.) Chanc. 181; 2 Jo. & H. 248.

The proper construction of the 92nd section of the Lands Clauses Consolidation Act, which enacts, that "no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory if such party be willing and able to sell and convey the whole," is, that a landowner shall not be compelled to sell a part of his house, &c., if before the company have begun to put their compulsory powers into motion, he gives them notice to take the whole. Ibid.

Unfinished houses standing upon a piece of land, which, when they were completed, was to be apportioned between them as gardens, are within the 8 & 9 Vict. c. 18. s. 92, and a railway company cannot compulsorily take a part of the land without bringing themselves under a liability to purchase and take the whole of the land and the unfinished houses. *Alexander* v. *the West-End of London and Crystal Palace Rail. Co.*, 31 Law J. Rep. (N.S.) Chanc. 500; 30 Beav. 556.

A contractor for the removal of dust had extensive premises, to which the dust was taken and sorted, and portions of it were stamped for plastering purposes, and other portions prepared for manure. The tot-shop, where the sorting of the materials was carried on, was required by a board of works in the construction of a new street; and the contractor required, under the 92nd section of the Lands Clauses Act, that the whole of his premises should be taken, alleging that the tot-shop formed part of a manufactory:—Held (reversing the judgment of one of the Vice Chancellors), that the tot-shop did not form part of a manufactory within the meaning of the section. *Reddin* v. *the Metropolitan Board of Works*, 31 Law J. Rep. (N.S.) Chanc. 660.

A railway company gave notice to take part of a manufactory, and were required by the owner, under the 92nd section of the Lands Clauses Act, to take the whole. A valuer, on behalf of the company, went to the manufactory, and, without entering it, valued it at a specified sum, and that amount was paid into court under the 85th section of the Lands Clauses Act, in the usual way. The company were then proceeding to take possession, and to issue their warrant to summon a jury, when the owner of the manufactory insisted that the valuation had not included certain fixtures upon the premises, such as a steam-engine, shaping and turning lathes, &c., and that the company were bound to take such fixtures. The company contended that, the fixtures being trade fixtures and removable by the owner, he could not compel the company to take them. The owner then filed a bill and moved for an injunction to restrain the company from taking possession, or summoning a jury, without making compensation for the fixtures:—Held, that although the fixtures in question were trade fixtures, which the lessee might remove during the term, the company were bound to take them; and that whatever a railway company are bound to take under the 92nd section, they must, in proceeding under the 85th section, cause to be valued, and pay the value of into court. *Gibson* v. *the Hammersmith Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 337.

F was lessee of a house and garden, and of a strip or piece of meadow land separated therefrom by a road originally made for the convenience of himself and the lessees of the adjoining houses, but which road was afterwards thrown open to the public. Each of the other lessees had also a strip of land on the other side of the road. The leases contained covenants restraining the lessees from building on the strips, and the strips were by arrangement all thrown into one piece, and were used by F and the other lessees in common as cricket and pleasure ground; the whole being however also let to a butcher for grazing purposes. A railway company required this piece of land for the construction of their line; F insisted that the company if they took the land must also take his house and garden, and on their proceeding to obtain possession under the provisions of the Lands Clauses Consolidation Act, filed his bill praying for an injunction. *Romilly, M.R.*, refused an interlocutory injunction, considering it doubtful whether the strip of meadow land was a "part of a house," within the meaning of the 92nd section of the Lands Clauses Act. On appeal, the decision was affirmed, *Turner, L.J.* agreeing with the Master of the Rolls, on the ground that the strip of land being held for pleasure only, and not of necessity for the enjoyment and occupation of the residence of the plaintiff, it would not have passed by a conveyance of the "house" simply. *Dissentiente Knight Bruce, L.J. Fergusson* v. *the London, Brighton, and South Coast Rail. Co.*, 33 Law J. Rep. (N.S.) Chanc. 29; 33 Beav. 103.

A landowner, part of whose house, within the meaning of the 92nd section of the Lands Clauses Act, is taken by a railway company, cannot, under that section, compel the company to take any portion beyond what it requires, less than the whole (per *Turner, L.J., semble*, agreeing with the Master of the Rolls). *Pulling* v. *the London, Chatham and Dover Rail. Co.*, 33 Law J. Rep. (N.S.) Chanc. 505; 33 Beav. 644.

A field, separated from the garden of a house by a ha-ha, traversed by a gravel walk leading to a coachman's house at the further end thereof, and used occasionally for purposes of pleasure (as archery and dancing), though chiefly as pasture for cows, was held, by *Turner, L.J., (dubitante Knight Bruce, L.J.)*, not to be part of the house within section 92. of the Lands Clauses Act. Ibid.

The 92nd section of the Lands Clauses Act is applicable although the landowner may have only a leasehold interest. Ibid.

*(e) Land taken for Purposes ultra Vires.*

The W Railway Company being authorized to make their line up to a point of junction, marked on the parliamentary plans, with the line of the L Company, with all proper stations, works and conveniences connected therewith, gave the plaintiff the usual landowner's notice to treat for a piece of his land which lay beyond the point of junction, but within the limits of the deviation of the W line, the notice stating that that line would pass through the land and that the land was required for the purpose of the W line; and they took all the necessary steps under the Lands Clauses Consolidation Act to acquire a right of entry thereon. Intending to erect a station upon the land, but before they had commenced to do so, and before their line had been completely set out by their engineer, they entered into an arrangement with the L Company that the latter should have the joint use of the station with them, upon certain terms, which were afterwards embodied in an act of parliament; and eventually the W Company built the station upon the land, and prolonged their line with a double set of rails from the point of junction with the L line into the station, one line of rails being for the use of both companies, the other for the use of the W Company only. The plaintiff having brought ejectment to recover possession of the land,—Held, that the W Company, by prolonging their line from the point of junction into their station, had not exceeded their powers so as to forfeit the land; nor had failed to comply with the substance of their notice. Held also, that the arrangement with the L Company did not vitiate their title. *Wood* v. *the Epsom and Leatherhead Rail. Co.*, 30 Law J. Rep. (N.S.) C.P. 82; 8 Com. B. Rep. N.S. 831.

*Semble*, per *Erle, C.J.*, that, even if the W Company, at the time they acquired title to the land, intended to use it for a purpose *ultra vires*, as well

as for a legitimate purpose, and did afterwards use it for both purposes, their title was not therefore forfeited; although the use *ultra vires* might in equity be ground for an injunction. Ibid.

*Semble*, per *Williams, J.*, that, if the W Company took the land, not for their own purposes, but for the purposes of the L Company, and parted with their rights to the latter, the plaintiff might recover. Ibid.

*Semble*, per *Byles, J.*, that, if the W Company took the land for the joint use of both companies, inasmuch as the land was necessary for the junction of the two lines, and only one company could take it, the W Company had not exceeded their powers. Ibid.

(*f*) *Taking Possession and Right to Possession.*

The plaintiff, who had a leasehold interest in premises held by a tenant from year to year, received notice from a projected railway company that the premises were required for the purposes of their undertaking; and the company subsequently arranged with the tenant and received from him the key. The plaintiff thereupon gave the company notice, under the 68th section of the Lands Clauses Consolidation Act, 1845, of the amount of her claim and the nature of her interest in the premises, requiring them to issue their warrant to the sheriff to summon a jury; and, upon their neglecting so to do, she brought an action for the sum claimed:—Held, that these facts warranted the jury in finding that the company had actually taken the premises, and consequently that they were liable for the amount demanded. *Baker* v. *the Metropolitan Rail. Co.*, 17 Com. B. Rep. N.S. 785.

A railway company having, under their acts, taken some land for the purposes of their railway, by agreement from the ostensible owner, and having entered into possession, were afterwards informed by the plaintiff that he was a mortgagee in fee of the land. The company, without disputing the title of the plaintiff, asked for delay during the absence of their legal advisers. The plaintiff, however, within two months after giving them notice of his title, brought ejectment to recover possession of the lands:—Held, that the title not being in dispute, the action could not be maintained, since 8 & 9 Vict. c. 18. s. 124. gave the defendants a right to lawful possession of the lands for six months after notice of the plaintiff's claim. *Jolly* v. *the Wimbledon and Dorking Rail. Co.* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 95; 1 Best & S. 807.

(*g*) *Purchase-Money and Compensation under Sections* 18. *and* 63. *for Land taken.*

The plaintiffs, who were brewers, were the owners in fee of a public-house, which was let for an unexpired term of seven years, and there was in the lease a covenant by the tenant not to sell on the premises any beer other than that purchased of the plaintiffs; the defendants were empowered, by their special act (with which was incorporated the Lands Clauses Consolidation Act), to take the premises:—Held, that in ascertaining, under sections 18. and 63, the amount of purchase-money and compensation to be paid by the defendants to the plaintiffs, the additional value of the premises to the plaintiffs by reason of the covenant to sell the plaintiffs' beer only was to be taken into consideration. *Bourne* v. *the Mayor of Liverpool*, 33 Law J. Rep. (N.S.) Q.B. 15.

(B) COMPENSATION.

(*a*) *For what Damage and in respect of what Interest.*

(1) *In general.*

Copyhold lands taken under the Lands Clauses Act, 1845, are enfranchised under the 96th section of that act, and no fine is payable to the lord under the 6th section of the Copyhold Act, 1858, as a condition of compulsory enfranchisement. Therefore, where the lord of the manor was tenant for life, it was held that he was not entitled to any part of the money paid into court by a railway company as compensation for the enfranchisement of copyhold land taken by them. *In re Sir Thomas Maryon Wilson's Estates*, 32 Law J. Rep. (N.S.) Chanc. 191; 2 Jo. & H. 619.

The defendants, a railway company, purchased under parliamentary powers, the surface above the plaintiffs' colliery, and carried their railway over it by means of a cutting. The original surface was impervious to water; but by the cutting, the clay, of about 23 feet depth, was removed, and a porous stratum of rock was reached, which was also subject to cracks and fissures on being undermined. At the time the railway was constructed none of the mines underneath had been worked; but afterwards the plaintiffs, on their works approaching the railway, gave the defendants the statutory notice, but they did not purchase the subjacent mines. The plaintiffs worked the mines underneath the railway in a proper manner; but the consequence of the working was that the railway sank from time to time; the defendants reinstated the line to its former level with porous materials. In consequence of the cutting and of a bridge, by which the railway crossed a brook, the water from the brook in flood-time flowed along the railway above the plaintiffs' mines, and the side drains being insufficient to carry it off, the water flowed over the porous surface and so penetrated into and flooded the plaintiffs' mines. The rain-water also in like manner, from the insufficiency of the drains, constantly penetrated into the mines. The defendants' works were in accordance with the deposited plans and sections, but they were bound by their act to make and maintain effectual drains:—Held (affirming the judgment of the Court of Exchequer), that the plaintiffs could maintain an action in respect of both heads of the damage caused by the flooding of the mines, and that such damage was not the subject of compensation under the compensation clauses of the Railways and Lands Clauses Acts, 1845. *Bagnall* v. *the London and North-Western Rail. Co.* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 480; 1 Hurls. & C. 544.

A railway company, having power under an act of parliament to construct a tunnel under buildings and premises of which the plaintiff was owner in fee, the parties, in 1848, by voluntary agreement, referred to arbitration "the amount to be paid by the defendants to the plaintiff for the right to construct and for ever maintain the tunnel under the premises, and for the purchase of the site of the tunnel, and in full compensation for all damage or injury *to be sustained* by him by reason of the construction of the tunnel underneath the premises"; and the arbitrator awarded a certain sum to the plaintiff "as compensation for

the right to construct," &c. in the terms of the submission, and "for all damage and injury *sustained* by him by reason of the construction of the tunnel." A deed was afterwards executed by the plaintiff, by which, after reciting the submission and award, in consideration of the sum awarded, which he acknowledged to be "in full for the purchase of the site of, and the right to construct, maintain, and use the tunnel underneath the premises," he granted to the defendants "the site of, and full and free liberty, power, and authority to bore, dig, excavate, make, and construct the tunnel underneath the premises, together with the full and exclusive and uninterrupted right at all times hereafter to use, maintain, and repair the tunnel: to hold the same for the purposes of their act of parliament, freed and discharged from all claims whatsoever of the plaintiff." The stratum through which the tunnel passed consisted of clay and loose earth; it was opened for traffic in 1849; and, after 1853, serious injuries arose to the buildings over the tunnel, which were caused by the subsequent subsidence of the surface consequent upon the construction of the tunnel in such a soil and by the vibration resulting from the passing of trains, or by one of such causes. On a special case, raising the questions, whether the plaintiff could maintain an action for the damage, or recover compensation under the 68th section of the Lands Clauses Consolidation Act, 1845,—Held, by *Cockburn, C.J.*, that the damage, which was likely to accrue from subsidence and vibration, and might have been foreseen, was matter which might and ought to have been taken into consideration by the arbitrator, and assessed prospectively; and that the plaintiff could not afterwards recover compensation for the damage by action or otherwise. By *Crompton, J.* and *Mellor, J.*, that, whether the question turned on the construction of the submission, award and deed of conveyance, or of the statute, the plaintiff was equally precluded from claiming any further compensation. *Croft* v. *the London and North-Western Rail. Co.*, 32 Law J. Rep. (N.S.) Q.B. 113; 3 Best & S. 436.

Section 135. of the Metropolis Local Management Act (18 & 19 Vict. c. 120.) authorizes the Metropolitan Board of Works to repair and maintain certain sewers, with full power to carry such sewers through or under any lands, "making compensation for any damage done thereby," and the Lands Clauses Consolidation Act is incorporated with such act. In exercise of the powers conferred on them by their act, and for the purpose of enabling them to reconstruct a sewer running under a street, the board erected a hoarding in such street, which rendered the access to the plaintiff's premises less convenient than it had been before; but no part of such premises was taken, nor did it appear that the hoarding was kept up beyond a reasonable time:—Held, that the plaintiff was not entitled to compensation under the statute for the damage he had sustained by the erection of such hoarding. *Herring* v. *the Metropolitan Board of Works*, 34 Law J. Rep. (N.S.) M.C. 224; 19 Com. B. Rep. N.S. 510.

One who sustains a private and particular injury from the diversion or obstruction of a public road by the works of a railway company, which diversion or obstruction, if done without the sanction of an act of parliament, would give a right of action, is entitled to compensation under the Lands Clauses Consolidation Act, 1845. *Wood* v. *the Stourbridge Rail. Co.*, 16 Com. B. Rep. N.S. 222.

No compensation can be claimed under the Lands Clauses Consolidation Act, 1845, for inconvenience sustained by the authorized crossing on a level of a public road by a railway. Ibid.

(2) *Lands injuriously affected.*

The plaintiff was the lessee of houses situate on a high road, and the defendants, a railway company, being authorized by their act, made an obstruction and deviation in the road, by which that part of it running by the houses was no longer used as a high road, and the number of persons passing by the houses was greatly diminished, so that the houses were rendered less suitable to be occupied as shops, and their value was greatly diminished:—Held, that the plaintiff was entitled to compensation under the 8 Vict. c. 18. s. 68. and the 8 Vict. c. 20. s. 6; inasmuch as the houses were "injuriously affected": the test being whether on the facts an action would have lain, at common law, at the suit of the plaintiff against the defendants, if they had not been authorized by their act to make the obstruction in the highway. *Chamberlain* v. *the West-End and Crystal Palace Rail. Co.*, 31 Law J. Rep. (N.S.) Q.B. 201; 2 Best & S. 605: in Ex. Ch. 32 Law J. Rep. (N.S.) Q.B. 173; 2 Best & S. 617.

The plaintiff, the lessee for three years and occupier of a house and shop, gave notice to the defendants, a railway company, that his premises had been injuriously affected by their works, and claimed compensation, to be settled by a jury under section 68. of the Lands Clauses Consolidation Act, 1845. The defendants, refusing to admit that the plaintiff had sustained any damage as alleged, and subject to and under protest, issued their warrant, pursuant to the Lands Clauses Consolidation Act, 1845, to the sheriff to summon a jury to settle by their verdict the amount of compensation (if any) to be paid to the plaintiff in respect of the said premises having been or being injuriously affected by the execution of the company's works. The jury found, that no structural damage had been sustained by the premises, and assessed the compensation at 60*l.* for the loss of trade by reason of obstruction only:—Held, on a case stated, without pleadings, after action brought, for the opinion of the Court as to whether loss of trade caused by obstruction was damage in respect of which the plaintiff was entitled to compensation,—that on this finding of the jury, and on the authority of *Chamberlain* v. *the West-End of London and Crystal Palace Rail. Co.*, the plaintiff was so entitled, and that he was also entitled to the costs of the inquiry before the sheriff's jury. *Senior* v. *the Metropolitan Rail. Co.*, 32 Law J. Rep. (N.S.) Exch. 225; 2 Hurls. & C. 258.

Per *Bramwell, B.* and *Wilde, B.*, in assessing compensation to the parties whose premises may be injuriously affected by works done under the authority of parliament by a railway company, the company are not entitled to set off any benefit accruing to such parties, or to the neighbourhood, by the construction of the railway. Ibid.

The plaintiff, who was the lessee and occupier of a house in which he carried on the business of a baker, suffered loss of trade in such business in con-

sequence of the traffic past his house having been diminished by a railway company stopping up a public passage in the execution of the works authorized by their act of parliament, and substituting for it a less convenient communication by a tunnel, situate 100 yards south of the street in which was the plaintiff's house, instead of being in a direct line with such street as the former passage was:—Held, on the authority of *Senior* v. *the Metropolitan Rail. Co.* and *Chamberlain* v. *the West-End and Crystal Palace Rail. Co.*, that the plaintiff was entitled under section 68. of the Lands Clauses Consolidation Act, 1845, to compensation in respect of such loss of trade. Held, also, that a notice in which the plaintiff described himself as "the occupier" of the said house where the business was carried on for the injury to which he so claimed compensation, sufficiently stated the nature of the plaintiff's interest in such house within the meaning of the said 68th section. *Cameron* v. *the Charing Cross Rail. Co.*, 33 Law J. Rep. (N.S.) C.P. 313; 16 Com. B. Rep. N.S. 430—reversed in Ex. Ch. 19 Com. B. Rep. N.S. 764.

A railway company took some land of L under their act, and proposed to make their railway on it so close to a cotton-mill belonging to L, that by reason of the proximity of the railway and the danger of fire from the trains using the line the building was less suitable for a cotton-mill, could only be insured at an increased premium, and was rendered of less saleable value:—Held, that L was entitled to compensation in respect of the mill being so injuriously affected, and that the rule that compensation could only be given for that which unless sanctioned by the private statute would otherwise have been an actionable wrong, had no application to cases where the act complained of was done on claimant's own land, taken from him by the company by force of their statute. *In re the Stockport, Timperley and Altringham Rail. Co.*, 33 Law J. Rep. (N.S.) Q.B. 251.

If a railway company during the execution of their works under their special act place a bridge on a highway, up and down and over which bridge passengers must pass, instead of along the level highway, and so render the access to a public-house more difficult, and passengers are thereby deterred from going that way, and there is in consequence a loss of trade to the public-house, the tenant of the public-house cannot sustain a demand for compensation, under section 68. of the Lands Clauses Consolidation Act, 1845, on the ground that his land has been injuriously affected by the works; for no action would have lain against the company had they not been authorized by their special act; and even if an action might have been supported, still no compensation is claimable, since the damage, if any, is of a personal character, and not an injury to the land. So held in the Exchequer Chamber (reversing the judgment of the Court of Queen's Bench) by *Erle, C.J.*, *Pollock, C.B.*, *Channell, B.* and *Pigott, B.*; *dissentientibus Byles, J.* and *Keating, J.* *Ricket* v. *the Metropolitan Rail. Co.* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 257. (The judgment of the Ex. Ch. affirmed in the House of Lords by *Lords Chelmsford* and *Cranworth (dissentiente Lord Westbury)*, 36 Law J. Rep. (N.S.) Q.B. 320.)

*Senior* v. *the Metropolitan Rail. Co.* and *Cameron* v. *the Charing Cross Rail. Co.* overruled. Ibid.

The Temple Pier, erected under a licence from the Conservators of the Thames, determinable by seven days' notice, was purchased and managed by the T P Company. The Metropolitan Board of Works, under the provisions of the Thames Embankment Act, 1862 (which incorporates the Lands Clauses Consolidation Act, 1845, with the additional provision that the word "lands" shall include easements and interests in land, and which gives express power to alter and divert piers), altered and diverted the pier temporarily, to enable them to prosecute the embankment works, yet not so as to interrupt the use thereof; and proposed eventually to build, as nearly as might be at the same spot, a new pier in the place of the old one. The conservators refused to grant any licence to the T P Company with respect to the proposed new pier:—Held, that the Metropolitan Board were not taking or permanently using any land or easement belonging to the T P Company, and consequently were not bound to comply with the terms of the 84th section of the Lands Clauses Consolidation Act before dealing with the pier in the manner mentioned. *The Temple Pier Co. (Lim.)* v. *the Metropolitan Board of Works*, 34 Law J. Rep. (N.S.) Chanc. 262.

*Semble*—The 68th section of the Lands Clauses Act does not apply to cases where a company have under a mistake wrongfully taken possession of the land. *Perks* v. *the Wycombe Rail. Co.*, 3 Giff. 663.

The Thames Embankment Act, 1862, incorporates the Lands Clauses Consolidation Act, 1845, with the additional provision that the word "lands" shall include easements and interests in land. M, the owner of a wharf on the Thames, had a right of free access from the river, and also the right of loading and unloading barges at his wharf. There was no campshed or hard, but at low water the barges rested on the mud of the foreshore. The Metropolitan Board of Works were proceeding, under the Thames Embankment Act, to fill up the river in front of M's wharf. Thereupon M filed a bill to restrain them from doing so without first making a deposit and entering into a bond under the Lands Clauses Act, section 85:—Held, that the Metropolitan Board of Works were not taking and using for the purposes of the undertaking any easement or interest in lands belonging to the plaintiff, but were only injuriously affecting his rights, and, therefore, could not be restrained from proceeding with their works, till they had complied with the provisions of section 84. of the Lands Clauses Consolidation Act. *Macey* v. *the Metropolitan Board of Works*, 33 Law J. Rep. (N.S.) Chanc. 377.

Whether the machinery for ascertaining compensation prescribed by the Lands Clauses Act, or that prescribed by the Metropolitan Local Management Act, 18 & 19 Vict. c. 120. s. 225, is primarily applicable under the Thames Embankment Act, 1862—*quære*. Ibid.

(3) *Injury to Right of Shooting Game.*

A party who has a right of shooting over land by an agreement not under seal with the owner, has not such an interest as to entitle him to compensation from a railway company under section 68. of the Lands Clauses Consolidation Act, 1845, in

respect of the shooting being diminished in value by the company constructing a railway over part of such land. *Bird* v. *the Great Eastern Rail. Co.*, 34 Law J. Rep. (N.S.) C.P. 366; 19 Com. B. Rep. N.S. 268.

*(b) To Tenant from Year to Year.*

Where no part of the lands of a tenant from year to year are taken by a railway company, but his interest in the lands is injuriously affected by the railway works, he is entitled to claim compensation, and to have it determined under section 68. of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, before a jury or arbitrators; and his case does not come within section 121. of the act, which provides for the assessment of the compensation being made before Justices only when some part of the lands is required by the company. *R.* v. *the Sheriff of Middlesex (in re Somers* v. *the Metropolitan Rail. Co.)*, 31 Law J. Rep. (N.S.) Q.B. 261.

If a railway company require possession to be delivered to them of a house (which they are entitled to take) in the occupation of a tenant from year to year, before the expiration of his tenancy, and call on Justices to determine the amount of compensation to be paid to him under section 121. of the statute 8 & 9 Vict. c. 18, the Justices need not put their decision into writing, but may give it verbally. *R.* v. *Combe*, 32 Law J. Rep. (N.S.) M.C. 67.

To a declaration framed on the 68th section of the Lands Clauses Consolidation Act, 1845,—alleging that the plaintiff, being possessed of a house, the defendants, a railway company, having taken the same and injuriously affected it by the execution of their works, and not having made any satisfaction under the aforesaid act, their special or any other act, and the plaintiff's claim exceeding 50*l.* he had given notice to the defendants to have the same determined by a jury, and of the nature of his interest in the said house; that the defendants, not having entered into any written agreement with the plaintiff, and not having summoned a jury within the twenty-one days required by the act, had become liable to the plaintiff for the whole amount of his claim—the defendants pleaded, that at the time the notice was given and the house taken, the plaintiff had no greater interest therein than as a tenant from year to year; to which the plaintiff replied, that the plaintiff had not, before the giving the said notice, been required to give up possession of the said house, and that the defendants, without the plaintiff's consent, had entered upon and taken the house without notice to him:—Held, on demurrer to the replication, that the plea was good, and that the plaintiff should have proceeded under the 121st, and not under the 68th section, as decided in *R.* v. *the Manchester, Sheffield and Lincolnshire Rail. Co. Knapp* v. *the London, Chatham and Dover Rail. Co.*. 32 Law J. Rep. (N.S.) Exch. 236; 2 Hurls. & C. 212.

To a count for trespass to the same house, the defendants pleaded—that the said house was delineated in the plans and described in the books of reference deposited as required by their act, and that it was necessary to take and use the said house for the purposes of their act, and that they entered and took possession of the said house with the consent of the owners and occupiers thereof, and after such entry and possession taken the plaintiff took possession of the said house and occupied the same, and the defendants, because it was necessary to the construction of their works authorized by that act, entered the said house, the plaintiff then being therein, and pulled down the same, &c.:—Held, on demurrer, that the plea was good; and that the consent could not be revoked, as decided in *Doe* d. *Hudson* v. *the Leeds and Bradford Rail. Co.* Ibid.

To a count alleging that the plaintiff was entitled to support for the same house from an adjoining house, and complaining that the defendants wrongfully deprived the plaintiff of such support, to wit, by negligently and improperly pulling down the same without taking due care to secure the plaintiff's house against the consequences of such pulling down—the defendants pleaded (except as to so much of the count as charged them with having negligently and improperly pulled down the adjoining house), that the same was delineated in the plans and described in the books of reference deposited as required by their act, and that it was necessary for the purposes of that act to enter upon and pull down the same:—Held, on demurrer, that the plea was good; that the portion of the count to which it was pleaded stated a good cause of action. Ibid.

By an agreement for a tenancy from year to year determinable upon six months' notice, it was agreed that in case the tenants should erect any buildings on the demised premises, they were to have the privilege of removing the same at any time during their occupation; or otherwise, if they were required to give up possession before the expiration of twenty years, they were to be allowed one-twentieth part of the amount expended on such buildings for each remaining year of the unexpired term of twenty years. The premises were required by a public company under a local act of parliament, in which was incorporated the Lands Clauses Consolidation Act, 1845, and notice to quit was served upon the tenants. The buildings were not removed by the tenants, and after the expiration of the notice the company took forcible possession of the premises without having given the tenants notice to treat for their interest therein, or deposited the value of such interest as required by the 84th and 85th sections of the act. Upon a bill filed by the tenants to restrain the company from taking or keeping possession of the premises until they should have properly entitled themselves thereto,—Held, affirming the decision of one of the Vice Chancellors, that the tenants had a sufficient interest in the premises after the expiration of the notice to entitle them to relief. *Rogers* v. *the Dock Company at Kingston-upon-Hull*, 34 Law J. Rep. (N.S.) Chanc. 165.

*(c) Powers of Jury and Arbitrator.*

(1) *Jurisdiction generally.*

On an inquisition under the 68th section of the Lands Clauses Consolidation Act, the only question that can be inquired into is the amount of compensation for the damage actually done, and there is no jurisdiction to inquire into the legal rights of the claimant. *R.* v. *the Metropolitan Rail. Co.*, 32 Law J. Rep. (N.S.) Q.B. 367.

Therefore, where a man claimed damages in respect of his premises having been injuriously affected from the execution of the works of a railway company by the removal of the adjacent soil: and, in answer

to questions put to them, the jury found that if there had been no building the ground would not have sunk, upon which the presiding officer directed them, as matter of law (the building being a new one), that the claimant had not sustained any legal damage: and the jury accordingly found, under his direction, that the claimant's property had not been injuriously affected; the Court quashed the inquisition. Ibid.

Neither a jury nor an arbitrator has, under the Lands Clauses Consolidation Act, jurisdiction to determine whether a claimant is entitled to the interest which he claims in land taken by the company. Their function is only to assess the value of the interest claimed. *Brandon* v. *Brandon*, 34 Law J. Rep. (N.S.) Chanc. 333; 2 Dr. & S. 305.

Under the Lands Clauses Act, a company taking land which is in lease must deal separately with the lessee and the reversioner. Ibid.

As respects leasehold interests the function of a compensation jury summoned under the Lands Clauses Consolidation Act extends only to ascertaining the value of the leasehold interest claimed by the landowner, and if too large an interest be claimed, the Court itself will, after the compensation-money has been paid in by the company, direct a proper apportionment and order the excess in the amount paid into court to be returned to the company. *Ex parte Cooper, in re the North London Rail. Co.*, 34 Law J. Rep. (N.S.) Chanc. 373; 2 Dr. & S. 312.

A railway company requiring certain premises in the occupation of A B, gave him notice to treat. A B claimed compensation in respect of two leases, one for 21 years and the other for 80 years, and for loss of trade. A jury awarded 1,500*l.* for the leases and 700*l.* for loss of trade, which sums were paid into court by the company to the credit of *ex parte* the company, the account of A B. The leases were in fact invalid, in consequence of their having been granted by the executors instead of the heir of a last surviving trustee:—Held, that A B was entitled to so much of the 1,500*l.* as represented the value of certain improvements effected by him on the faith of the leases being valid (the amount to be ascertained by an inquiry in chambers), and that the residue of the money paid in must be returned to the railway company. Ibid.

Held also that, A B having served the persons who were interested in contending under the will that the leases were invalid, the company would not be ordered to pay the costs of their appearance. Ibid.

A written agreement void at law, but equivalent in equity to a lease, is an interest greater than a yearly tenancy within the meaning of the Lands Clauses Consolidation Act; and a tenant, having and producing such an agreement, is not liable to have the value of his interest assessed by two Justices under the 121st section of the act. *Sweetman* v. *the Metropolitan Rail. Co.*, 1 Hem. & M. 543.

A jury summoned under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 68, to assess the compensation due to a claimant for lands, &c., injuriously affected by the works of a public company, have no jurisdiction to determine whether the lands have been injuriously affected, their jurisdiction is limited to assessing the amount of compensation. The leaseholder of a house, with a forecourt abutting on a road, constructed a building on the forecourt, subsequent to which a railway company made a trench in the road for the purpose of constructing their railway, in consequence of which the building was deprived of its lateral support from the adjacent land. A claim having been made for compensation, a jury was summoned under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 68, who found that the sinking of the ground had been caused by the erection of the new building upon it, and that the lands of the claimant had not been injuriously affected by the works of the company:—Held, that the jury had exceeded their jurisdiction. *Horrocks* v. *the Metropolitan Rail. Co.*, 4 Best & S. 315.

(2) *Arbitrator's Award.*

If on a reference under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, the parties consent to enlarge the time for making the award beyond the statutable term of three months, the Court will not set the award aside, on the ground that it is made beyond the prescribed time and that the parties cannot by consent dispense with the provisions of the statute. *Palmer* v. *the Metropolitan Rail. Co.*, 31 Law J. Rep. (N.S.) Q.B. 259.

(*d*) *Assessment of Damages.*

(1) *Contingent Damage.*

A question of disputed compensation between a railway company and a landowner was referred, under the Lands Clauses Consolidation Act, to an umpire, to ascertain the amount of compensation to be paid, "for the interests in the lands and for any damage that might be sustained by reason of the execution of the works." By their private act the company were empowered, at their option, to abandon certain tramways which led to the claimant's ironworks, and the latter claimed compensation, which he alleged would result to him if the company should ever exercise their option and stop up the tramways, and the umpire awarded to him compensation for "damage sustained, and which might be sustained, by him by reason of the execution of the works of the railway or by the exercise by the company of the powers of their act." *Semble*—That, assuming the umpire to have given compensation for damage contingent on the tramways being stopped up, the award was not therefore bad. *Brogden* v. *the Llynvi Valley Rail. Co.*, 30 Law J. Rep. (N.S.) C.P. 61; 9 Com. B. Rep. N.S. 229.

(2) *When conclusive.*

The assessment of damages by the verdict of a jury under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), in respect of lands injuriously affected by public works, is not conclusive that the lands were damaged and injuriously affected; and therefore in an action upon such verdict and the judgment thereon to recover the damages awarded and costs, the defendants are not estopped from pleading that the lands and the plaintiff's interest therein were not damaged and injuriously affected. *Read* v. *the Victoria Station and Pimlico Rail. Co.*, 32 Law J. Rep. (N.S.) Exch. 167; 1 Hurls. & C. 826.

Where the damages claimed and awarded exceed 50*l.*, the defendants are estopped from denying that

the plaintiff was entitled to compensation to an amount exceeding 50*l.* Ibid.

*(e) Notice of Claim; Nature of Interest.*

The 68th section of the Lands Clauses Consolidation Act enacts, that it shall be lawful for any person entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which no satisfaction shall have been made, to give notice in writing to the promoters of his desire to have the question of compensation decided by arbitration, "stating in such notice the nature of his interest in the lands in respect of which he claims compensation, and the amount he claims"; and if he desires a jury, then it shall be lawful for him to give notice thereof in writing, "stating such particulars as aforesaid":—Held, that where lands have been taken, in order to bring himself within this clause a claimant must give, in his notice for a jury, such reasonable information as to his interest as will enable the promoters to judge whether they will pay the whole claim, or what amount they ought to offer; and where the claimant is occupier under a lease for years, it is not sufficient to state in the notice that he "holds under a lease." *Healey* v. *the Thames Valley Rail. Co.*, 34 Law J. Rep. (N.S.) Q.B. 52; 5 Best & S. 769.

*Cameron* v. *the Charing Cross Rail. Co.* commented upon. Ibid.

*(f) Offer of, and Costs.*

An offer of compensation in respect of lands injuriously affected by the execution of works coming within the Lands Clauses Consolidation Act, 1845, may be made at any time before the notice of the time and place of inquiry is given to the person claiming compensation under s. 68, such notice being given as required by s. 46. not less than ten days before the inquiry is to take place. *Hayward* v. *the Metropolitan Rail. Co.*, 33 Law J. Rep. (N.S.) Q.B. 73; 4 Best & S. 787.

S. 51, which provides for the costs of inquiries before a jury, applies to inquiries taken under s. 68. as to lands injuriously affected. Ibid.

S. 38, which provides for giving notice of the summoning of the jury, does not apply to inquiries taken under s. 68, as to lands injuriously affected. Ibid.

The promoters of the undertaking may make fresh offers of compensation so long as they make them before giving the requisite notice of the time and place of inquiry. Ibid.

Where the claimant, under s. 68, claims one sum as compensation for premises having been injuriously affected, and another in respect of loss of business, it is not necessary in the offer to mention one lump sum, but the promoters may offer one sum as compensation in respect of the premises having been injuriously affected, and another as compensation in respect of loss of business, and if the jury give the same sum in the aggregate as the sum offered, although they reverse the position of the two sums, the claimant cannot get the costs of the inquiry. Ibid.

If an inquiry into the compensation due to a claimant for land injuriously affected by a railway company take place before a jury, pursuant to the 8 & 9 Vict. c. 18. s. 68, and the costs are settled by one of the Masters of the Queen's Bench under s. 52, the decision of the Master, if subject to be reviewed at all, is only subject to the review of that Court; and the magistrate, upon an application for a distress-warrant, to levy the costs under s. 53, is bound to consider the decision of the Master as final. *The Metropolitan Rail. Co.* v. *Turnham*, 32 Law J. Rep. (N.S.) M.C. 259; 14 Com. B. Rep. N.S. 212.

*Quære*—Whether the decision of the Master can be reviewed by the Court. *Semble*—that it can. Ibid.

By s. 46, in case of any such inquiry, the promoters are to give to the claimant ten days' notice of the time and place of holding the inquiry. *Semble*—That in order to destroy the right of a claimant to costs under s. 51. by an offer "previously made," the offer must be made not later than the time of giving this notice. Ibid.

(C) APPLICATION OF COMPENSATION MONEY.

*(a) Building.*

Under special circumstances an order was made by the Lords Justices for the application of money which had been paid into court by a railway company, under the Lands Clauses Consolidation Act, 1845, s. 69, as the purchase-money of one part of certain trust freehold premises, in the erection of cottages on waste land forming another part of the trust estate. *In re Dummer's Will*, 34 Law J. Rep. (N.S.) Chanc. 496; 2 De Gex, J. & S. 515.

*(b) Payment to Trustees.*

Where a railway company took certain real property vested in trustees for a married woman and her children, and paid the money into court, the Court declined, under the 69th and 78th sections of the Lands Clauses Consolidation Act, to direct the fund to be paid to the trustees. *In re Horwood's Estate*, 3 Giff. 218.

*(c) Costs of Petition for Investment or Payment.*

A testator devised lands to trustees upon trust for A for life, with remainder over, and also upon trust to sell. A railway company served the trustees with the usual notice to treat, and their claim was sent in, but before the value was assessed or any agreement come to, the company took possession. Being threatened with a suit, the sum specified in the notice was paid into court, and the parties subsequently agreed for that sum. The trustees then petitioned for re-investment of the sum paid in on other lands, and for the payment of the dividends to the tenant for life; and the parties to the suit were served with the petition, which also asked that the company might pay the costs of re-investment, of the petition, and of the wrongful taking possession:—Held, that the company must pay the costs of the petition and of the parties served, but not of wrongfully taking possession. *Haynes* v. *Barton; in re the Metropolitan Railway Act; in re the Lands Clauses Consolidation Act*, 30 Law J. Rep. (N.S.) Chanc. 804; 1 Dr. & S. 483.

A railway company took lands which stood limited to a tenant for life, with remainder, subject to a charge of 20,000*l.*, to four sisters as tenants in common in tail, and paid the purchase-money into court under the Lands Clauses Act. A petition was presented for payment out of court to the owner of the

charge, in part satisfaction thereof; and upon the petition, the tenants in common in tail, and other parties having charges, appeared separately:—Held, that the company were liable to pay the costs of all parties. *In re the London and North-Western Railway Company's Act*, 1846, *and the Rugby and Stamford Railway Act*, 1846; *in re the Settled Estates of Baroness Braye*, 32 Law J. Rep. (N.S.) Chanc. 432.

When money has been paid in by a company taking lands compulsorily, and part has been laid out in purchasing other lands *prima facie*, the balance ought to be laid out in one sum, but if laying out a portion of it is shewn to be not capricious but necessary for the benefit of the estate, the company must pay the costs of the petition. When the estate is in the hands of trustees and there is a suit, the trustees (unless they have the express direction of the Court to act without the concurrence of the parties to the suit) must serve them and the company must pay the costs of all the parties served. *In re Brandon's Estate*, 2 Dr. & S. 162.

When lands have been taken compulsorily, and the purchase-money paid into court under the Lands Clauses Act, and before payment out of court it becomes necessary to file a bill for the administration of the landowner's estate, of which the fund forms a part, such suit not being occasioned by adverse claims, the company must pay the costs of all the defendants who had been served with the petition for transfer of the fund to the credit of the cause. But, *semble*, that it was not necessary to serve any of them, the object of the petition not being to obtain the payment of any money out of court. *Eden* v. *Thompson*, 2 Hem. & M. 6.

Upon an application to deal with compensation-money for land forming the subject of an administration suit and taken by a railway company under the Lands Clauses Act, parties to the suit who have usually appeared by separate solicitors and counsel are entitled, notwithstanding they may be numerous, to appear separately at the expense of the company. *Brandon* v. *Brandon*, 34 Law J. Rep. (N.S.) Chanc. 333.

Where two contracts had been entered into for the investment in land of the purchase-money of other land purchased by a railway company, and each of the proposed purchases, as well as the titles in relation thereto respectively, had been approved by the Master, but in consequence of difficulties in relation to each of the purchases, and the expense which their prosecution would have occasioned, they were rescinded,—the Court ordered the company to pay the costs of each of the abortive attempts to purchase. *In re the North Staffordshire Railway Company's Act*, 1846, *and Lands Clauses Consolidation Act; in re the Trusts of the Will of John Vaudrey*, 30 Law J. Rep. (N.S.) Chanc. 885; 3 Giff. 224.

Where a re-investment of purchase-moneys paid into court by two railway companies is sought, the costs of the re-investment are to be borne by the two companies in equal shares, and not in proportion to the amount paid in by each company; and this rule will not be departed from except in cases of extreme hardship. *In re Byron's Estates*, 32 Law J. Rep. (N.S.) Chanc. 584; 1 De Gex, J. & S. 358. *In re Merton College*, 1 De Gex, J. & S. 361; 33 Beav. 257.

According to the rule of the Court, as now settled, the costs of a joint re-investment of purchase-moneys for lands taken by different companies must be borne by the companies equally, without reference to the amounts of the purchase-moneys; but the Court will apportion the *ad valorem* duty on the conveyance according to the amounts contributed by each company to the consideration-money. *In re the Maryport, &c., Railway Act, and Lord Lonsdale's Settled Estates*, 32 Law J. Rep. (N.S.) Chanc. 811; 32 Beav. 397.

Where three companies took lands, and two of them subsequently became amalgamated with another company, the costs of a joint re-investment were ordered to be borne, as to two-thirds, by the company which represented the two amalgamated companies. Ibid.

Lands were taken by three separate companies from the same owner. After which, one of the companies leased its line for 999 years:—Held, that each company must bear one-third of the costs of the re-investment, with a proportionate part of the *ad valorem* stamp. *In re the Carlisle and Silloth Rail. Co.*, 33 Beav. 253.

Under the 69th section of the Lands Clauses Consolidation Act the Court may order the purchase-money of lands to be invested in building, and, as a necessary consequence, the costs of the application must be paid by the company. *Ex parte the Incumbent of Whitfield*, 30 Law J. Rep. (N.S.) Chanc. 816; 1 Jo. & H. 610.

Where settled lands had been taken by a railway company for the purpose of their undertaking, and the purchase-money paid into court, the Court, upon an application to invest that sum, together with a sum provided by the tenant for life, ordered that the costs of the company should not be increased, by reason of the price given for the purchased land being greater than that paid into court. *In re Loveband's Settled Estates*, 30 Law J. Rep. (N.S.) Chanc. 94.

A railway company having taken land which was the subject of a suit, and paid the money into court, the parties obtained an order for re-investing a large portion of the money in land. They then applied by petition for a small portion of the remaining fund to be invested, and they served all the parties to the suit:—Held, that, the Court considering this purchase to be for the benefit of the parties, and neither capricious nor unnecessary, the railway company must pay the costs. *Brandon* v. *Brandon; in re the South-Eastern Rail. Co. and the Lands Clauses Consolidation Act*, 32 Law J. Rep. (N.S.) Chanc. 20.

Compensation-money was invested in consols, and an application was afterwards made to re-invest it on a mortgage security:—Held, under the Lands Clauses Consolidation Act, that the company must pay the costs, but that in regard to future costs it must be considered as a permanent security. *In re Lomax*, 34 Beav. 294.

Where land was taken by a railway company under the compulsory powers of their own acts, with which the Lands Clauses Consolidation Act was incorporated:—Held, that under the 80th section of the latter act the company were bound to pay the costs of the petition for *interim* investment. *In re Shuttleworth's Estate Act*, 4 Giff. 87.

Under the Lands Clauses Consolidation Act a

company was held not liable to pay the costs of a mortgagee served with a petition which prayed payment to him out of court of the compensation-money. *In re Hatfield's Estate; in re the Leeds Waterworks Act*, 1852, 29 Beav. 370.

A railway company paid the purchase-money for certain land taken by them into court, under the Lands Clauses Act. The land was vested in trustees under a private act of parliament, with power of sale and re-investment, and the tenant for life petitioned for a re-investment under the private act, and made the trustees and the remainderman respondents:—Held, that as the money might have been dealt with under the Lands Clauses Act, without serving the trustees and remainderman, the company were not bound to pay the costs of bringing them before the Court in the matter of the private act. *In re the Bowes Estate*, 33 Law J. Rep. (N.S.) Chanc. 711.

Lands devised upon trust for sale and distribution of the proceeds among fifteen persons were compulsorily taken by a railway company, who paid the purchase-money into court. The surviving trustee and four of the *cestuis que trust* presented a petition for payment of the fund out of court and distribution among all the *cestuis que trust*, making those who were not co-petitioners respondents. The interests of all the *cestuis que trust* were in a certain sense the same. Some of the original co-petitioners were subsequently made respondents. The respondents appeared by four separate counsel:—Held, that the company must pay the costs of the petitioners and of the respondents, other than those of a respondent who had originally been a co-petitioner, and for the removal of whose name as a co-petitioner no cause was suggested. *In re Long's Trust*, 30 Law J. Rep. (N.S.) Chanc. 620.

The Commissioners of Woods and Forests took possession of certain property under two special acts of parliament, and paid the purchase-money into court. By the first of these special acts, passed before the Lands Clauses Act, it was enacted that the Commissioners should be liable to the costs of re-investment of the purchase-money in other lands. By the second special act, passed subsequently to the Lands Clauses Act, the powers and provisions of the former special act were extended to this. Upon a petition for payment of the money out of court to the parties interested, it was held (overruling the decision of one of the Vice Chancellors), that the Commissioners were not liable to pay the costs of the petition, although such costs would have been payable under the Lands Clauses Act. *In re Cherry's Settled Estate*, 31 Law J. Rep. (N.S.) Chanc. 38, 351.

The provisions of the Lands Clauses Act with respect to costs of sales and conveyances of lands taken for an undertaking, held to be applicable to sales and conveyances under an act of later date, which authorized the taking of lands, but made no provision for such costs, notwithstanding that the later act in no way referred to the Lands Clauses Act. *Ex parte the Vicar and Churchwardens of St. Sepulchre's, in re the Westminster Bridge Act*, 1859, 33 Law J. Rep. (N.S.) Chanc. 372.

An act of parliament (passed subsequently to, but not mentioning or referring to the Lands Clauses Consolidation Act, 1845) for enabling the Commissioners of Her Majesty's Woods to purchase lands for the purpose of public works, after directing that the purchase-money of lands belonging to persons under disability, when paid into court as therein provided, should be applied in the re-purchase of other lands to be settled to the same uses, and in the mean time might be applied in temporary investments in the funds, proceeded to enact that where, by reason of disability, &c., purchase-money should have been so paid into court, to be applied in the purchase of other lands to be settled to the same uses, it should be lawful for the Court to order the expenses of "all purchases from time to time to be made in pursuance of the act," or so much of such expenses as the Court should deem reasonable, to be paid by the said Commissioners. One of the Vice Chancellors held, upon the construction of this enactment, that the words "all purchases, &c." applied not merely to purchases made with moneys paid into court, but to purchases made by the Commissioners of lands taken by them; and, accordingly, in assumed exercise of the jurisdiction conferred by that enactment, directed payment by the Commissioners of the expenses of an original purchase of lands taken by them; but upon appeal to the Lord Chancellor, this construction was disapproved of:—Held, however, affirming the decision, that inasmuch as the special act contained no provision respecting expenses of original purchases, the provisions of the Lands Clauses Consolidation Act, 1845, with respect to such purchases, must be taken to be incorporated in it, and that the Court had power under that act to order such expenses to be paid. Ibid.

*In re Cherry's Estate*, 31 Law J. Rep. (N.S.) Chanc. 351, distinguished. Ibid.

A railway company having taken lands, and paid the money into court, the dividends were received by a tenant for life, and upon her death, her husband re-settled the property, and presented a petition for payment of the dividends to himself:—Held, that the company was not liable to pay the costs of the petition. *In re Pick's Settlement*, 31 Law J. Rep. (N.S.) Chanc. 495.

The costs of mortgagees must be paid by a railway company taking a part of settled estates when the parties beneficially interested apply for the investment of the purchase-money. *Ex parte Brook's Will, in re the Cheshire Midland Rail. Co.*, 31 Law J. Rep. (N.S.) Chanc. 456; 30 Beav. 233.

If a corporation pays money into court under the Lands Clauses Consolidation Act as compensation, they are not liable for the costs incurred by the service of the petition upon a mortgagee, asking for payment of the money to him in respect of his mortgage. Such costs must be paid by the owner. *In re Hadfield*, 30 Law J. Rep. (N.S.) Chanc. 278; 29 Beav. 370; see also *In re Hatfield*, 32 Beav. 252.

### (D) Superfluous Lands.

By the 216th and 217th sections of a local act for making a railway (containing similar provisions with those in the 127th section of the Lands Clauses Consolidation Act), lands acquired by the company under the provisions of the act, but which would not be required for the purposes thereof, were to be sold within ten years after the passing of the act, and if they were not so sold, they were to vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same:—Held, that

this applied to all land acquired under the provisions of the act, for the purpose of making the railway, and not used for that purpose, whether the lands were actually in the possession of the company or in the occupation of their tenants. *Moody* v. *Corbett*, 34 Law J. Rep. (N.S.) Q.B. 166; 5 Best & S. 859.

In the year 1861 the plaintiff brought an action to recover the possession of lands which, under the act, would become vested in him as the owner of adjoining land. In 1863 the company, in promoting another private act, got a clause inserted, to the effect that the respective periods limited for the sale of superfluous lands were to be extended for five years from the passing of the act. The vested interest of the plaintiff, if he had any at all, had vested in him in the year 1854:—Held, that the clause so inserted in the year 1863 had no operation upon the claim of the plaintiff. Ibid.

Held, also, that the proper way to apportion the superfluous lands among the owners of the land adjoining thereto, was by drawing a line from the point where the boundaries of two adjoining owners meet to the nearest point of the land actually used by the company. Ibid.

In order to prove that land was sold by a railway company, it is not sufficient to prove by an auctioneer that he received directions for the sale from one of the directors, and that he received the conditions of sale from the solicitor of the company by whom he had been employed in former sales for the company, and who attended the sale. Some evidence ought to be given to shew that the director or the solicitor were authorized by the company to offer the particular land for sale. *Moody* v. *the London Brighton and South Coast Rail. Co.*, 31 Law J. Rep. (N.S.) Q.B. 54; 1 Best & S. 290.

### (E) Conveyance.

The owner in fee simple of an estate (part of which was subject to a mortgage) entered into a contract to sell a portion to a railway company, but no provision was made in the contract as to costs. On the investigation of the title it appeared that only a very small portion of the mortgaged part was included. The mortgaged portion of the estate was vested in trustees of a person whose estate was in course of administration by the Court of Chancery. The railway company required the concurrence of those trustees in the conveyance. The vendor applied to one of the Vice Chancellors for the sanction of the Court to the trustees releasing the mortgaged part of the estate included in the contract of sale, and the same was ordered. On taxing the costs of the vendor, the Taxing-Master disallowed the costs of the above application to the Court; but the Vice Chancellor ordered the Master to review his taxation. On appeal, the Lords Justices held that the railway company were not liable to pay these costs. *Ex parte Phillips, in re the London and South-Western Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 102; 2 Jo. & H. 390.

The H Railway Company ageeed to pay for certain lands a sum equal to thirty-five years' purchase on the ground-rents. The lands required were held in lease with other lands, and an apportionment became necessary, in the course of which considerable expenses were incurred:—Held, that the costs of apportioning the ground-rents must be regarded as incurred in ascertaining the price, and not as incidental to the conveyance or deduction of title, and that the company was otherwise not liable to pay the same under s. 82. of the Lands Clauses Act. *In re the Hampstead Junction Rail. Co., ex parte Buck*, 33 Law J. Rep. (N.S.) Chanc. 79; 1 Hem. & M. 519.

Where a testator devised land to his widow Mary for life, remainder to his son and Elizabeth his wife in fee, who, during the life of the tenant for life, conveyed the land by a deed, not acknowledged, to a railway company,—Held, that the wife's interest was within the 7th section of the Lands Clauses Consolidation Act, and passed to the company. *Cooper* v. *Gostling*, 4 Giff. 449.

### (F) Costs.

A railway company served a notice to treat, and gave the usual bond, and made the deposit required by the 85th section. The landowner filed a bill to restrain the company from entering, but a motion for injunction stood over by arrangement, and no further steps were taken. Ultimately the company abandoned the purchase with the concurrence of the owner:—Held, on a petition for a re-transfer of the deposit to the company, and for the cancelling of the bond, that the owner was not entitled to have the costs of the suit out of the deposit. But, *semble*, he would have been so entitled if the purchase had been abandoned by reason of the inability of the company to complete. *Ex parte the Birmingham, Wolverhampton and Dudley Rail. Co.*, 1 Hem. & M. 772.

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## LARCENY.

[See Receiving Stolen Goods.]

[The Statute Law of England and Ireland relating to Larceny and other similar offences consolidated and amended by 24 & 25 Vict. c. 96.]



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### (A) Jurisdiction.

If a person be apprehended in a borough for a larceny committed on the high seas, he may be tried for that larceny before the Court of Quarter Sessions of the borough. *R.* v. *Peel*, 32 Law J. Rep. (N.S.) M.C. 65; 1 L. & C. 231.

### (B) What amounts to Larceny.

#### (*a*) *Cases of Finding and Lawful Possession.*

On an indictment for stealing a 10*l.* note, the jury found that the prosecutor had dropped the note in

the prisoner's shop; that the prisoner had found it there; that the prisoner, at the time he picked it up, did not know, nor had he reasonable means of knowing, who the owner was; that he afterwards acquired knowledge of who the owner was, and after that he converted the note to his own use; that the prisoner intended, when he picked up the note in the shop, to take it to his own use and deprive the owner of it, whoever that owner might be; that the prisoner believed, at the time he picked up the note, that the owner could be found:—Held, that the prisoner was guilty of larceny. *R.* v. *Moore*, 30 Law J. Rep. (N.S.) M.C. 77; 1 L. & C. 1.

A boy having found a cheque that had been lost, the prisoner by some pretence got it from him and retained it, in hopes of getting a reward, but the owner not offering a sufficiently large reward, he refused to deliver it either to the owner or the boy:—Held, that the prisoner was not guilty of larceny. *R.* v. *Gardner*, 32 Law J. Rep. (N.S.) M.C. 35; 1 L. & C. 243.

B in ploughing in a field turned up some solid gold ornaments, for which no owner could be discovered. Supposing the articles to be brass, B sold them to T as brass, telling T how he had found them. T and W afterwards, and together, sold them for gold for 500*l.*, and after they had received the price, made repeated false statements that they had sold the metal as brass for a few shillings. Before the sale W was present at a conversation which took place between B and T about the matter. An indictment against T and W, after alleging the finding of the treasure by B, charged T and W that they unlawfully, wilfully and knowingly concealed the finding of the said treasure from our Lady the Queen:—Held, that the indictment was good, although it did not state that they concealed it fraudulently. Held, further (*Wightman, J. dubitante* as to W), that there was evidence sufficient for a jury to support the conviction against both W and T. *R.* v. *Thomas*, 33 Law J. Rep. (N.S.) M.C. 22; 1 L. & C. 313.

A lady wishing to get a railway ticket, finding a crowd at the pay-place at the station, asked the prisoner, who was nearer in to the pay-place, to get a ticket for her, and handed him a sovereign to pay for it. The price of the ticket was 10*s.* He took it, intending to steal it, and instead of getting the ticket immediately ran away with the money:—Held, that he was guilty of larceny at common law, as the lady being present retained the dominion and possession, in point of law, after she had handed it to him for the intended purpose. *R.* v. *Thompson*, 32 Law J. Rep. (N.S.) M.C. 53; 1 L. & C. 225.

### (*b*) *Obtaining Goods by a Trick or Fraud.*

The prosecutor was the owner of a coal-yard at which coal and slack, or small coal, were sold, the price of slack being about half the price of best coal. By the custom of the yard, with which the prisoner was acquainted, the carts were weighed at a weighing-machine on entering the yard empty, and after being loaded were again taken to the machine and weighted, and the weight of the coal on the cart being thus ascertained, the price was paid before the carts were permitted to leave the yard. The prisoner, a coal higgler, went to the yard with his cart, and asked for a load of the best coal, which was loaded on his cart by the prosecutor's servant. After the cart was loaded, the prisoner placed slack over the coal so as to conceal it, and took the cart to the weighing-machine. Being asked by the man at the weighing-machine what he had in his cart, he replied "Slack." The cart was then weighted, and the contents having been paid for after the rate of slack, driven away by the prisoner:—Held, that if the prisoner went to the colliery with the pre-conceived plan of obtaining the coal by the above artifice, he might be convicted of stealing the coal. *R.* v. *Bramley*, 1 L. & C. 21.

### (*c*) *Servant carrying away Property with his Master's Wife.*

If a servant carries off his master's box by direction of his master's wife, and takes it away with her, and the servant and wife go off together with the property, with the intention of carrying on an adulterous intercourse, the servant is liable to be indicted for stealing the box. *R.* v. *Mutters*, 34 Law J. Rep. (N.S.) M.C. 54; 1 L. & C. 511.

## (C) BY A BAILEE.

A person who holds money for another, under an obligation to give back the amount deposited at a specified time, but who is not bound to return the specific coins which he has received, is not indictable as a bailee under 20 & 21 Vict. c. 54. s. 4. *R.* v. *Hassall*, 30 Law J. Rep. (N.S.) M.C. 175; 1 L. & C. 58.

The prosecutor, who had lodged at the house of the prisoner's husband, on going away to work at a distance, left his box with money in it, locked up, in the charge of the prisoner, who promised to take care of it, and he gave her the key. During his absence she opened the box and fraudulently took the money. Her husband never interfered with her in any arrangements she made with her lodgers, and he had nothing whatever to do with the transaction with the prosecutor, and was wholly innocent. On an indictment charging her with larceny as a bailee, under the statute 20 & 21 Vict. c. 154. s. 4, and, also, with a larceny at common law,—Held, that if she was a bailee, she might be convicted on the first count; if not a bailee, on the second count. *R.* v. *Robson*, 31 Law J. Rep. (N.S.) M.C. 22; 1 L. & C. 93.

*Semble*—per *Pollock, C.B.* and *Martin, B.*, that although she could not enter into a contract of bailment, being a married woman, she might, nevertheless, become a bailee within the meaning of the above-mentioned statute, by licence. Ibid.

The prosecutor asked the prisoner to bring him half a ton of coal from the railway coal station, and gave the prisoner 8*s.* 6*d.* to pay for it. The prisoner bought half a ton of coal at the station in his own name, paying 8*s.*, but having credit for the remaining 6*d.* He then put the coal into his own cart, and on his way abstracted a hundred-weight of it, and afterwards delivered the residue to the prosecutor as the coal which he had required. The prisoner was not in the prosecutor's employment:—Held, that the prisoner was guilty of larceny as a bailee, some of the Judges thinking that the coal being purchased with money given by the prosecutor for that express purpose, the property in it vested in the prosecutor on the purchase; others holding that to make the prisoner a bailee there must be evidence of a specific appropriation of the

coal to the prosecutor; and all the Court agreed, that there was evidence on the facts of such an appropriation. *R.* v. *Bunkall*, 33 Law J. Rep. (N.S.) M.C. 75; 1 L. & C. 371.

(D) Unlawfully killing Pigeons.

By the 24 & 25 Vict. c. 96. s. 23, "whosoever shall unlawfully and wilfully kill, wound or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall on conviction," &c. "forfeit and pay, over and above the value of the bird, any sum not exceeding 2*l*." Certain pigeons kept by the respondent were in the habit of feeding upon the land of the appellant, who complained of the damage which resulted from their feeding there, and gave notice to the respondent that, if they were not prevented from doing so, he would be obliged to shoot or otherwise destroy them. He subsequently found them there and shot one of them: —Held that, under the circumstances, the appellant could not be said to have "unlawfully" killed the pigeon within the meaning of the 23rd section. *Taylor* v. *Newman*, 32 Law J. Rep. (N.S.) M.C. 189; 4 Best & S. 89.

(E) By Servants or Clerks; Letter Carrier.

It was the duty of a postman, on returning from his round, to bring back to the post-office any letters which he had failed to deliver. A letter with coin in it having, on one occasion, been given to him with other letters to deliver, he detained the money letter with the intention of stealing it. On his return from his round, he brought back to the office the pouch containing some letters which he had been unable to deliver, but said nothing about the money letter. Shortly afterwards, it having been ascertained that the money letter had not been delivered, inquiry was made of the postman, and he produced it unopened from his trousers pocket:—Held, that the postman was guilty of stealing the letter. *R.* v. *Poynton*, 32 Law J. Rep. (N.S.) M.C. 29; 1 L. & C. 247.

(F) Indictment and Evidence.

(*a*) *Ownership of Property.*

H was sole manager of the business and responsible for all moneys coming into his possession of an Industrial Society or partnership, in which he was a partner. He was likewise in possession of the shop in which the business was carried on. The prisoner also was a partner entitled to share in the gains, and liable to the losses of the society. On one occasion, when the prisoner was assisting in the shop, he fraudulently abstracted some sovereigns from the till:—Held, that the prisoner might be convicted of stealing the money on an indictment laying the property in H alone. *R.* v. *Webster*, 31 Law J. Rep. (N.S.) M.C. 17; 1 L. & C. 77.

B, a servant of a co-operative society, duly enrolled, but without trustees, sold goods at a shop of the society, and received payments, and was accountable for the money. The prisoner, a member of the society, and one of the committee of management, stole some money from the till in the shop:—Held, that he might be convicted on an indictment charging him with stealing the moneys of B. *R.* v. *Burgess*, 32 Law J. Rep. (N.S.) M.C. 185; 1 L. & C. 299.

The prisoner was convicted of stealing lead from the dwelling-house of W. Upon the trial, B proved that he managed the property for W, who resided at Patras; that he received the rent in W's absence, and let the house:—Held, sufficient evidence of W's ownership to support the conviction. The Court will not send back a case to be re-stated upon an objection which is beside the merits. *R.* v. *Brummitt*, 1 L. & C. 9.

(*b*) *Conviction as Accessory after the Fact on Indictment for Stealing from the Person.*

On an indictment charging a man with stealing from the person, he cannot be convicted of the offence of being an accessory after the fact to the felony. *R.* v. *Fallon*, 32 Law J. Rep. (N.S.) M.C. 66; 1 L. & C. 217.

## LEASE.

[See Covenant—Landlord and Tenant—Mine.]

[The Leases and Settled Estates Act, 1856, amended by 27 & 28 Vict. c. 45.]



(A) Construction of Demise.

A shop was demised to H C, the landlord retaining the right of occupying the flat roof. Shortly afterwards the landlord demised an adjoining house to another person, with the right of walking and sitting on the roof of the shop. H C's lease having determined, the landlord demised the shop to the plaintiff by the description of "all that shop situate at, &c. as the same was late in the occupation of H C." The lease of the house having afterwards determined, the landlord re-let it to the defendant, with the right to occupy the roof of the shop, and to erect on it a photographic studio:—Held, by the *Lord Justice Turner* (affirming the decision of *Vice Chancellor Wood, dissentiente* the *Lord Justice Knight Bruce*), that the words "as the same was late in the occupation of H C" ought to be considered as inserted only for the purpose of identifying the property, and not of limiting the operation of the deed; that the lease to the plaintiff therefore gave him a right to the

occupation of the roof, and that the erection of a photographic studio by the defendant was an unlawful act. *Martyr* v. *Lawrence*, 2 De Gex, J. & S. 261.

A canal company, in consideration of the lessee's expenditure on certain ice-houses on the banks of the canal, granted a lease thereof with licence to take ice from a part of the canal:—Held, that the licence was not exclusive, but that it was a grant of sufficient ice to enable the lessee to fill the ice-houses; and that, so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licences which would interfere with it. *Newby* v. *Harrison*, 1 Jo. & H. 393.

A demise of the exclusive right of sporting over a farm does not justify the lessee in turning out on it game not bred thereon in the ordinary way. *Semble*, also, that in such a case the lessor is justified in keeping down the excess. *Birkbeck* v. *Paget*, 31 Beav. 403.

In 1795, P, being the lessee for a term of years, expiring in 1860, of a house and stables, No. 7, Great Cumberland Street, and also lessee for the same period, under the same lessors, of a house, No. 4, Hyde Park Place, assigned the lease of No. 7, Great Cumberland Street, reserving the stables (which adjoined the rear of No. 4, Hyde Park Place), and from that period the stables were occupied with the house in Hyde Park Place. In 1823, the defendant, who had acquired the interest of P in the last-mentioned house, and was in actual possession of the house and stables, obtained from the parties entitled to the reversion of both houses, a reversionary lease of No. 4, Hyde Park Place, for ninety-nine years. This lease described the house by metes and bounds and reference to a plan, the stables not being included in either the description or plan, but the following words, not included in the original lease, were added: "together with all outhouses, edifices, buildings, stables, yards, gardens, ways, watercourses, lights, areas, vaults, cellars, easements, profits and commodities whatsoever to the said premises hereby demised belonging or appertaining":—Held, that the stables did not pass under the general words, and that, therefore, on the expiration of the original lease, in 1860, of No. 7, Great Cumberland Street, the parties entitled to the reversion could maintain ejectment for the stables. *Maitland* v. *Mackinnon*, 32 Law J. Rep. (N.S.) Exch. 49; 1 Hurls. & C. 607.

S the owner in fee of two mills, in 1855 leased one to P, who used it as bleaching works, a drain partly covered and partly open carrying off the water, &c. used in the works into a stream from 300 to 400 yards distant, on which a little lower down the other mill was situate; this discharge of refuse took place about seven times a fortnight. In 1858, by arrangement between S, P, and the defendant, P surrendered his lease, and S granted a new lease to the defendant of the premises late in P's occupation; the defendant being described in the lease as "bleacher," and there being a clause in it that all buildings erected by the defendant for the purpose of bleaching should be the property of S at the end of the term. In 1859 the plaintiff purchased the fee in both mills. The defendant carried on the business of a bleacher, and used his premises as P had done, the premises, including the drain, remaining precisely as in P's time. The plaintiff occupied the other mill himself, and used it as a paper-mill, and brought an action against the defendant for fouling the stream by discharging the refuse into it:—Held, that the lease might be explained by the state of the premises and the mode in which they had been used at the time it was granted; and that by the lease, thus explained, there was an implied grant by S to the defendant of the right to use the drain and stream in the manner he had; and that consequently the plaintiff, who stood in S's place, could not maintain the action. *Hall* v. *Lund*, 32 Law J. Rep. (N.S.) Exch. 113; 1 Hurls. & C. 676.

To trespass for entering the plaintiff's land, described as land on each side of a certain slip, the defendant pleaded that before the plaintiff was possessed of the land, in which &c., a certain railway company were the owners in fee of the said land and slip, and that they demised the land in which &c., "excepting and reserving thereout the said slip, and the dues payable for the use thereof, and excepting and reserving to the said company, their assigns, officers, servants and workmen, free access to and from the said slip, for the purpose of using and working the same or otherwise," and that the said company granted their licence to the defendant to work and use such slip, and the plea justified the trespass as being committed in the exercise of such licence,—Held, a good defence, as the reservation in the demise enabled the company to use the slip by themselves or their licensees, and the word "assigns" was not to be construed as limited to persons taking an estate in the land. *Mitcalfe* v. *Westaway*, 34 Law J. Rep. (N.S.) C.P. 113; 17 Com. B. Rep. N.S. 658.

Declaration for breach of covenants contained in a farming lease dated the 24th of December, 1851, and made between the plaintiff of the first part, the defendant of the second part, and one Y of the third part, whereby the plaintiff and Y (so far only as they legally could or might, according only to their respectives estates and interests) demised to the defendant a farm for a term of fourteen years from the 25th of March, 1851. Plea, that at the time of the execution of the deed the plaintiff was possessed of the premises for the residue of a term of years in case the plaintiff should so long live, and the reversion of the premises after the expiration of the estate of the plaintiff then was vested in Y, and that the indenture was never executed by Y as his deed, and that there never was any demise by the plaintiff and Y to the defendant of the premises, and that there never was any consideration for the execution of the indenture or of the defendant's part of the same:—Held, on demurrer, that the plea was bad, as it was expressly stated in the lease that the plaintiff and Y demised so far only as they legally could or might, according only to their respective estates and interest, and that therefore the defendant had received the consideration for which he stipulated, viz., a lease for fourteen years, if the plaintiff should so long live. *How* v. *Greck*, 34 Law J. Rep. (N.S.) Exch. 4; 3 Hurls. & C. 391.

### (B) CONSTRUCTION OF AGREEMENT FOR.

An agreement, not under seal, between two persons, by which one agrees to let, and the other to take, certain premises for the term of seven years, and by which it is agreed that a good and sufficient lease of

the premises shall be prepared, may be good as an agreement; so that an action may lie upon it for not accepting the lease when prepared, although it would be void as a lease, in consequence of 8 & 9 Vict. c. 106. s. 3. *Bond* v. *Rosling*, 30 Law J. Rep. (N.S.) Q.B. 227; 1 Best & S. 371.

The plaintiff and the defendant entered into an agreement in writing, by which the plaintiff undertook to do certain repairs to a house and premises, and "to complete the whole work necessary by the 14th of June next," and the defendant, in consideration of these conditions being fulfilled, agreed to take the house for three years, the rent to begin from Midsummer next:—Held, first, that this was an agreement, and not a lease; secondly, that the plaintiff's engagement to complete the whole work necessary by the 14th of June was a condition precedent to the defendant's liability on his contract, and that upon the non-fulfilment of this engagement he might lawfully refuse to enter and occupy the house. *Tidey* v. *Mollett*, 33 Law J. Rep. (N.S.) C.P. 235; 16 Com. B. Rep. N.S. 298.

By a written agreement the defendants agreed to let and the plaintiff to take a mill and lands and machinery for the period of three years from Lady-day then next, at the rent of 120*l.* per annum, a lease for the same to be executed as soon as possible, subject to the permission of H, the landlord of the mill. The defendants also agreed to let and the plaintiffs to take the said mill and lands and machinery from the date of the agreement up to Lady-day then next, on the same terms and at the same rate of rent as mentioned above, the plaintiff to have the sole use of the said mill and land and machinery. The plaintiff further agreed to give up the mill and land and machinery at the end of the above-mentioned period of three years or at Lady-day then next if the lease could not, for any unforeseen reason, be entered into:—Held, that the instrument was not void as being a lease for more than three years, and that an action could be maintained against the defendants for not letting the mill or suffering the plaintiff to have possession, either for the term of three years from Lady-day or up to Lady-day; as even if the instrument amounted to a lease, and so was void in respect to the three years, still there would be a good breach in respect to the agreement to let until Lady-day. And, by *Bramwell, B.*, the agreement did not amount to a lease, but only to an agreement for a lease. *Rollason* v. *Leon*, 31 Law J. Rep. (N.S.) Exch. 96; 7 Hurls. & N. 73.

### (C) LEASE FOR LIVES.

A devise was made to trustees and their heirs, upon trust for an illegitimate person and his heirs. Upon the death of the *cestui que trust* intestate and without heirs,—Held, affirming the decision of the Master of the Rolls, that a freehold lease for lives passed to the Crown under an administration taken out by the Solicitor of the Treasury, and did not belong to the trustees. *Reynolds* v. *Wright*, 30 Law J. Rep. (N.S.) Chanc. 381.

### (D) RENEWABLE LEASE.

Lessees for lives of ecclesiastical property under a lease which it had been a long-continued practice to renew upon certain fixed terms on the dropping of each life, executed an underlease of a portion of the property for the same lives, with a covenant for perpetual renewal on certain fixed terms, as often as a new life should be added to the original lease. The property afterwards became vested in the Ecclesiastical Commissioners, who declined to renew the lease, but sold the reversion to the lessees in pursuance of the 14 & 15 Vict. c. 104. Upon a bill filed by the underlessee to establish his rights in respect of the reversion so purchased, it was held that the lessees were *quasi* trustees of the reversion so purchased for the underlessee, but the right of the latter was not to have a perpetual renewal, but to purchase the reversion upon the terms of paying a due proportion of the consideration given by the lessees, and of the expense of purchasing the fee; and, the lessees having offered before the filing of the bill to convey the reversion on fair and reasonable terms, the plaintiff was ordered to pay their costs. *Postlethwaite* v. *Lewthwaite*, 31 Law J. Rep. (N.S.) Chanc. 584; 2 Jo. & H. 237.

For the purpose of the Irish Tenantry Act, 19 & 20 Geo. 3. c. 30. a mortgagor in possession (without notice of the mortgage to the landlord) is the agent of the mortgagee to receive notice of a demand of the fines to be paid on the renewal of a renewable lease for lives. *Galbraith* v. *Cooper*, 8 H.L. Cas. 315.

The statute is addressed solely to Courts of equity, and was intended not only to protect assignees of leases against neglects of their assignors, but to enable the landlord to secure himself by his vigilance against the misconduct of his tenant. Ibid.

Where the tenant has assigned his whole interest by way of mortgage (of which no notice is given to the landlord), but remains in possession, a demand on him to renew is sufficient, and if payment of the fine is unreasonably neglected, neither the mortgagor nor mortgagee can come to equity for relief. Ibid.

A mortgagee of a lease is liable to all the covenants which run with the land, and, as a general rule will, under the provisions of the Tenantry Act, be bound by the acts of the mortgagor, whom he has suffered to remain in possession. Ibid.

The register, in such a case, is not notice to the landlord of the mortgage. A mortgagee is equally "an assign" within the statute, whether the mortgage is registered or not. Ibid.

Per *Lord Wensleydale.*—The demand ought not to be made, at the option of the landlord, on the tenant or his assign, but on him whom the landlord would, under existing facts, reasonably consider as the person entitled to ask for a renewal. Ibid.

The 5th section of the 12 & 13 Vict. c. 105. (I.) is exceptional, and applies to all cases where there is some peculiar and extraordinary value belonging to an estate, which under that act is converted from a leasehold for lives, renewable for ever, into a fee-farm tenure. *Donegall* v. *Layard*, 8 H.L. Cas. 460.

Such a conversion took place. The affidavit in support of the claim for extra compensation stated the opinion of the solicitor, that, "but for the passing of the act the majority of the tenants of the Donegall estate holding such renewable leaseholds would willingly have paid substantial sums of money as a consideration for fee-farm grants"; that since the passing of the act the tenants had not been willing to do so; but that some had agreed to pay increased

rents, and that in his opinion the difference was "an amount equal to two years' purchase upon the annual value of the premises":—Held, that this was not sufficient to constitute an exceptional case within the section. Ibid.

Where a lease, renewable for ever, had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants, and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed,—Held, that no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease and the sub-lease. *Archbold* v. *Scully*, 9 H.L. Cas. 360.

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under the 42nd section of 3 & 4 Will. 4. c. 27. the amount to be recovered is limited to six years. Ibid.

The 24th section of that statute only bars equitable rights so far as they would have been barred if they had been legal rights. Ibid.

It is not in the power of a tenant, by any act of his own, to alter the relation in which he stands to his landlord. Ibid.

A in 1699 granted to B a lease for lives, renewable for ever. This lease, by the death of B intestate, vested in his four daughters. The interest of three of them became, in 1778, vested in C, who got possession of the whole of the property; but upon D, who claimed one undivided part, filing a bill in Chancery against C, he, in 1779, agreed to accept, and D consented to grant him, a lease of that undivided fourth part for 999 years, at an annual rent of 40*l.* The lives in the original lease dropped in 1784, but all the parties went on for years acting upon its terms. Up to 1828 the rent on the lease of 1779 had been duly paid. D died, having first devised her interest in that lease to E. The representative of C then asserted a claim to the whole property, and refused to pay the rent of 40*l.*, and E did not take any steps to enforce its payment. In 1835, the representative of C obtained a renewal of the lease of 1699. In 1854, he became party to a proceeding in the Incumbered Estates Court, and from what occurred there, E became acquainted with facts which induced him, in 1856, to file a bill to have the grantee of the renewal lease declared a trustee for him as to one undivided fourth part of the estate comprised in that lease:—Held, that E was entitled in equity to this relief, notwithstanding the lapse of time and his own non-enforcement of payment of rent, but he was required to grant a renewal of the lease of the fourth part for the residue of the term of 999 years. Ibid.

Considering the delay of E in enforcing his rights, the decree was ordered to be made without costs. Ibid.

Septennial fines only become payable under the 19 & 20 Geo. 3. c. 30. (the Irish Tenantry Act), where the non-payment of a fine on the dropping of a life in a renewable lease is the fault of the tenant. The right to such septennial fines is given by the act as a consequence of the tenant's neglect. *Aldworth* v. *Allen*, 11 H.L. Cas. 549.

Where such renewal fine, and the rent, &c., have been properly calculated, and the calculation transmitted to the landlord or his agent, and admitted to be correct, and an offer to pay the amount has been made, accompanied by a demand for a renewal, and the grant of the renewal has been postponed for the landlord's convenience, he cannot afterwards by imposing conditions and requiring proof of the tenant's title open up the whole matter, and make the delay, which thenceforward occurs, the ground for demanding septennial fines, and rely on the refusal to pay them as a cause of forfeiture. Ibid.

A granted a lease for three lives renewable for ever. In 1844 two of the lives having dropped, the tenant sent in a demand for renewal, together with the calculation of rent, fines on the dropped lives, &c., and an offer to pay what was due. The account was acknowledged to be correct, but the renewal was put off on account of the landlord's absence from Ireland. In 1845 and 1846 a correspondence occurred between the agents, and on the part of the landlord the tenant was required, by a given day, to prove strictly his title to renewal, and also to pay all the renewal and septennial fines, calculated up to that time. These last were demanded, under the statute, as a consequence of the non-payment of the ordinary renewal fines when originally demanded. These conditions were not complied with, and some years afterwards a bill was filed to compel a renewal:—Held, that the tenant was entitled to a decree for renewal without paying the statutory septennial fines. Ibid.

## (E) RENT.

In a mining lease, besides an annual surface rent, certain sums, payable half-yearly, described as "further consideration money," and depending upon the rate of working the mines, were reserved to the lessor, his heirs and assigns:—Held, on the death of the lessor intestate, that these sums were, not purchase-money passing to the personal representative of the lessor, but in the nature of rent, and therefore passed to the heir as incident to the reversion. *Barrs* v. *Lea*, 33 Law J. Rep. (N.S.) Chanc. 437.

A lessor, in filling up the draft of a lease, inserted a less sum for the rent than was agreed to be paid. The lease and counterpart were engrossed and executed. Upon a bill filed by the lessor to rectify the mistake,—Held, that the defendant was entitled to retain or reject the lease; that if retained, the lease must be reformed by the insertion of the higher rent; that if rejected the higher rent must be paid for the use and occupation, with a set-off for repairs, but not for the expenses of establishing the defendant in business there. *Garrard* v. *Frankel*, 31 Law J. Rep. (N.S.) Chanc. 604; 30 Beav. 445.

Held, also, that if the lease was given up, the plaintiff must repay the money which had been advanced on its security, or that the house must stand as security to the mortgagee for the amount, with costs; but that the plaintiff was entitled to repayment; and if the lease was rectified, that he had a right to retain it as security. Ibid.

By a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee:—Held, that though the covenant might be pleaded at law as a release *pro tanto* of the rent, this was only to avoid circuity of action, and the covenant was not for all purposes a release. Therefore, the lessee having specifically bequeathed

the premises subject to the rent:—Held, as between the executors and the specific legatees that the specific legatees took subject to the whole rent and that the benefit of the covenant for reduction of rent, went to the executors. *Ledger* v. *Stainton*, 2 Jo. & H. 687.

### (F) DEFECTIVE LEASE.

Where property of which a defective lease has been granted is subsequently sold, the purchaser takes the property subject to the burthen of any delay of which the vendor may have been guilty; and in reference to a defence founded on *laches*, the purchaser can stand in no better position than the vendor would have done, if he had never parted with the property. *Ernest* v. *Vivian*, 33 Law J. Rep. (N.S.) Chanc. 513.

A was tenant for life of estates, with an ill-defined power of leasing the minerals thereunder. In 1840 she granted a lease of the mines for a long term of years, and died the same year. B, the remainderman in tail to the property, was then an infant. He entered into possession and attained his majority in 1846, when he executed a disentailing deed. He then first discovered the existence of the lease granted by A, and protested against the validity of it, as not being authorized by the power, and as being obtained by fraud; and he refused to receive the rents and royalties reserved thereby. In 1852 he agreed to sell the whole estate to E, but with a stipulation that he should receive the rents and profits of the mines of the estate until August, 1856. In 1855 B and the representatives of E, who had died, conveyed the whole property to the plaintiff in this suit, who had throughout acted as B's agent. B died in 1856. In 1860 the plaintiff filed this bill, alleging that he had then first ascertained the nature of the lease of 1840, and the circumstances under which it was granted, and praying a declaration that it was void, or that it was obtained by fraud, and ought to be set aside, and an injunction; or in the alternative, if the Court should think the lease valid, then for an account and further relief:—Held, that on the ground of *laches* alone, the plaintiff was not entitled to a decree on the first part of his prayer, and the bill must be dismissed; but without prejudice to his filing a bill for an account, on the footing of the validity of the lease, or to his taking such proceedings at law as he might be advised. Ibid.

### (G) UNDER-LEASE.

P demised a house and shop to the agents of a company; the lease contained a covenant not to use any part of the premises for the purpose of sales by auction. The agents of the company sublet to S, who made no inquiry as to the terms of the original lease. S being about to hold sales by auction upon the premises, P filed a bill to restrain him from so doing:—Held, that S having neglected to inquire into the provisions of the original lease he did so at his own risk, and could not be treated as taking without notice. *Parker* v. *Whyte*, 32 Law J. Rep. (N.S.) Chanc. 520; 1 Hem. & M. 167.

### (H) COVENANTS.

#### (a) *Construction of.*

##### (1) *User of House.*

A lease of a house contained a covenant by the lessee to use the house as a private dwelling-house only, provided that if any of the adjoining houses of the lessor should be converted into a shop the lessee might convert the demised premises to a similar use. One of the adjoining houses of the lessor was afterwards let to a photographer, who exhibited photographs outside, and used the ground-floor room for the exhibition of photographs and the sale of albums, cases and frames, the door being kept open by day, but no alteration was made in the building. *Semble*—That "conversion into a shop" might be effected by a user of the house for the sale of goods as to be a conversion into a shop within the meaning of the proviso. *Wilkinson* v. *Rogers*, 2 De Gex, J. & S. 62.

##### (2) *Quiet Enjoyment.*

The plaintiff being in occupation of premises under a lease from J F, which would expire on the 4th of December, 1864, obtained from J F a reversionary lease for twenty-one years and twenty-one days, to commence from the said 4th of December, 1864, on payment of a premium. In November, 1863, J F died, and it turned out he had no power to grant this reversionary lease. F V, who was entitled to the premises on the death of J F, refused to ratify the said lease, and the plaintiff was obliged to accept a lease from F V, to commence on the 25th of December, 1864, for seven years only, at a greater rent. The plaintiff brought an action against the executor of J F on a covenant for quiet enjoyment contained in the void lease:—Held, first, that a plea that the plaintiff had never entered into possession of the premises under such lease was bad; secondly, that on a plea that F V did not claim the premises from the plaintiff or threaten to oust him from the possession thereof, the plaintiff was entitled to judgment; thirdly, that the plaintiff was not merely entitled to recover the premium and expenses of the void lease, but was entitled to recover the difference between the expenses of the void lease and the lease granted by F V, and also the difference between the respective values of such leases, but that in calculating such difference in value, the transaction was not to be considered in the nature of a compulsory sale, and that the expenses of counsel, &c. were not recoverable. *Lock* v. *Furze*, 34 Law J. Rep. (N.S.) C.P. 201; 19 Com. B. Rep. N.S. 96.

##### (3) *Repair.*

A lease contained a demise of three houses and a field to B for a term of ninety-nine years, who covenanted "well and sufficiently to repair, sustain and keep the said tenements or dwelling-houses, field or plot of ground and premises, and every part thereof, as well in houses, buildings, walls, hedges, ditches, fences and gates, as in all other needful and necessary reparations whatsoever, when and so often as occasion shall require during the said term, and at the end or other determination thereof the said premises, so well and sufficiently repaired, into the hands and possession of the said lessors peaceably to leave and yield up." B granted an underlease of the field to one C, who granted underleases to several persons who erected houses in the field:—Held, that the covenant to repair contained in the lease to B, did not extend to the houses erected during the term in the field. *Cornish* v. *Cleife*, 34 Law J. Rep. (N.S.) Exch. 19; 3 Hurls. & C. 446.

Although, in respect of rent, the personal liability of an executor of a lessee for years does not exceed the value of the demised premises, this qualification does not extend to a covenant for repairs. *Sleap* v. *Newman*, 12 Com. B. Rep. N.S. 116.

Plea by an executor that the demised premises had yielded no profit beyond what he had paid over to the lessor, that the premises came to him only as executor, and that he offered to surrender them before the breaches occurred, held bad on demurrer. Ibid.

(4) *Determination of Demise.*

A demise by deed for the term of three years "determinable on a six months' previous notice to quit by either lessor or lessee, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, and the tenancy cannot be determined sooner than by a six months' notice ending with the third year. *Jones* v. *Nixon*, 31 Law J. Rep. (N.S.) Exch. 505; 1 Hurls. & C. 48.

A lease for twenty-one years, expressed to be "determinable, nevertheless, in seven or fourteen years, if the said parties hereto shall so think fit," is determinable only by consent of *both* the parties, although it may have been their intention to give the option to either alone. *Fowell* v. *Franter*, 34 Law J. Rep. (N.S.) Exch. 6; *nom. Fowell* v. *Tranter*, 3 Hurls. & C. 458.

(5) *Farming Leases.*

On a covenant in a farming lease, that the lessee would not sell or carry away from the demised premises any hay, straw or manure which should be grown or produced thereon, without the consent of the lessor first had and obtained, under the increased rent of 10*l.* for every ton so sold or carried away, and so in proportion for any greater or less quantity, but that the lessee would eat and consume the hay and straw by his cattle; the breach alleged was that the lessee, without the consent of the lessor, did sell a large quantity of hay and straw grown and produced on the demised premises, to wit, &c.:—Held, that the covenant was one covenant, which gave the lessee the right to sell the hay, &c. on payment of the increased rent, and that therefore the breach was not well assigned. *Leigh* v. *Lillie*, 30 Law J. Rep. (N.S.) Exch. 25; 6 Hurls. & N. 165.

In a lease of a farm the clause—"the tenant to perform each year for the landlord at the rate of one day's team-work with two horses and one proper person for every 50*l.* of rent when required (except at hay and corn harvest), without being paid for the same,"—extends to other than agricultural work, such as hauling coals; but it does not oblige the tenant to find a cart, plough, or other vehicle or machine necessary for the performance of the work (*Mellor, J.* dissenting on the latter point). *The Duke of Marlborough* v. *Osborn*, 33 Law J. Rep. (N.S.) Q.B. 148; 4 Best & S. 67.

A covenant in a farming lease that the lessee "shall not, nor will, during the last year of the term sell or remove from the lands demised, any of the hay, straw, and fodder which shall arise and grow thereon," prohibits the lessee from removing any of the hay, &c., during the last year of the term, at whatever period of the term it may have grown or arisen. *Gale* v. *Bates*, 33 Law J. Rep. (N.S.) Exch. 235; 3 Hurls. & C. 84.

An agricultural lease contained a covenant on the part of the lessor, his heirs, &c., that he and they would "drain with proper drain-tiles, one rod apart, ten acres of the lands now in rye grass, at his and their costs, except the carriage of the said drain-pipes, which is to be borne and paid by the lessee; and will drain the remainder of the lands hereby demised, in manner aforesaid, on being paid a further yearly rent of 5*l.* for every 100*l.* so expended":—that the words "in manner aforesaid" referred only to the mode of performing the work, viz., placing the drain-tiles one rod apart; and consequently, that the tenant was not chargeable with the expense of carriage of the drain-pipes beyond the first ten acres. *Beer* v. *Santer*, 10 Com. B. Rep. N.S. 435.

(6) *Increased Rent if Property-Tax become payable.*

By a lease made in 1807, when the property-tax imposed by the 46 Geo. 3. c. 65, and which expired soon after the end of the war in 1815, was in existence, there was reserved a rent of 340*l.* per annum, "reducible by and upon the contingency hereafter in that behalf mentioned," free and clear from all rates, taxes, &c. whatsoever made or imposed, or to be made or imposed, upon the demised premises (the property and income tax always and alone excepted). In a subsequent part of the lease there was a proviso, that "if the said tax called the income or property tax shall become and be repealed, annihilated or suspended, and not paid or payable at any time or times during the term and continuance of the demise, then upon every such occasion and from time to time when, and for and during so long a time as the said tax shall be and remain repealed and not paid or payable as aforesaid, but no longer, the said yearly rent or sum of 340*l.* shall be and remain reduced unto the yearly rent or sum of 330*l.*":—Held, that the higher rent of 340*l.* became payable from the time the 5 & 6 Vict. c. 35. (the Property Tax Act now in force) came into operation, as the lease referred in its terms to any future property-tax, and as the proviso was not a provision for payment of the tax by the tenant in violation of section 73. of the 5 & 6 Vict. c. 35, which makes void any contract between a landlord and his tenant by which the latter is bound to pay the property-tax without deducting it from the rent. *Colbron* v. *Travers*, 31 Law J. Rep. (N.S.) C.P. 257; 12 Com. B. Rep. N.S. 181.

(b) *Relief in Equity in respect of.*

The circumstance that a lessor has a right of re-entry for breach of a covenant does not preclude him from coming to a Court of equity to restrain the commission of the breach. *Parker* v. *Whyte*, 32 Law J. Rep. (N.S.) Chanc. 520; 1 Hem. & M. 167.

By a lease a tenant entered into a covenant that he or a person to be approved by the landlord would reside on the property demised to him, and that he would not assign without licence; and it was provided that in the event of the bankruptcy of the tenant, the landlord should have a right to re-enter, and avoid the lease. The tenant, having taken possession of the property demised to him, became bankrupt, and the landlord received rent from his assignees, and accepted them as tenants. One of the

Vice Chancellors was of opinion, that the assignees came in by contract upon the terms of the lease, and that they were bound by the stipulations therein; and granted an injunction, upon an interlocutory application, restraining the assignees from assigning, underletting or otherwise disposing of or parting with the possession of the demised property without the consent in writing of the landlord. *Dyke* v. *Taylor*, 30 Law J. Rep. (N.S.) Chanc. 281; 2 Giff. 566; 3 De Gex, F. & J. 467.

There having been certain dealings between the assignees and one S for a letting of the farm, which, it was contended, was a breach of the injunction, a motion was made for the committal of the assignees for contempt; but the same Vice Chancellor, although he made no order on the motion to commit, directed that the assignees should pay the costs of the motion:—Held, on appeal, that the evidence of the transactions between the assignees and S was too doubtful to warrant the Court to order the assignees to pay the costs of the motion to commit; and that as to the injunction against assigning and underletting, it must be dissolved, the inconvenience from maintaining it erroneously being probably greater than that of erroneously dissolving it. Ibid.

### (c) *Relief against Breach of.*

Where a lessor brought ejectment for breach of covenant to repair within three months after notice, it appearing that out of twenty-two items twenty had been proceeded with, and fourteen completed, that the works had been partially delayed by weather, and that no further remonstrance had been made by the lessors, the Court restrained the action and directed an inquiry whether the covenants had been performed. *Bargent* v. *Thomson*, 4 Giff. 473.

On a bill by a tenant for relief who had allowed judgment in ejectment to go by default, the Court relieved against the judgment on payment by the plaintiff of the taxed costs at law, the arrears of rent, the amount due for repairs and insurance, and 50*l.* costs in equity, and ordered the defendant to account for the rent. *Bamford* v. *Creasy*, 3 Giff. 675.

## (I) FORFEITURE.

### (a) *Breach of Covenants.*

A lessee, under a lease containing a covenant not to assign, with a proviso for re-entry in case of breach, by executing a deed of assignment of all his personal property for the benefit of creditors, commits a breach of that covenant and forfeits his lease, although the deed of assignment be executed by him for the purposes and in accordance with the provisions of the 192nd and subsequent sections of the Bankruptcy Act, 1861, and be duly registered under the 197th section. *Holland* v. *Cole*, 31 Law J. Rep. (N.S.) Exch. 481; 1 Hurls. & C. 67.

### (b) *Waiver.*

The plaintiff, who had leased premises to B for a term of years, which was unexpired at B's death, afterwards, in the belief that no one would administer to B's estate, agreed with B's son for him to occupy the premises as a yearly tenant, at the rent reserved by the lease to B. The son accordingly occupied and paid rent. The plaintiff repaired the premises shortly before Michaelmas, 1861, and having afterwards discovered that the defendant, a daughter of B, was the administratrix to his estate, and, as such, claimed to hold the premises for the remainder of the term under B's lease, the plaintiff sued her on the covenant in the lease to repair, and also brought ejectment for forfeiture for non-repair. In the action on the covenant the defendant paid a sum of money into court, which the plaintiff accepted in satisfaction. There was no want of repair to the premises after the plaintiff had so repaired them, and the rent due up to Michaelmas, 1861, was paid by B's son, and received from him by the plaintiff before either action:—Held, in the action of ejectment, that either the rent paid by B's son was to be taken in satisfaction of the rent under the lease, and so there had been a waiver of the forfeiture, or else there had been an eviction of the defendant by the plaintiff which would prevent his taking advantage of a forfeiture for non-repair during such eviction.—Held, also, per *Erle, C.J.* and *Byles, J.*, that the statement in the plaintiff's declaration in the action on the covenant, that the breach for non-repair occurred during the existence of the term, was a further ground against the plaintiff recovering in ejectment. *Pellatt* v. *Boosey*, 31 Law J. Rep. (N.S.) C.P. 281.

The plaintiff, by deed, granted the defendant leave and licence to pick all the copperas-stone over certain land for twenty-one years from the 24th of June, 1843, at the yearly rent of 25*l.*, payable half-yearly, on the 24th of June and the 25th of December; with a proviso that if any part of the rent should be in arrear twenty-one days it should be lawful for the plaintiff, without any demand, to determine the grant by notice in writing. On the 27th of March, 1858, the plaintiff distrained on goods of the defendants' sub-agent lying on the lands for five and a half years' arrears of rent up to the 25th of December, 1857, and an action was brought by the sub-agent for the illegal distress. In May and June, 1858, negotiations for a settlement of that action took place, and in the course of them the plaintiff agreed to grant a new licence for a further term of twenty-one years, commencing on the 24th of June, 1864, when the former grant would expire by effluxion of time. This agreement, however, the plaintiff afterwards refused to carry out, and on the 3rd of July, 1858, he gave a written notice to the defendant that he determined the grant, on the ground that the half-year's rent due on the 25th of December, 1857, was in arrear more than twenty-one days; and the defendant disregarding the notice, the plaintiff sued him in trespass:—Held, on a special case, in which the Court were to draw inferences of fact, that the circumstances above stated were evidence that the plaintiff had elected to treat the licence as still subsisting after the forfeiture had accrued, and that, consequently, the plaintiff had no longer any power to determine the grant by notice. *Ward* v. *Day* (Ex. Ch.), 33 Law J. Rep. (N.S.) Q.B. 254; 5 Best & S. 359—affirming the judgment below, 33 Law J. Rep. (N.S.) Q.B. 3; 4 Best & S. 337.

*Quære*—Where in a lease for years, &c., there is a proviso for re-entry on non-payment of rent, and rent being in arrear, the lessor distrains within six months after the forfeiture had accrued—whether, since the 8 Ann. c. 14. ss. 6, 7, the distress, without more, would be a waiver of the forfeiture. Ibid.

(K) Right to Possession of Lease.

To detinue, by an administrator, for a title-deed whereby defendant demised land and premises to the intestate for an unexpired term of fourteen years, defendant pleaded that the deed was a farmiog lease, at a yearly rent, with various farming covenants, and that after the death of the intestate, and upon grant of administration, defendant, pursuant to the terms of the lease, re-entered, for breach of covenants, and thereupon the title-deed became the defendant's title-deed, and the lessee ceased to have any interest in it:—Held, that the plea was no answer to the action, and that the plaintiff was entitled to the deed. *Elworthy* v. *Sandford*, 34 Law J. Rep. (N.S.) Exch. 42; 3 Hurls. & C. 330.

To trover and trespass for taking goods of the plaintiff as administrator, the defendant pleaded that the claims arose by reason only of the defendant being executor *de son tort* of the intestate before grant of administration to the plaintiff, and that before such grant the defendant fully administered all the estate which had come to his hands:—Held, that the plea was bad. Ibid.

## LEGACY.

[See Devise—Will.]

(A) Construction of.
- (*a*) *In general.*
- (*b*) *Meaning of Words.*
- (*c*) *Implied Gift.*

(B) Who take as Legatees.
- (*a*) *Description of Legatees.*
- (*b*) *Gift to a Class.*
  - (1) *How made.*
  - (2) *When and how ascertained.*
  - (3) *Per Capita or per Stirpes.*
  - (4) *Children, Legitimate and Illegitimate.*

(C) What Property passes.
- (*a*) *In general.*
- (*b*) "*Money.*"

(D) What Interest vests.
- (*a*) *Absolute.*
- (*b*) *For Life.*
- (*c*) *Joint Tenancy or Tenancy in common.*

(E) Vested or Contingent.
- (*a*) *In general.*
- (*b*) *Period of Vesting.*

(F) On what Property chargeable.

(G) Specific or Demonstrative.

(H) Substitutional or Cumulative.

(I) Conditional.

(K) Forfeiture.

(L) In Satisfaction of Debt.

(M) Ademption.

(N) Abatement.

(O) Lapse.

(P) Period of Payment.

(Q) Remoteness.

(R) Interest on.

(S) Rights and Disabilities of the Legatees.

(T) Legacy Duty and Income-Tax.

(A) Construction of.

(*a*) *In general.*

A testator gave his residue to his grandchildren, the children of his son and daughter (A and B) living at his decease, with a gift over to his brothers and sisters in case any died before attaining a vested interest. By a codicil, he gave 4,000*l.*, the interest to be paid "in equal moieties" to A and B during their lives, and at their decease the said sum of 4,000*l.* to be for the benefit of his grandchildren agreeably to the instructions contained in his will. A died, living B:—Held, that a moiety of the 4,000*l.* became, upon the death of A, divisible amongst his children. *Archer* v. *Legg*, 31 Beav. 187.

Bequest of the income of a fund "equally between my brother, W S, and his wife Jane, and my sisters M M and S S, during their lives and the life of the survivor of them":—Held, that W S and wife took two-fourths, and *not* one-third. *Marchant* v. *Cragg*, 31 Beav. 398.

A testatrix directed trustees to make an investment, and out of the dividends to pay annuities of 100*l.* each to her two nieces, and her nephew for life, and the capital to their children respectively, and to apply 100*l.* a year in the maintenance of the children of D, a deceased nephew, until twenty-one, when she gave them the capital fund producing this annuity. She bequeathed her residue to her two nieces and nephew, and the children of D "in equal shares, in like manner as was thereinbefore mentioned with respect to the annual sums of 100*l.* bequeathed to them respectively":—Held, that the children of D took one-fourth only of the residue. *Eames* v. *Anstee*, 33 Beav. 264.

Bequest to A B, an unmarried lady, for life, for her separate use, with remainder to her children, and in default to her absolutely, if she survived her husband, but if she should die in his lifetime, then as she should appoint by will, and in default for her next-of-kin. A B died without ever having married:—Held, that in the events which had happened A B took an absolute interest, and that her executors were entitled to the legacy. *Brock* v. *Bradley*, 33 Beav. 670.

The testator directed some property to be divided, at a future period, amongst the then surviving children of J and S W and C H. S was a sister of the testator, but C was a stranger; and S had children, but C was a spinster at the date of the will:—Held, that C personally, and not her children, was entitled to participate. *Stummvoll* v. *Hales*, 34 Beav. 124.

Bequest to A for life, and afterwards to the testator's brothers and sister, share and share alike, or their children in case of their decease:—Held, that the children of a brother who survived the testator, but died in the life of the tenant for life, were entitled. *Bolitho* v. *Hillyar*, 34 Beav. 180.

A testator, by his will, directed the interest only of all the residue of his property to be divided into as many equal parts or shares as there might be children of N T W, share and share alike, as each of the said children should come of age; and in case any one of them should die without any children of their own, his or her share of the said interest should devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said residue should come into the hands of the

grandchildren and great-grandchildren of N T W:—Held, first, that the children took immediate vested interests in the shares, subject to the executory gift over, and that the enjoyment only was postponed till twenty-one; secondly, that the children took life interests only, and not absolute interests in the shares; and, thirdly, that the gift to the grandchildren and great-grandchildren of N T W was not void for remoteness, as in the event of a child dying leaving issue, the death of that child was the period at which the class of persons to take his share was to be ascertained. *Wetherell* v. *Wetherell*, 32 Law J. Rep. (N.S.) Chanc. 476; 1 De Gex, J. & S. 134.

A testatrix having made specific gifts of chattels, gave a small annuity and pecuniary legacies to various persons, and to charities, and bequeathed her residuary estate among the persons whose legacies did not exceed 200*l.*:—Held, that the specific legatees of chattels and the charities were not entitled to share in the residue, but that an aged legatee of an annuity of 36*l.* a year, valued at 146*l.*, was entitled to a share of the residue. *Nicholson* v. *Patrickson*, 3 Giff. 209.

Bequest to A T for life, with remainder to the child, or, if more than one, to all and every the children of A T, whether by her present or any future husband,—Held, not to exclude a child by a former husband. *In re Pickup's Will*, 30 Law J. Rep. (N.S.) Chanc. 278; 1 Jo. & H. 389.

A share under a will consists of what remains after all equities between the legatee and estate have been settled. *Willes* v. *Greenhill*, 29 Beav. 376.

An absolute bequest by will is not altered or revoked by being repeated in a codicil, with limitations in favour of a class which never came into existence. *Norman* v. *Kynaston*, 30 Law J. Rep. (N.S.) Chanc. 189; 3 De Gex, F. & J. 29.

By a will, specific and pecuniary legacies were given to several legatees by name, and the testator gave all the residue of his personal estate to all the before-mentioned pecuniary legatees, with certain exceptions, to be divided between them in proportion to their respective pecuniary legacies. By a codicil, after reciting the death of one of the pecuniary legatees, the testator bequeathed the legacy given to her by the will to J B:—Held, that there was an intestacy as to the share of the residue given by the will to the deceased legatee. *In re Gibson's Trusts*, 31 Law J. Rep. (N.S.) Chanc. 231; 2 Jo. & H. 656.

The testator bequeathed a legacy to trustees for his son for life, with remainder to his children. Subsequently, by a codicil, reciting that he had given a legacy for the benefit of his son and his family, he revoked the legacy, and in lieu thereof made his son one of his residuary legatees:—Held, that the son was entitled to the share of the residue absolutely. *Hargreaves* v. *Pennington*, 34 Law J. Rep. (N.S.) Chanc. 180.

A testatrix bequeathed the interest of a fund to her husband for life and after him to her sister C C for life, if she remained single, but if she married it was to be divided into three equal portions: the interest of one-third to W C for life, the interest of another third to C C for life, and the other third to accumulate till the death of the above-named persons, when the whole was to be equally divided between the children of F W. C C survived the husband, and then died, without ever having been married:—Held, that the gift over of the fund to the children of F W took effect on the death of C C. *Wardroper* v. *Cutfield*, 33 Law J. Rep. (N.S.) Chanc. 603.

A testator gave his residuary estate in trust for his wife for life, and after her death he directed that one-sixth of the fund should be held in trust to pay the income to his daughter H R, for life, and after her death for her children, who being a son or sons should attain twenty-one, or being a daughter or daughters attain that age or marry. He gave other shares upon similar trusts for others of his children by name and their children respectively. The will contained a proviso, that if any of his said children should die without having any child who, under the above trust, should become absolutely entitled to a share of the trust fund, then as well the original share thereby given as also the share accruing under the proviso to each child whose issue should so fail and his or her children or child should go to the survivors or survivor of the testator's said children, and if more than one in equal shares during their respective lives, and after their respective deaths the said shares to be respectively transmitted to such their respective children or child as thereinbefore expressed with respect to their original shares. H R was living at the date of the will, but died childless in the testator's lifetime:—Held, that her share was not undisposed of, but that the gift over in the proviso took effect. *Rackham* v. *De La Mare*, 2 De Gex, J. & S. 74.

A testator gave the capital stock or sum of 800*l.* consols and two leasehold houses to trustees for all his estate and interest therein, upon trust to pay his wife the interest and proceeds for her life, and after her decease upon trust to pay an annuity of 44*l.* to his daughter for life, with a gift over of the 800*l.* to his grandson and his children. At the death of the testator the sum of 800*l.* consols was standing in the names of himself and his wife:—Held, upon bill filed by the trustees against the wife's executor for a transfer of the fund, that the gift of the 800*l.* was a general bequest, that the said sum survived to the wife, and that she was not put to her election. Bill dismissed, with costs. *Poole* v. *Odling*, 31 Law J. Rep. (N.S.) Chanc. 439.

The circumstance that legacies are payable immediately is not *per se* sufficient to give them priority over legacies the payment of which is postponed. *Nickisson* v. *Cockill*, 32 Law J. Rep. (N.S.) Chanc. 753.

A testator gave to trustees all his real and personal estate, with power, "if they should consider it advisable, but not otherwise," to sell his real estate, or any part thereof, and upon trust to realize the personal estate and invest the proceeds of the real and personal estate and pay the income to his wife for life; and after her death he gave out of the investments directed to be made certain general and charitable legacies, the charity legacies to be paid out of his personal estate only; and after giving the income of the residue to A C for life, he directed his trustees, after the decease of the said A C, out of his personal estate to raise and pay a further charitable legacy of 500*l.* The wife died, and the personal estate and proceeds of sale of certain portions of the real estate which had been sold by the trustees were insufficient for payment of all the legacies:—Held, first, that the legacies payable at the death of the wife had

no priority over the 500*l.* legacy payable at the death of A C; secondly, that the charitable legacies ought to be first provided for out of the pure personal estate; and, thirdly, that the trustees were bound to exercise their power of sale over the real estate to the extent necessary for providing for the general legacies. Ibid.

J N V, by his will, directed his trustees to purchase 8,000*l.* stock, and to pay the dividends to E A for life, and in case she should marry a person of good character having property equal in value to the above sum, and who should "well and effectually, and to the good liking of the trustees, settle or secure, to be paid to the issue of such marriage," an amount equal to the provision made by his will for such issue, he directed upon E A's death a transfer of certain parts of such 8,000*l.* stock to such issue, according to number. If E A died without issue, or if she married without regard to this condition, he gave the stock to his nephews. Capt. B (who was possessed of property of the required amount) proposed marriage to E A, and the trustees signified their approbation of him as a husband personally, and their acceptance of a bond from him as security for an amount equal to the value of the 8,000*l.*, "provided his property is of the nature required, and the bond is a security within the intent and meaning and according to the construction of the will." One of the Vice Chancellors decided that the bond was not a sufficient security within the meaning of the will; but, upon appeal, the Lords Justices held that it was, and that the children of the marriage had become entitled to the specified shares of the 8,000*l.* stock. *Bacchus* v. *Gilbee*, 33 Law J. Rep. (N.S.) Chanc. 23.

(*b*) *Meaning of Words.*

A testatrix gave certain sums of money in trust for a lady, independently of her husband, and after her death to the use of such persons as she should by will appoint, and in default of appointment for such person or persons as at the time of her death should be entitled to her personal estate under the Statute of Distributions, as if she had died intestate and unmarried. The legatee, having had eight children, survived her husband, and died without appointing the money:—Held, that the word "unmarried," though it was popularly used to indicate a person who never had been married, must be construed according to the intention of the testatrix; and that in this case it meant "not having a husband at the death of the legatee," otherwise her children would be excluded, which was not a probable intention. *Day* v. *Barnard*, 30 Law J. Rep. (N.S.) Chanc. 220; 1 Dr. & S. 351.

A testator bequeathed "a sum" of consols to trustees for his daughter L for life, with remainder to her children. By a codicil he directed that a sum of 200*l.* per annum be added to the sum by his will granted to his daughter L during her life, and invested in the same manner and trusts as governed the will:—Held, that the words "during her life" were words of reference and not of limitation, and that the gift by the codicil was of a sum sufficient to produce 200*l.* a year, which was to be held for the daughter for life, with remainder to her children. *Auldjo* v. *Wallace*, 31 Beav. 193.

A testator gave legacies to his nieces, with power to his executors to settle them on his nieces for life, and at their deaths for the benefit of their "issues." He also gave them his residue, with like power to settle it on his nieces and for the benefit of "their respective children," as provided with respect to the legacies:—Held, that "issues" must be construed children, and that the children of nieces took, to the exclusion of grandchildren. *Baker* v. *Bayldon*, 31 Beav. 209.

Bequest to a widow "to be applied by her for the payment of my lawful debts, and the residue for her own use and benefit and that of our infant daughter": Held, that this was not a discretionary trust, but that they were equally entitled. *Bibby* v. *Thompson* (No. 1), 32 Beav. 646.

In a bequest "to brothers and sisters, or their representatives in equal shares":—Held, that "representatives" meant executors or administrators, and not the next-of-kin. *Chapman* v. *Chapman*, 33 Beav. 556.

(*c*) *Implied Gift.*

Bequest of leaseholds in trust for two persons, until one of them should attain twenty-five, and if such one should die under twenty-five then over,—Held, to be an absolute gift, subject to the gift over on death under twenty-five. *Gardiner* v. *Stevens*, 30 Law J. Rep. (N.S.) Chanc. 199.

An erroneous recital in a will or codicil, that the testator has given something, which he has not given, will not of itself create a gift by implication. *Mackenzie* v. *Bradbury*, 34 Law J. Rep. (N.S.) Chanc. 627.

A testatrix, by her will, gave a legacy of 1,000*l.* among such of the children of M as should attain twenty-one. By a codicil she recited that she had by her will given 1,000*l.* to F, a child of M, and directed that "the said legacy" should not be payable till F attained twenty-one:—Held, that the recital referred to the legacy given to the children of M, and that F did not take a further legacy by the codicil. Ibid.

Testatrix, having by her will directed the trustees, who were also the executors of her will, to invest the residue of her property in the funds, left the interest to two nieces to be paid to them half-yearly, and at their decease "the half-yearly dividends to be continued to their children till they come to the age of twenty-one years." She then "constituted and appointed" the said executors (*nominatim*) trustees for the said nieces and their children. All children of a deceased niece had attained twenty-one:—Held, that they were entitled absolutely to the moiety given to her for life. *Wilks* v. *Williams*, 2 Jo. & H. 125.

A testator gave by will 3,000*l.* upon trust for A and her children, and after the decease of A without issue for children of B. By a codicil of later date the testator recited that he had by his will given the 3,000*l.* to A for life with remainder to her children, and afterwards to B for life with remainder to his children, and revoked the will as to 2,000*l.*, part of the 3,000*l.*, from and after the devise to A and her children, and instead of giving the said sum of 2,000*l.* to B and his children, bequeathed the same to C:—Held, that the erroneous recital in the codicil, that the 3,000*l.* was given to B for life, did not amount to a gift of a life estate in the 1,000*l.* which remained unrevoked. *In re Smith*, 2 Jo. & H. 594.

By the will the testator had also given 2,000*l.* to B for life, with a gift over on insolvency:—Held, that if the codicil had been read as an implied gift of 1,000*l.* to B for life, the gift over on insolvency would have attached to the 1,000*l.* as well as to the 2,000*l.* Ibid.

### (B) WHO TAKE AS LEGATEES.

#### (*a*) *Description of Legatees.*

Under a bequest as follows, "I give to the two grandchildren of A 19*l.* 19*s.* each. They live near B." It appearing that A had three grandchildren, of whom two only lived near B,—Held, that the third grandchild was not entitled. *Wrightson* v. *Calvert*, 1 Jo. & H. 250.

The principle on which an erroneous statement of the number of a class is rejected is to avoid uncertainty, and does not apply where the will affords the means of determining which of the class are pointed at. Ibid.

Bequest between and amongst all and every the child and children of Thomas T deceased and Henry T in equal shares:—Held, that all the children of Thomas and of Henry took equally *per capita*, and not *per stirpes*, and that Henry himself took nothing. *In re Davies's Will*, 29 Beav. 93.

A married man bequeathed his residue to his niece and "all his other nephews and nieces on both sides":—Held, that the nephews and nieces of his wife participated in the bequest. *Frogley* v. *Phillips*, 30 Beav. 168; 3 De Gex, F. & J. 466.

Bequest by will to cousins ("descendants from my father's and mother's brothers and sisters"), with a substituted gift to the "issue" of any dying in the testator's life, the issue to take their parent's shares:—Held, that "cousins" must be construed "first cousins," and that "issue" meant only the children of first cousins, notwithstanding the testator had, by a codicil, excluded by name all his first cousins, and, his uncles and aunts being all dead, he could not possibly have any other first cousins. *Stevenson* v. *Abingdon*, 31 Beav. 305.

A bequest of stock after the death of J W, "unto and amongst his issue male," will be confined to males claiming through males, and cannot include males claiming through females. *Lywood* v. *Warwick*, 30 Law J. Rep. (N.S.) Chanc. 507; *sub nom.* *Lywood* v. *Kimber*, 29 Beav. 38.

A testator directed a policy on the life of his son John to be settled, and the interest to be paid to John's widow for life, and after her decease to her "offspring":—Held, that the children of John who survived him were entitled to the exclusion of grandchildren. *Lister* v. *Sidd*, 29 Beav. 618.

Bequest to the testator's grandchildren and nephews and nieces. The testator had no brothers or sisters, and therefore no nephews and nieces:—Held, that the nephews and nieces of his wife were entitled. *Hogg* v. *Cook*, 32 Beav. 641.

The testator gave his residuary real and personal estate to his wife for life, and after her decease to his brothers T and E, "or their heirs in proportion to the number of children each might have then living, share and share alike." At the death of the wife both the brothers were dead; and there were then living four children of T and two of E:—Held, that the word "heirs" meant "children," and that the residue was divisible in sixths amongst the children living at the death of the wife. *Roberts* v. *Edwards*, 33 Law J. Rep. (N.S.) Chanc. 369; 33 Beav. 259.

A testator, in 1841, bequeathed 200 guineas to such of the representatives as might be alive at his death of Messrs. P & H, then both dead, with whom, in 1793, he had had some business by which they were losers to the amount of about 200 guineas:—Held, that the legal representatives of P & H, and not the partners in the firm at the death of the testator, were entitled; and, secondly, that such representatives took in equal moieties, and not in the proportion of their shares in the partnership. *Leak* v. *Macdowall* (No. 2), 33 Beav. 238.

A will directed that all legacies should be paid within six months after the testator's death. By a codicil executed on the day of the testator's death, after giving 500*l.* a piece to five of the grandchildren of his brothers by name, he bequeathed 500*l.* to legatees thus described: "each child that may be born to either of the children of either of my brothers, lawfully begotten":—Held, that of the children of my brothers' children, neither those born at the date of the codicil nor those begotten after the testator's death were entitled, but only children *en ventres leurs mères* at the date of the codicil and of the testator's death. *Townsend* v. *Early*, 3 De Gex F. & J. 1.

Gift by a testator to the children of his late brother John; and, in another clause, there was a gift to the issue of his said brother. The brother John had only one son, who died in the testator's lifetime, leaving four children:—Held, that these four grandchildren were entitled, there being no children. *Berry* v. *Berry*, 3 Giff. 134.

Bequest to "Francis the youngest son of T G." He had no son Francis, but he had an eldest named Arthur Francis, and a youngest named Arthur Charles, who was the testator's godson:—Held, that the youngest was entitled to the legacy. *In re Gregory's Settlement and Will*, 34 Beav. 600.

#### (*b*) *Gift to a Class.*

##### (1) *How made.*

The rule that the Court will lean to a construction which gives portions to all of a class of children who may live to require them, is not confined to settlements, but extends also to wills. The rule will be applied so as to modify express words of gift, though the instrument contains no necessary implication to that effect. *Jackson* v. *Dover*, 2 Hem. & M. 209.

Gift of residue upon trust for testatrix's adopted daughter A for life, then upon trust to pay to all the children of A living at her decease equally at twenty-one or marriage, unless such day of payment should happen in the lifetime of A, and then the payment to be postponed till the death of A, but to be a vested interest in each of the children at twenty-one or marriage:—Held, that a son who attained twenty-two, and died in A's lifetime, was entitled to share. Ibid.

A testator gave his residuary estate to his wife for life, and after her death upon trust for his and her next-of-kin in equal shares. The testator was illegitimate:—Held, that it was a gift to a class; that the Crown could take no interest, and that the only surviving brother of the wife was entitled to the fund. *Rook* v. *the Attorney General*, 31 Law J. Rep. (N.S.) Chanc. 791.

R C, by will, directed that his residuary, real and personal estate should be sold and converted; and that his trustees should hold four-sixths of the proceeds upon trust for three reputed daughters and a lawful daughter (naming them) of his brother during their respective lives, and after their respective deaths upon trust for their children respectively, as they should respectively appoint, and in default of appointment upon trust for the children of the four daughters respectively, in equal shares, with cross-executory trusts as between the children of the same parent as regards the shares of male children dying under twenty-one and female children dying under twenty-one and unmarried, with an ulterior trust in case the said four daughters should all die without leaving any child or children, or leaving such, if such children should all happen to die under twenty-one, and without having been married. One of the four legatees died without having been married:—Held, that as to her share cross-limitations must be implied between the other three legatees and their children, corresponding with the limitations contained in the will of the original shares. *In re Clark's Trusts*, 32 Law J. Rep. (N.S.) Chanc. 525.

Held, also, that no such cross-limitations could be implied as to the share of any daughter after once a child of that daughter had attained a vested interest, even though the daughter might subsequently die *without leaving a child*, the proper function of the cross-limitations being not to divest any estate once vested, but merely to supply the gap left by the testator. Ibid.

A testator, by will, gave the residue of his property equally to all and every the children of R B and B B who should be living at his decease, and to ten other persons by name; and one of the latter died in the testator's lifetime:—Held, that the ten persons named were not members of a class, and that the share of the deceased legatee lapsed. *In re Chaplin's Trusts*, 33 Law J. Rep. (N.S.) Chanc. 183.

Under a bequest to trustees for "my four nephews and niece, children of my brother Richard, namely, Robert, Richard, Francis, and Margaret Jane,"—Held, that a fourth nephew (also a son of Richard), Thomas by name, was not entitled to share. *Glanville* v. *Glanville*, 33 Law J. Rep. (N.S.) Chanc. 317; 33 Beav. 302.

A gift of residue by will "to the persons hereinafter appointed my executors" in equal shares, held (distinguishing *Knight* v. *Gould*, 2 Myl. & K. 295) to be a gift to those persons as individuals. *Hoare* v. *Osborne*, 33 Law J. Rep. (N.S.) Chanc. 586.

By a marriage settlement certain real and personal property was vested in trustees to be dealt with and disposed of as the wife should from time to time, by deed, appoint, and, until such appointment, upon trust, during the lives of the husband and wife, to pay the income to the wife for her separate use, and if the wife should die first, then the property to be held in trust for such persons as she should, by will, appoint, and in default of appointment, for the husband for life, and after his decease for other persons absolutely; and the settlement contained a full covenant to settle all other property of the wife. There were no children of the marriage; and soon after it had taken place the lady exercised the first power, and re-settled the property, with this difference, that she then excluded her husband from any life interest in it. On the same day she made her will, whereby, in exercise of the powers reserved to her, she appointed the property upon trusts for conversion and payment of debts and legacies, and as to all the residue of her real and personal estate, after answering the purposes aforesaid, she gave and bequeathed the same "to the persons thereinafter appointed her executors, in equal shares," and appointed A, B and C her executors, of whom A attested her will, and B pre-deceased her:—Held, first, that the gift was to A, B and C as individuals, and that C took one-third only of the residue; and, secondly, that the remaining two-thirds went under the settlement trusts, as in default of appointment. Ibid.

Bequest to a brother for life, and at his death to be equally divided amongst his surviving children and my niece R W:—Held, that this was not a gift to a class, and R W having died in the life of the testator that R W's share lapsed. *Drakeford* v. *Drakeford*, 33 Beav. 43.

(2) *When and how ascertained.*

Bequest to A, with a direction that if she should leave children, "to be left to them":—Held, that this was a gift to the children of A, who survived her, in joint tenancy. *Noble* v. *Stow*, 29 Beav. 409.

Bequest to all the children of A "now born or hereafter to be born," who shall attain twenty-one, in equal shares; with powers of maintenance out of and for accumulation of income, and of advancement out of the presumptive shares:—Held, that on the first child attaining twenty-one the class was ascertained, and that the children afterwards born were excluded. *Bateman* v. *Gray*, 29 Beav. 447.

In a gift over upon the death of any of the class without leaving issue, to the "survivors," the word "survivors" was construed "others," in consequence of the ultimate gift over being only to take effect on the death of "all" the class without issue. *Holland* v. *Allsop*, 29 Beav. 498.

A testator gave his daughter a life annuity of 50*l.*, and from and immediately after her death he bequeathed 1,000*l.* unto her children, share and share alike, payable twelve months after the daughter's death. This was payable exclusively out of the testator's real estate:—Held, that those children alone of the daughter who survived her participated in the 1,000*l.* *In re Cartledge*, 29 Beav. 583.

A testator bequeathed a house, described as copyhold, to his wife for life, and at her death to be disposed of for the benefit of her surviving children, share and share alike. The house was in fact leasehold:—Held, that only those children who survived the widow were entitled to share in the proceeds of the house. *Thompson* v. *Thompson*, 29 Beav. 654.

If a bequest is made to a class to be ascertained, and it consists of persons, some of whom are within and some without the limits allowed by law, as the class cannot be ascertained until the period may have elapsed which is beyond the limits allowed by law, the whole bequest is void. *Wilkinson* v. *Duncan*, 30 Law J. Rep. (N.S.) Chanc. 938; 30 Beav. 111.

If a stated sum is given to each member of a class, wholly independent of the same, or a similar gift to every other member of a class, and cannot be affected

whether the others receive their legacies or not, the gift is good as to those who are within the limits allowed by law. Ibid.

G W appointed a trust fund for the benefit of his children in manner thereinafter mentioned, namely, to pay 2,000*l.* to each of his daughters as and when they attained twenty-four, and to divide the residue between the sons equally, if more than one, as and when they respectively attained twenty-four:—Held, that the appointment was good as to daughters attaining twenty-four within twenty-one years after the death of G W, but that it was void as to the sons and such of the daughters as did not attain twenty-four until after the period allowed by law. Ibid.

A testator bequeathed his residue to his widow for life, with remainder to his nephews and nieces living at her decease, and he substituted their children for any who should die in her life. But if any of the nephews and nieces should die in the life of the wife, without having any child "then living," he directed his share to go to the survivors of the nephews and nieces. A nephew died without children in the life of the widow:—Held, that his share did not go to the survivors at his death, but the survivors at the death of the widow. *Essex* v. *Clement*, 30 Beav. 525.

A testator, by his will, gave 2,000*l.* to trustees, upon trust to pay the interest thereof to his daughter for her separate use for life, and after her death for her husband and children, and in case his daughter should not leave any children, then to assign and transfer such sum unto such person or persons as should happen to be the testator's next-of-kin, according to the Statute for the Distribution of Intestates' Effects. The daughter survived the testator, and died without ever having been married:—Held, that the class of next-of-kin was to be ascertained at the death of the testator, and that they took as joint-tenants. *In re the Trusts of Greenwood's Will*, 31 Law J. Rep. (N.S.) Chanc. 119; 3 Giff. 390.

Bequest to be equally divided between R G "and my brothers and sisters or their children," and unto J J:—Held, that the children of such of the brothers and sisters as were dead at the date of the will could not take by substitution. *In re Ann Wood's Will*, 31 Beav. 323.

A testator gave certain dividends to his son, and at his death, to his (the testator's) surviving daughters and their lawful offspring. The testator left his son and also four daughters him surviving. The will was attested by two of the daughters, and of these two one died during the son's lifetime and the other survived the son:—Held, that the period for ascertaining the survivorship was the death of the son; that the word "offspring" meant "issue," and that therefore the daughters took absolutely as joint-tenants. Also, that the gift to the attesting daughter who survived the son being, by section 15. of the Wills Act, simply void, the other daughters, as joint-tenants, took the whole, and there was no lapse. *Young* v. *Davies*, 32 Law J. Rep. (N.S.) Chanc. 372; 2 Dr. & S. 167.

A testator bequeathed a legacy to such of his nephews and nieces (children of A B) as should be living at his death equally, and he provided as follows; that in case any nephew or niece "shall die in my lifetime" leaving children living at my decease, such children should stand in their parent's place, and be entitled to the share which the deceased parent would have been entitled to if living at my decease. A child of a niece who had died prior to the date of the will, was held entitled to participate in the legacy. *In re Chapman's Will*, 32 Beav. 382.

Bequest to A, and at his death (with certain exceptions) to B, and "at her decease" to be divided amongst four named persons, "or as many of them as may be living":—Held, that those only took who survived both A and B. *Knight* v. *Poole*, 32 Beav. 548.

A testator bequeathed his funded property to his widow for life, and afterwards to his brother for life, and then to be equally divided amongst his brother's surviving legitimate children and his niece R W:—Held, that the survivorship had reference to the death of the brother only. *Drakeford* v. *Drakeford*, 33 Beav. 43.

Gift to A for life, and after her decease to all the children of B who should be living at the testator's death, or be born afterwards, who should attain twenty-one, with a direction that no child should be excluded in consequence of any other child having attained a vested interest:—Held, that the class was to be ascertained upon the latter of these two events, viz. a child of B attaining twenty-one, and the death of A; and that a child born after that period was excluded. *Parsons* v. *Justice*, 34 Beav. 598.

Legacy to A for life, and at her death to be equally divided between her two sons (who were named), or given to the survivor of them:—Held, that the survivorship had reference to the death of the tenant for life. *Naylor* v. *Robson*, 34 Beav. 571.

(3) *Per Capita or per Stirpes.*

A testator directed the residue of his personal estate "to be equally divided between his sisters J and M, and the lawful issue of his deceased sisters E and A, in equal shares if more than one of such respective lawful issue":—Held, that one fourth of the residue was given to each of the sisters J and M, one other fourth to the issue of E as tenants in common, and the remaining fourth to the issue of A as tenants in common. *Davis* v. *Bennet*, 31 Law J. Rep. (N.S.) Chanc. 337.

A substituted bequest was held subject to the same contingency as the original bequest. *In re Corrie's Will*, 32 Beav. 426.

A testator bequeathed his residuary personal estate to his nephew and niece equally, and after their respective deaths, amongst their "issue," if there should be any "children" to take their parent's share. But in case the nephew or niece died without issue, or leaving such they should die under twenty-one without issue, then he gave his or her share to the other of them, or his or her issue, "if he or she be then dead leaving issue as aforesaid." The niece died in 1861 leaving issue; the nephew died in 1862 leaving no issue:—Held, that "issue" in the first part of the will meant "children," but in the latter part "issue generally," and that on the death of the nephew all the issue of the niece then living took *per capita*. Ibid.

Bequest to the descendants of the brothers and sisters of the testator's grandfather in equal shares, *per stirpes* and not *per capita*. These were two

sisters:—Held, that the fund was divisible in the first instance into moieties, and that one belonged to the descendants of one sister *per capita*, and the other moiety similarly to the descendants of the other. *Robinson* v. *Shepherd*, 32 Beav. 665.

(4) *Children, Legitimate and Illegitimate.*

Illegitimate children, unless they are expressly mentioned, cannot be included in a class. *Edmunds* v. *Fessey*, 30 Law J. Rep. (N.S.) Chanc. 279; 29 Beav. 233.

A testator gave "to each of the sons and daughters of his late cousin T H 100*l.* a-piece." There were three sons and a daughter, one son and the daughter being illegitimate:—Held, that the gifts were made to a class, and that the illegitimate son could not take any legacy, as there were sons to answer the description, but that the daughter, being the only one, was entitled to her legacy by express description. Ibid.

A testator gave a large sum of money upon the happening of several contingent events, "to be equally divided amongst the children, legitimate or illegitimate, of my brother H B." At the death of the testator illegitimate children only were living. Legitimate children were afterwards born:—Held, that the fund vested in the illegitimate children on the death of the testator, subject to be divested on the birth of legitimate children, and that it was divisible equally among both classes. *Barnett* v. *Tugwell*, 31 Law J. Rep. (N.S.) Chanc. 629; 31 Beav. 232.

A testator and two legatees perished in a ship which was supposed to have foundered. There being no evidence of survivorship,—Held, that the bequest failed. Ibid.

(C) WHAT PROPERTY PASSES.

(*a*) *In general.*

Where there is a bequest particularized by one word, followed by general words, the latter will not be restricted to things *ejusdem generis*. *Swinfen* v. *Swinfen*, 29 Beav. 207.

A testator devised to Mrs. S "all his estate at Swinfen, or thereto adjoining; also all furniture and other movable goods here":—Held, that the live stock and implements of husbandry, which were in or about the lands and premises adjoining the mansion at Swinfen (at which the testator resided), passed by this bequest. Ibid.

Held, also, that money in the house at the testator's death amounting to 54*l.* also passed to the legatee. Ibid.

General words in a bequest following a specific enumeration of articles in a particular locality will be confined to articles *ejusdem generis*. Thus, a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other the goods, chattels and effects which shall be in or upon or about my dwelling-house and premises at the time of my decease," held not to include a sum of money found in the house. *Gibbs* v. *Lawrence*, 30 Law J. Rep. (N.S.) Chanc. 170.

A bequest in general words will not be restricted by the enumeration of articles forming part of a previous gift. *Gover* v. *Davis*, 30 Law J. Rep. (N.S.) Chanc. 505; 29 Beav. 222.

A reversionary interest in residuary estate will pass under the words, "Also the whole of my property and effects, that is to say, my box, clothing and bedding, &c. &c.," if, from the context of the will, the words of enumeration may be referred to articles previously given. Ibid.

A bequest of household furniture, plate, china and household effects will pass a cabinet of gold, silver and mounted snuff-boxes, and also agate and enamel jewel-cases, displayed in the drawing-room of the mansion-house. *Field* v. *Peckett*, 30 Law J. Rep. (N.S.) Chanc. 813; 29 Beav. 573.

Indefinite bequest of the income of personalty held not to carry the corpus. *Buchanan* v. *Harrison*, 31 Law J. Rep. (N.S.) Chanc. 74; 1 Jo. & H. 662.

Gift of "personal estate and property whatsoever and wheresoever," held not to pass real estate. Ibid.

A testator by his will said, "I give to my wife all my household furniture, plate," &c., "and other effects of the like nature, and all wines," &c., "which shall at my decease be in or about any dwelling-house then occupied by me":—Held, that, in construing the bequest, the sentence ought to be divided into two, and that the qualification as to his dwelling-house applied only to the latter part; therefore, that it passed plate at the testator's banker's, family plate in the possession of the testator's father as tenant for life, and to which the testator was entitled absolutely in remainder, and also the produce of family plate wrongfully sold by the tenant for life, and furniture, &c., deposited for safe custody at a warehouse. *Domville* v. *Taylor*, 32 Beav. 604.

Bequest by testator of all the furniture (except plate and pictures) which might be in a house mentioned at his decease:—Held to be confined to articles of solid silver, and not to include a plated service in the said house. *Holden* v. *Ramsbottom*, 4 Giff. 205.

A testatrix, by her will, after disposing of various portions of her property (other than Spanish bonds), bequeathed "the remainder of her money in the Spanish bonds" to her nephews and nieces, and stated her intention to be to divide her property equally between her two sisters' children. The bulk of the residue consisted of Spanish bonds:—Held, that the general residue passed under the above bequest; the words "in the Spanish bonds" being, under the circumstances, descriptive only of the nature of the investment of the bulk of the property comprised in the bequest. *Patrick* v. *Yeatherd*, 33 Law J. Rep. (N.S.) Chanc. 286.

A legacy given thus, "£1. 0. 0.," which stood between two other legacies for 100*l.* each, the dots between the figures being smeared as if for the purpose of obliteration,—Held, to be a legacy for 100*l.* *Manchee* v. *Kay*, 3 Giff. 545.

(*b*) "*Money.*"

An officer in the army died abroad, having by his will, dated the day before his death (after giving two legacies of 10*l.* each, and directing his carpet-bag, portmanteau and sea-chest to be sent to England to his father), directed that "the remainder of his money and effects might be expended in purchasing a suitable present for his godson." After payment of the testator's debts, there remained in the hands of the paymaster of his regiment a sum of about 11*l.* At the time of his death the testator was

entitled to a reversionary interest in one-third of two sums of 2,397*l.* consols, and 11,344*l.* consols:—Held, affirming the decision of one of the Vice Chancellors, that the testator's reversionary interest in the above sums did not pass to his godson by the direction, that "the remainder of his money and effects might be expended in purchasing a suitable present for his godson." *Barton* v. *Dunbar*, 30 Law J. Rep. (N.S.) Chanc. 8.

Bequest by G K to his wife, Mrs. K, of "all sum and sums of money that may be in my house." Certain shares in an assurance company were found, after the testator's death, in a chest in which he usually kept his ready money, inclosed in an envelope, on which was indorsed, in the testator's handwriting, "To be considered as ready money, and given to Mrs. K for her use.—G K":—Held, that the shares passed to Mrs. K as ready money under the above bequest. *Knight* v. *Knight*, 30 Law J. Rep. (N.S.) Chanc. 644; 2 Giff. 616.

A testatrix gave all her real estate to trustees upon trust for her sister and her husband and the survivor for life, and then upon trust to sell and stand possessed of the purchase-money, upon trust, as to one fourth, to divide it equally between the children of her deceased aunt D D; as to one other fourth, to divide it equally among the children of her deceased aunt E B; as to another fourth, to divide it equally between the children of her deceased uncle F C; and as to the remaining fourth, to divide it equally between the grandchildren of her deceased aunt M D. Provided that, in case any child or children of the first three legatees, or any grandchild or grandchildren of the last should die in the testatrix's lifetime leaving any child or children living at her decease, who should live to attain twenty-one, then the child or children of each such child or grandchild so dying in her lifetime should represent and stand in the place of his, her or their deceased parent, and should be entitled to the same share which his, her or their parent would have been entitled to if living at her decease, equally. The testatrix gave all the residue of her personal estate to the trustees upon trust to convert such parts as should consist of money or securities for money, and to invest, with power to vary securities, and pay the dividends to her sister C and her husband for life and divide the principal amongst the persons to whom the proceeds of the realty were given. The testatrix had money at her bankers', and several of the persons forming the class of "children" to whom the proceeds of the realty were given were dead at the date of the will:—Held, first, that money at the bankers' was not included in the words "money or securities for money," which were both included in the words following the gift to the trustees of the residue; and that issue of children who were dead at the date of the will took under the substitutionary words of the proviso. Held, also, that the word "children" did not include "grandchildren." *Loring* v. *Thomas*, 30 Law J. Rep. (N.S.) Chanc. 789; 1 Dr. & S. 497.

M, by her will (made subsequently to the Wills Act), gave a legacy of 1,000*l.* and half her residuary estate to her daughter P, a married woman, for her separate use. P having under her marriage settlement a general power of appointment over all property coming to her during coverture, by her will, in pursuance of such power and every other power thereunto enabling her, appointed two specified sums of money and "all other her moneys and securities for money over which she had any power of disposition," to her executors upon certain trusts, and appointed all her "goods, chattels, and separate personal estate and effects, not thereinbefore disposed of," to other persons. P pre-deceased M, leaving her husband, who also pre-deceased M, and issue who survived M:—Held, that the legacy of 1,000*l.* and moiety of M's residuary estate passed by the residuary appointment in P's will. *In re Mason's Will*, 34 Law J. Rep. (N.S.) Chanc. 603; 34 Beav. 494.

A bequest of "money and securities for money" will not carry a legacy due to the testator from another testator's estate. Ibid.

*Semble*—The will of a child legatee who dies in the parent's lifetime leaving issue is, with reference to the property bequeathed to such child by the parent, to be construed as if the child had survived the parent; but whether as if the child had died immediately after the actual date of the parent's death or as if the parent had died immediately before the actual date of the child's death—*quære*. Ibid.

General residue of personal estate was held to pass under the words "residue of money," the will commencing with a general bequest of everything "in trust for the following purposes," and the gift of money being preceded by bequests of specific chattels. *Montagu* v. *the Earl of Sandwich*, 33 Beav. 324.

The word "money" coupled with the word "cash," held, confined to money strictly and properly so called. *Nevinson* v. *Lennard*, 34 Beav. 487.

The word "money" standing by itself is confined to the proper meaning of that word; yet if money be given after a direction to pay debts, legacies, and funeral and testamentary expenses, or with any other words which denote an intention on the part of the testator to dispose of the whole of his estate, it will be construed as synonymous with "property." Ibid.

### (D) WHAT INTEREST VESTS.

#### (*a*) *Absolute.*

Bequest of a residue to the testatrix's father "to spend both principal and interest or any part of it during his lifetime," should he "not spend the property" then in trust for the testatrix's sisters:—Held, that the bequest to the father was absolute, and that the gift over was inconsistent with it and inoperative. *Henderson* v. *Cross*, 29 Beav. 216.

A testator gave all his real and personal estate to trustees, in trust to pay and make up to his wife 1,200*l.* per annum for her life, and upon trust to pay and divide the residue of his property unto and amongst his children living at his decease; and after the decease of his wife, he directed that the said sum of 1,200*l.* per annum should go to and be equally divided between and among all and every his children who should be then living:—Held, affirming the decision of one of the Vice Chancellors, that this annuity was not perpetual, but limited to the lives of the widow and children. *Lett* v. *Randall*, 30 Law J. Rep. (N.S.) Chanc. 110.

A testatrix directed her executor to purchase an annuity of 50*l.* a year in government securities for her servant M S:—Held, that the annuity was per-

petual, and not for life only. *Ross* v. *Borer*, 31 Law J. Rep. (N.S.) Chanc. 709; 2 Jo. & H. 469.

A wine merchant, possessed of a large stock of wine, by his will gave all his household goods, &c., and everything that he died possessed of, to his wife for life, and he bequeathed the whole of his effects that might be remaining after her death to his daughter:—Held, that the wife took absolutely the wine which the testator had for his private use, but a life interest only in the rest. *Phillips* v. *Beal*, 32 Beav. 25.

A testator made an indefinite bequest of the interest of his residue to a class of children equally, with a declaration that they should have the right to will away their shares on their deaths. There was a gift over, if they should omit to make their wills:—Held, that they took absolute vested interests, and not a life interest with a power to bequeath, and that the gift over was void for repugnancy. *Weale* v. *Olliver*, 32 Beav. 421.

A testator bequeathed to his wife 4,000*l.* to be used for her own and the children's benefit as she should think best, recommending her not to diminish the principal, but vest it in government or freehold securities. There being two children, one adult and the other a minor, the widow made an appointment of 500*l.* to the minor, and of the residue to the adult, and she and the adult child petitioned for payment out of court of the residue:—Held, affirming a decision of the Master of the Rosll, that such payment could not be ordered. *Hart* v. *Tribe*, 1 De Gex, J. & S. 418.

Bequest of the use of the "book debt or capital" employed in the testator's trade at his death,—Held, upon the context to pass the absolute interest therein. *Terry* v. *Terry*, 33 Beav. 232.

The testatrix directed her residuary estate "to be divided equally" between her two grandchildren, on the youngest attaining twenty-one. She added, if they both marry a relation of J D, then the residue is to be divided between my nephews and nieces. The grand-daughters having attained twenty-one, and being still unmarried, the Court declined deciding the validity of the gift over, but held that they were entitled to payment subject to any future question. *Hird* v. *Pinckney*, 33 Beav. 273.

Gift by a testator of 3,000*l.* to a woman, with whom he had contracted an invalid marriage, "to be for her sole and separate use during her lifetime, and while she continues unmarried; thereafter, should she marry, the principal sum with accruing interest thereon, to pass into the hands of the residuary legatee:—Held, an absolute gift subject to a gift over in case of her marrying again. *M'Culloch* v. *M'Culloch*, 3 Giff. 606.

(*b*) *For Life.*

Bequest of personal estate to C, "and to his first and other sons after him in the usual mode of succession,"—Held, that C took for life only. *Sparling* v. *Parker* (No. 3), 29 Beav. 450.

A testator directed his trustees to set apart out of his personal estate 10,000*l.* consols, and to pay the dividends thereof to his sister for life, and after her decease to retain so much of the 10,000*l.* as should be sufficient to realize the yearly income of 150*l.*, and to pay the dividends of the trust fund so retained to his nephew until he should become bankrupt, or assign away or encumber his interest, in which cases the trust declared for the benefit of his nephew was to cease and determine, and the said sum of 10,000*l.* was to fall into the testator's residuary estate. The nephew died without having become bankrupt or encumbered his interest:—Held, that the interest given to the nephew was not an absolute interest, but one only for his life. *Banks* v. *Braithwaite*, 32 Law J. Rep. (N.S.) Chanc. 198.

Bequest of 140*l.* to A B, the interest to be paid to her during her life, and at her death to be paid to her children, followed by the appointment of a trustee, and by a direction (not limited to her life) to pay her the interest:—Held, that A B took a life interest only, and not an absolute interest subject to the gift to her children. *In re Graham's Will*, 33 Beav. 479.

A testator gave his estate to his wife and his four children in equal proportions; but his wife was to "have her proportionate part" for her life, and it was given afterwards to the four children. And as to "the part of his estates" thereinbefore given to his daughter, she was to have it for life, with remainder to her children:—Held, that the part of the daughter included her share in the part given to the wife for life, and that therefore she was only entitled to a life interest in it. *Watson* v. *Pryce*, 34 Beav. 71.

(*c*) *Joint Tenancy or Tenancy in common.*

A legacy to several persons and their executors and administrators respectively makes them tenants in common. *In re Moore's Settlement Trusts*, 31 Law J. Rep. (N.S.) Chanc. 364.

A testator gave legacies to his children absolutely, and then gave the income of his residuary estate to his wife for her life, and directed that after her death the income should be divided equally among his said children; he directed that the capital should be divided equally among all his grandchildren: provided, nevertheless, that in case of the death of any of his said children leaving lawful issue, "the respective legacy, share and interest" of the child and children so dying should immediately thereupon become vested in such his, her or their issue respectively:—Held, that upon the death of a child leaving issue before the period of distribution, the income of that share of the residue of which the child had been tenant for life was payable until the period of distribution to the issue as joint tenants, and not to the surviving children of the testator. *Walmsley* v. *Foxhall*, 1 De Gex, J. & S. 605.

Under a will, A, B, C and D became entitled to a sum of stock as tenants in common. C, the sole executor, transferred it into the joint names of C and D. Afterwards, by the deaths of A and B, C and D became equally entitled to the shares of A and B:—Held, that C and D were tenants in common of the whole fund. *Eames* v. *Godwin*, 31 Beav. 25.

Under a will, C and D were entitled equally to a sum of stock. C, the executor, with the concurrence of D, transferred it into the joint names of C and D:—Held, that they thereby became joint tenants. Ibid.

Bequest of the income of the residue equally amongst three daughters, A, B and C, "during the term of their natural lives and the lives of the survivors and survivor of them during their and her natural life," with a gift over "after the decease of

the survivor of them." A died:—Held, that B and C were entitled to the whole income, and that on the death of either of these two, the survivor would be entitled for her life to the whole income. *Cranswick* v. *Pearson; Pearson* v. *Cranswick*, 31 Beav. 624.

A gift to a class, without words of severance, will not be construed as creating a tenancy in common merely because afterborn members of the class may be let in. *Secus*—if the gift, in terms, necessitates a vesting in different members of the class at different times, as where it is to children on their respectively coming of age. *Hand* v. *North*, 33 Law J. Rep. (N.S.) Chanc. 556.

A testator by a codicil to his will gave to his two grandchildren, J and C, as they should become of age, the portion or share that would have belonged to their mother under the will, had she survived the testator. J survived the testator, and attained twenty-one; C survived the testator, but died under age:—Held, that the grandchildren took as tenants in common, and not as joint tenants, and that the share of C was undisposed of. Ibid.

## (E) VESTED OR CONTINGENT.

### (*a*) *In general.*

A testator directed his executors to raise a legacy "to or in trust for his son." It was to be invested in the names of the trustees, and life annuities were given to the son and his wife out of the income, and interests were given to the children of the son and to their issue, with gifts over:—Held, that there was an absolute gift to the son cut down to the limited extent of the subsequent gifts. *Salmon* v. *Salmon*, 29 Beav. 27.

A testator devised his real estate to trustees, on trust to apply the rents towards the maintenance, &c. of his children, until the youngest attained twenty-one, then upon trust to sell and "pay, share and divide" the moneys between his children in manner following: one-fifth to W, one-fifth to T, one-fifth to S, and two-fifths to J. S died an infant:—Held, that her share was vested and passed to her representatives. *Cooper* v. *Cooper*, 29 Beav. 231.

Bequest in trust for the wife and children of J H during his life, and from and after the decease of J H, in trust to pay it to his children then living, reserving one-fifth for his wife for her life, which immediately on her death was to be divided amongst J H's children generally:—Held, that the reservation of the one-fifth for the wife and children was contingent on the wife surviving J H, and she having predeceased him that it did not take effect. *Patch* v. *Sparkes*, 30 Beav. 415.

A testatrix directed that her trustees should stand possessed of the residue of her estate in trust as to one moiety, and the dividends thereof, to pay the same to her daughter A for life, and then upon trust as to the said moiety and the dividends and accumulations thereof until it should be payable and distributable, to pay the same to the children of A who should survive her, at twenty-one, with benefit of accruer and survivorship; and she gave the other moiety in similar terms to her daughter B; and in case, at the decease of either of her said daughters, there should be no children of such daughter who should have lived to attain a vested interest under the trusts of the will, then the moiety of such daughter so dying and the dividends and accumulations thereof, to be held upon trust for the other daughter for life, and her children afterwards. And if upon the death of the survivor of the two daughters there should be no child or children of either who should have lived to attain a vested interest under the trusts in the two moieties, then the entirety of the two moieties and the dividends and accumulations thereof to be held in trust for the testatrix's six nephews and nieces on attaining twenty-one. The daughter A died before the testatrix, and she then made a codicil directing that her moiety should go to B in the same manner as it would have gone to A if she had lived; and she gave an annuity for the maintenance of the only daughter of A until she should attain twenty-one. B died, leaving six children, infants:—Held, that the interest of the six grandchildren of the testatrix was not vested until they attained twenty-one, and the dividends must be accumulated; and that the nephews and nieces were not entitled, under the gift over, until default in the attainment of twenty-one by the grandchildren. *Bull* v. *Jones*, 31 Law J. Rep. (N.S.) Chanc. 858.

Gift by a testator of the personal estate to his wife for life, remainder between and among his seven children by name, or such of them as should be living at his wife's decease, and the issue of such as should be dead leaving issue, with power to apply the presumptive share of such issue for maintenance. A son of the testator died after his father's death leaving an infant daughter, who died in the lifetime of the testator's widow:—Held, that such infant took a vested share. *In re the Trustees' Relief Act; in re Pell's Trusts*, 3 Giff. 153.

Gift of residue on trust to pay the dividends to the testatrix's son for life (except what was required for the education of her son's children); and should her son die before all or any of his children should attain twenty-one, she wished each child to receive their share on attaining twenty-one; but should all his children die before himself, at his death then over:—Held, that a child who died an infant in the lifetime of the son had not acquired a transmissible interest. *Chadwick* v. *Greenall*, 3 Giff. 221.

A testatrix directed the trustees of certain funds over which she had a power of appointment, from and immediately after her death, to stand possessed thereof upon trust to raise thereout 5,000*l.* and to pay the same to the five children of her deceased sister in equal shares, the shares of sons to be paid at twenty-one, the shares of daughters at twenty-one or marriage, and to apply the income arising from the residue of the trust funds as in the will mentioned:—Held, that this was a vested legacy, that it was severed from the remainder of the trust funds, and that the legatees were entitled to the interest of the fund set apart to answer it. *Dundas* v. *Wolfe Murray*, 32 Law J. Rep. (N.S.) Chanc. 151; 1 Hem. & M. 425.

The fiction or indulgence of the law which treats a child *en ventre sa mère* as actually born, applies only for the purpose of enabling such child to take a benefit to which if actually born it would have been entitled: in all other cases, the word "born" must have its natural interpretation. *Blasson* v. *Blasson*, 34 Law J. Rep. (N.S.) Chanc. 18; 33 Law J. Rep. (N.S.) Chanc. 403; 2 De Gex, J. & S. 665.

A testatrix bequeathed personal property to trustees to invest and accumulate, and when and so soon

as the youngest of the three children her nephew and nieces who should have been "born and living" at the time of her decease should arrive at the age of twenty-one years, then the stock, with its accumulations and increase, to be divided equally among all such children as should be then living. There were several children of the nephew and nieces who were actually born at the decease of the testatrix, two others were *en ventre sa mère*, and several others were both begotten and born after her decease:—Held, first, varying the decree of one of the Vice Chancellors, that the children who were *en ventre sa mère* at the time of the testatrix's death could not be deemed to have been then born and living, and, consequently, that the period of distribution was when the youngest of the children actually born attained the age of twenty-one years; and, secondly (affirming the decision of the Vice Chancellor), that all the children of the nephew and nieces living at the time of distribution, whenever born, were entitled to share in the fund. Ibid.

A testator gave his residuary estate to trustees in trust for his wife for life, and after her decease in trust to distribute and divide it amongst such of his four nephews and two nieces named in the will as should be living at her death in equal shares; but if any or either of them should then be dead, leaving issue, then it was his will and meaning that such issue should be entitled to their father's or mother's share:—Held, that issue of a deceased child were not entitled to their parent's share unless they were living at the death of the testator's widow. *Holgate* v. *Jennings*, 34 Law J. Rep. (N.S.) Chanc. 120; 34 Beav. 79.

A legacy was bequeathed, payable as soon as legal proceedings connected with the fund, out of which it was to be paid, should be terminated:—Held, that this was neither a reversionary interest nor a contingent legacy. *Luff* v. *Lord*, 34 Beav. 220.

A testator bequeathed his real and personal estate in trust to pay, for the benefit of his son (a lunatic), an annuity, until he should be able to manage his affairs, and if he ever returned to a sound mind, then he directed he should "divide" his residuary estate with his sister. The testator then gave the whole residue (subject to the contingency of his son's becoming of sound mind) to his daughter for life, and afterwards as she should appoint:—Held, that the daughter took the whole subject to the annuity and to the contingency, but that if the son recovered his reason he would be entitled, not only to one-half of the capital, but to one-half of the income from the testator's death. *Hole* v. *Davies*, 34 Beav. 345.

### (b) *Period of Vesting.*

W A, by will (after confirming his marriage settlement under which his wife took a life interest in certain property, and making other bequests to her), gave to his wife and two others, as trustees, the residue of his ready money, and money out at interest owing to him at the time of his decease, upon trust to pay certain legacies; and then to pay, distribute and divide the remainder to and between all his nephews and nieces who should be then living. He directed that the share of his nephew T should be subject to the payment of 100*l.* due from him (T) to W. The testator declared that, in case of the death of any of his nephews and nieces before receiving their respective shares, the shares of them so dying should be paid to and amongst the survivors. By codicil (which he declared should be taken as part of his will) the testator gave pecuniary legacies, and gave to H B a suit of mourning at his decease, which he empowered his executors to buy for her and give her out of his personal effects; he gave to F B articles of furniture (enumerated) after the death of his wife, and gave his wife all the residue of his real and personal estate during her life. One of the Vice Chancellors decided that the widow of the testator took no life interest in the ready money and money out at interest, but that the same belonged to the nephews and nieces; that such of the nephews and nieces as survived the testator, but died in the lifetime of the widow, did not thereby lose their interests; that the proper time for payment of the legacies was one year after the death of the testator; that a niece who died within that year without having received her share was not entitled; and that the share of the nephew T not amounting to 100*l.*, that share should be paid to W so far as it would go in payment of the debt of 100*l.* On appeal, their Lordships affirmed the Vice Chancellor's judgment, except as to the share of the niece who died within the year of the testator's death; but the parties agreeing, she was admitted to share, the point remaining undecided. *In re the Trusts of the Residuary Moneys of William Arrowsmith, and in re the Trustees' Relief Act*, 30 Law J. Rep. (N.S.) Chanc. 148.

A substitutional legacy to the children of a legatee dying before the period of distribution, vests in all the children who survive their parent, whether they survive the period of distribution or not. *In re Wildman's Trusts*, 30 Law J. Rep. (N.S.) Chanc. 174; 1 Jo. & H. 299.

A testator gave to his daughter the interest and dividends of all moneys which should be standing in his name in the 3*l.* per cent. reduced annuities, for her separate use; and, after her decease, the principal of the stock to the child or children of his daughter, in equal portions, on their attaining the age of twenty-one years. In case of the daughter's decease before her husband, the interest of the principal sum of stock to be enjoyed by him during his life; but should the daughter die without having any issue, then, after the decease of the husband, the principal of the stock to revert to the testator's son absolutely. The testator's daughter died before the testator, leaving one daughter, who, after the death of the husband, died under age and without issue:—Held, that the gift to the children of the testator's daughter was contingent; and, upon the death of the only daughter under twenty-one, the testator's son became entitled to the stock. *In re Wrangham's Trust*, 30 Law J. Rep. (N.S.) Chanc. 258; 1 Dr. & Sm. 358.

A testator gave the residue of his real and personal property to trustees to sell and stand possessed of the proceeds, upon trust to pay the dividends and interest thereof to his wife for life, to be by her expended in or about the maintenance of herself and the maintenance and education of his children, and after the decease of his wife the testator gave the principal of the said trust estate unto or amongst all his children equally, and to be paid to them as

they should severally attain twenty-one, with benefit of survivorship amongst them. There were seven children; and two of them upon attaining twenty-one, while four of the others were yet infants, petitioned jointly with the mother that the amount of their shares might be paid to them for their advancement in the world:—Held, that the shares became vested upon the children attaining twenty-one, and though the Court would not usually sanction the payment of the shares, where the whole income was not ample for the maintenance of the children, yet such a course might be adopted in this case upon the undertaking of the two children to secure to the mother the dividends which would have accrued in respect of those sums. *Berry* v. *Bryant*, 31 Law J. Rep. (N.S.) Chanc. 327; 2 Dr. & S. 1.

A testator bequeathed leaseholds in trust for his wife for life, and after her decease to apply the rents for the maintenance and education of all his children living at his decease; and after all his said children should attain twenty-one, upon trust to sell and "pay and divide" amongst all his said children; and "if but one or but one surviving child," the whole to such child:—Held, that all the children who survived the father took vested interests. *Boulton* v. *Pilcher*, 29 Beav. 633.

A testator gave the residue of his personal estate, after the death of his widow, unto his two sons, John and Richard, at their age of twenty-one years, if then living, equally between them, and to the issue of either of them that should be then dead, such issue taking the share the parent, if living, would have been entitled to only. Both sons attained twenty-one; John had a son, who died in his father's lifetime, and both father and son predeceased the widow of the testator:—Held, that there was an intestacy as to John's moiety. *Humfrey* v. *Humfrey*, 31 Law J. Rep. (N.S.) Chanc. 622; 2 Dr. & S. 49.

A testator directed that the income of certain property mentioned in his will should be enjoyed by his wife and his unmarried daughters during their lives, and after the death of the last survivor of his wife and unmarried daughters the principal of the stock should be divided equally among the two eldest children born in legitimate wedlock to each of his sons and daughters. But in case there be only one child living to any of his married sons or daughters, that that child receive only the proportion divided equally, according to the number there may be:—Held, that after the death of the widow and unmarried daughters those children only were entitled to take who were living at the period of distribution, and the property was not vested in those who were *priores natu*. *Madden* v. *Ikin*, 32 Law J. Rep. (N.S.) Chanc. 3; 2 Dr. & S. 207.

A testator, by will, gave a portion of the residue of his real and personal estate to trustees, upon trust for his son W R W, and his daughter J M W, to be divided between them in equal proportions as tenants in common, the share of his son to be vested in him at the age of twenty-four years, and the share of his daughter to be vested in her on her marriage with the consent of her guardians; and the testator declared that in case his son should die under twenty-four and without leaving issue, or his daughter should die without having been married with such consent as aforesaid, the share of him or her so dying should be held in trust for the survivor of them, his or her heirs, executors, administrators and assigns, and to be a vested interest in him or her respectively at the same age or time as his or her original share. The testator also declared that if at his death his son W R W should not have attained the age of twenty-one years, or his daughter should not have been married with such consent as aforesaid, it should be lawful for his trustees to apply all or any part of the income of his or her presumptive or contingent share in his said trust estates for his or her maintenance and education or benefit until such shares should respectively become vested. The son had attained the age of twenty-four and the daughter had attained twenty-one, but she had not been married:—Held, that the daughter became absolutely entitled to a share of the testator's residue upon her attaining twenty-one years of age. *West* v. *West*, 32 Law J. Rep. (N.S.) Chanc. 240; 4 Giff. 198.

A testator devised his real and personal estate to trustees, in trust to sell and invest, and to pay the interest to his wife, to be applied in support of herself and her children until they should respectively attain twenty-one; and upon their severally attaining twenty-one, to divide the capital between his wife and children:—Held, that a child who died under twenty-one had attained a vested interest. *Bird* v. *Maybury*, 33 Beav. 351.

A testator bequeathed his residue to his children in terms which gave them a vested interest, subject to be divested in favour of their children on their death under twenty-one. He then provided that if it should happen that he should leave no such children or child living to attain twenty-one, "or such, if any, dying without leaving lawful issue," then over:—Held, that "the dying" referred to was dying under twenty-one, and that the testator's children, on attaining twenty-one, acquired an indefeasible interest. *Pearman* v. *Pearman*, 33 Beav. 394.

### (F) ON WHAT PROPERTY CHARGEABLE.

A testator gave a legacy of 400*l*., charged upon his real and personal estate, to be divided, upon the death of his grand-daughter, equally between her children, if more than one, or if but one, then the whole to that child, the same to be paid to such children at the age of twenty-one; and if any child died before attaining twenty-one, then his share to go to the survivors and to the executor or administrator of such as should have lived to attain twenty-one; and the testator declared that the shares of such of the children as, upon the death of his grand-daughter, should be under twenty-one, should bear interest at the rate of 5*l*. per cent. per annum from her decease, such interest to be paid towards their maintenance, until their respective shares should become payable. No child lived to attain twenty-one, and the personalty was insufficient. It was held, that the legacy could not be raised out of the real estate, which had become freed from the charge. *Parker* v. *Hodgson*, 30 Law J. Rep. (N.S.) Chanc. 590; 1 Dr. & S. 568.

A testator charged his debts upon his real estate, and gave several legacies to his trustees for the benefit of divers persons. He then devised his real estate to trustees to sell, and directed that it should be con-

sidered as converted from the time of his death, and that the money to arise from the sale and the intermediate rents and profits should be considered as part of his residuary personal estate, which he directed his trustees to hold for some of the legatees:—Held, the personal estate being insufficient, that the legacies were payable out of the real estate. *Field* v. *Peckett*, 30 Law J. Rep. (N.S.) Chanc. 811; 29 Beav. 568.

A testator, possessed of real and personal estate, gave 4,000*l.* to trustees, for the benefit of several persons in succession, and directed that in case his personal estate should be insufficient, the amount should be raised out of his real estates. The residue of his real and personal estates he gave to H, who, after dealing with both estates, ultimately made his will, and disposed of some of the real estates of the testator. Upon his death, the 4,000*l.*, with an arrear of interest, was left unpaid; and upon a bill filed to obtain payment,—Held, that the residuary legatee had not affected the charge upon the property of the testator, but that his real and personal estate remained liable to pay the 4,000*l.* and interest; that if the personal estate was sufficient, the residuary legatee, by taking it, had made his own assets liable; that if insufficient, both the real and personal estate of the testator remained liable; that a general direction to raise money by way of mortgage on real estate does not exonerate the personal estate, or make the real estate primarily liable under the 17 & 18 Vict. c. 113; and that such act can only apply when the sum to be charged has been ascertained, and the real estate taken subject to the charge. *Hepworth* v. *Hill*, 31 Law J. Rep. (N.S.) Chanc. 569; 30 Beav. 476.

A testatrix charged the whole of her real and personal estate and effects with the payment of her debts, funeral expenses and legacies. She devised a copyhold messuage to her nephew for life, with remainder to his son and his heirs for ever. She then gave some pecuniary legacies, and she bequeathed the residue of her real and personal estate and effects not before specifically given, to her nephew, his heirs, executors, administrators and assigns respectively:—Held, that the specifically devised copyholds were charged with the pecuniary legacies. *Maskell* v. *Farrington*, 31 Law J. Rep. (N.S.) Chanc. 712.

A testator directed that his debts should be paid by his executors; he then gave two legacies, one to one of his executrixes, to be paid to her in addition to what was afterwards devised to her; and gave the residue of his personal estate and all his real estate to five persons, whom he appointed executors, in equal shares, as tenants in common:—Held, that the legacies were charged on the real estate. *Peacock* v. *Peacock*, 34 Law J. Rep. (N.S.) Chanc. 315.

One of the five devisees died in the testator's lifetime:—Held, that as between the heir and devisees the lapsed share was, in the hands of the heir, liable to bear a rateable proportion only of the debts and legacies. Ibid.

A testator having bequeathed numerous pecuniary legacies, some of them to charities, gave the residue of his real and personal estate to trustees on trust to sell and thereout to pay his debts and legacies "*herein* mentioned," and further directed the beforementioned charitable bequests to be paid, and that the proceeds of such part of his estate as the law did not permit to be given to charities should be first applied in payment of such legacies herein mentioned as were not given to charities. He further directed that no charitable bequest should be legally payable till six months after his decease. By a codicil he gave numerous other charitable legacies, and gave the residue of his property among charitable legacies:—Held, that the words "herein mentioned" included the legacies given by the will and codicil taken together. Secondly, held that, having regard to the distinction made in the will between property capable of being bequeathed for charitable purposes and property not so applicable, the word "property" in the codicil signified such property as was legally applicable to the purpose of the legacy. Thirdly, that the charitable legacies were not payable on the expiration of six months, but in the ordinary way. *Jauncey* v. *the Attorney General*, 3 Giff. 308.

## (G) SPECIFIC OR DEMONSTRATIVE.

A widow, being entitled to one-third of her husband's personal estate, took out administration, and having sold out a sum of stock belonging to him, she re-invested the produce with a small addition in another stock in her own name. By her will she bequeathed to her younger son all her share in the personal property of her husband, to which she became entitled at his decease:—Held, that the stock passed as a specific bequest to the legatee. *Moore* v. *Moore*, 29 Beav. 496.

A bequest of the sum of 2,000*l.* long annuities, described as standing in the name of the testatrix, who had only 300*l.* of that stock, held to be specific, and not demonstrative, and to fail as to the deficiency. *Gordon* v. *Duff, in re Ward*, 3 De Gex, F. & J. 662.

A testatrix bequeathed a large amount of "stock" legacies, declaring that by the word "stock" she meant government stocks, or stocks or shares in public companies, to which she might be entitled. She had various such stocks and shares:—Held, that the gifts were specific, and that the legatees were entitled to a proportionate share of each of such stocks and shares. *Measure* v. *Carleton*, 30 Beav. 538.

C W, believing herself to be the wife of B C, made her will; and after reciting her desire to give several legacies, she requested B C (who died before her) to pay several legacies out of property of hers which she assumed he had become entitled to on their marriage:—Held, that they were demonstrative legacies, and payable out of the general estate. *Jones* v. *Southall*, 32 Law J. Rep. (N.S.) Chanc. 130; 32 Beav. 31.

F H, by his will, gave certain annuities, and directed that they should be paid by his trustees out of the rents of his real estate. The testator then devised his real estates to trustees, upon trust out of the rents and income to pay the annuities, and subject thereto upon other trusts. F H died, and the rents and income of his real estates were insufficient to satisfy the annuities:—Held, that the gift was not specific, but demonstrative, and that the deficiency must be paid out of the capital of the testator's residuary personal estate. *Paget* v. *Huish*, 32 Law J. Rep. (N.S.) Chanc. 468; 1 Hem. & M. 663.

Devise of residue of real and personal estate on trust to permit A B to receive and take the rents,

issues and profits for life, with remainder over:—Held, that A B was entitled to enjoy leaseholds and railway stock in specie. *Vachell* v. *Roberts*, 32 Beav. 140.

Where a testator, having claims against his firm, directed his proportion of capital invested in the business to be converted into cash, such cash to be paid over as realized (with the exception of certain bequests thereinafter mentioned), to a charity, and requested his executors, as soon as convenient after his decease, out of the capital employed in the business, to pay the persons mentioned below the following sums, &c., the Court held, first, that the legacies were demonstrative, and not specific, and that if the particular fund failed, the deficiency was payable out of the general personal estate not specially given; secondly, that the proportion of capital included not only the testator's share in the assets, but also the debt due from the partner. *Bevan* v. *the Attorney General*, 4 Giff. 361.

### (H) SUBSTITUTIONAL OR CUMULATIVE.

A testator, by will, gave a legacy to his son, who was a member of a co-partnership firm. The members of the firm were after the death of the testator adjudged bankrupt, and at the time of the bankruptcy the firm was indebted to the testator's estate:—Held, that the assignees of the bankrupt partnership were not entitled to the legacy so long as the partnership debt remained due to the testator's estate. *Smith* v. *Smith*, 31 Law J. Rep. (N.S.) Chanc. 91; 3 Giff. 263.

A testator, by will, gave a legacy to a person who was entitled, under the trusts contained in the testator's marriage settlement, in default of appointment, to a portion of a sum of 1,000*l.*, due as a specialty debt from the testator to the trustees of such settlement. The Court, in the absence of such trustees, refused to declare that the legacy was *pro tanto* a satisfaction of the portion of the sum of 1,000*l.* payable to the legatee. Ibid.

Gifts of legacies of different amounts to the same persons, by two different testamentary instruments,—Held, substitutional, and not cumulative. *Tuckey* v. *Henderson*, 33 Beav. 174.

By her will, a testatrix, under an existing power, appointed 1,000*l.* to A B. By a subsequent testamentary instrument, she bequeathed 1,000*l.* to A B:—Held, that the gifts were cumulative. Ibid.

### (I) CONDITIONAL.

If a master bequeath an annuity to his servant provided she be in his service at the time of his decease, and two days before his death, and during the current year of service he dismisses her from his service without any just cause, and she in consequence leaves his house, she is not entitled to the annuity. *Darlow* v. *Edwards* (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 51; 1 Hurls. & C. 547.

A legacy was given to a person who was appointed an executor as follows: "I give to my friend J S, banker's clerk, and one of the executors of my will, 50*l.*" J S renounced probate:—Held, that the legacy was not conditional on the acceptance of the executorship. *In re Dendy*, 31 Law J. Rep. (N.S.) Chanc. 184; *sub nom. In re Denby*, 3 De Gex, F. & J. 350.

A testator bequeathed a legacy to M V in case she should be in his service at his decease. The testator was shortly afterwards removed to a lunatic asylum, and M V, who was a yearly servant, voluntarily quitted the house, receiving from the family her wages up to the end of the year, which did not expire till after the death of the testator:—Held, that she was not entitled to the legacy. *In re Serres's Estate, Vennes* v. *Marriott*, 31 Law J. Rep. (N.S.) Chanc. 519.

A legacy was given to trustees upon trust for I D for life, in case he should marry the testator's niece E, and after his decease in trust for the eldest son of I D who should be living at his death and have attained twenty-one. And in case I D should not marry E the bequest was not to take effect, but was to sink into the residue. I D, with the testator's consent, married another woman, and she and E, who was still unmarried, were both living. Upon a bill by the son of I D to secure the legacy,—Held, that a marriage with E was a condition precedent to vesting the legacy, and that it was not dispensed with by the assent of the testator to a marriage with another woman. *Davis* v. *Angel*, 31 Law J. Rep. (N.S.) Chanc. 613; 31 Beav. 223.

Though a vested interest given by will may be divested by a mere clause of revocation, without any gift over, yet, if the divesting clause contain a gift over so ill expressed as to leave the testator's intention respecting the destination of the fund uncertain, it will fail of effect altogether, and the vested interest will remain absolute. *In re Catt's Trusts*, 33 Law J. Rep. (N.S.) Chanc. 495; 2 Hem. & M. 46.

A testatrix gave residuary real and personal estate to trustees, upon trust to sell and convert and distribute the proceeds equally amongst her brothers and sisters, by name, subject to the proviso thereinafter contained. The proviso referred to directed that all the residuary legatees should within twelve months after they should severally become entitled to their shares take the name and arms of Willett, and in case any such residuary legatee should refuse or decline or neglect to comply with the requisitions of the proviso within twelve months after they should become so entitled, then the estate and interest of him, her or them in the trust moneys under the will, should after the expiration of the said twelve months cease and be void to all intents and purposes whatsoever, and the part or share of him, her or them in the same, should thenceforth go and be paid and applied in the same manner in all respects as if he, she or they so refusing, declining or neglecting was or were actually dead:—Held, that the testator not having clearly pointed out what should be the destination of the property in the event contemplated, the proviso was not an effective divesting clause, and that legatees who refuse to comply with the conditions thereof were entitled to their shares. Ibid.

Testatrix appointed an estate to her husband for life, remainder to trustees, upon trust for her daughters, subject to a proviso that her son should be at liberty to purchase the estate for 8,000*l.* on giving notice within twelve months after the husband's death, the right of pre-emption to determine if the notice were not given within that time; and she limited the 8,000*l.* on trust for the daughters and their issue:—Held, that the condition must be read as meaning within twelve months after the estate came to the trustees, and that a notice given within twelve months

of testatrix's death, though two years after the death of her husband was sufficient to entitle the son to the option of purchase. *Evans* v. *Stratford*, 2 Hem. & M. 143.

A bequest of an annuity to a married woman "in the event of the death of or her separation from her present husband," was followed by a right to reside in the testator's house "in the event of the death of her husband or her separation from or living apart from him. She was separated from him, not by any legal separation, but by reason of his infirmity: —Held, that she was entitled to the annuity. *Bedborough* v. *Bedborough* (No. 2), 34 Beav. 286.

### (K) FORFEITURE.

A testator gave his residuary estate to trustees, and directed them to pay the income to his nephews for life, or until any of them should be declared bankrupt, and upon the bankruptcy or death of any nephew his share was to be paid to the children of such nephew. It was also declared that the share of any nephew dying without children should vest in the surviving nephews and their children at the same time and in the same manner as the original shares, or as near thereto as circumstances would admit:— Held, upon the bankruptcy of a nephew, that the interest of the children was accelerated, and that the original and accrued shares passed to the children of such nephew though he had ceased to be bankrupt, and had obtained his certificate before the accrued share fell in. *Dorsett* v. *Dorsett*, 31 Law J. Rep. (N.S.) Chanc. 122; 30 Beav. 256.

It has been long established that a condition in restraint of marriage of a testator's widow is valid: and, *semble*, the opinions preponderate in favour of such a condition being lawful in the case of any widow. At all events, there is no decided authority in our law for saying it is void. Therefore, where a testator gave an annuity out of real estate to the widow of his nephew, and declared that if she should marry again the annuity should cease, the annuity was held to be forfeited on her second marriage. *Newton* v. *Marsden*, 31 Law J. Rep. (N.S.) Chanc. 690; 2 Jo. & H. 356.

Bequest to testator's widow during widowhood, remainder to his son-in-law "during the term of his natural life or marriage again," with a gift over after the decease or marriage of the son-in-law:—Held, on the construction that this was a gift for life or until marriage, and not a gift with a condition of defeasance on marriage. *Evans* v. *Rosser*, 2 Hem. & M. 190.

Whether a condition defeating a gift to a man on his second marriage is good or bad—*quære*. Ibid.

A testator gave a share of his estate to his nephew, but declared, that if he should "make any claim or demand against his estate" it should lapse, and there was a gift over. Two years before the testator's death a dispute had arisen between him and his nephew as to some cottages. The testator distrained on the tenants, and then replevied, and after the testator's death the nephew distrained, and it was determined, in a consolidated action, that the cottages belonged to the testator:—Held, that there was no forfeiture, the proceedings of the nephew being defensive, and the proviso pointing to acts subsequent to the testator's death. *Warbrick* v. *Varley* (No. 2), 30 Beav. 347.

### (L) IN SATISFACTION OF DEBT.

A sum of 200*l.* was charged on a brother's estate in favour of his sister. By his will he devised the estate in trust to raise 950*l.* for his sister owing (as he expressed himself) to her by him:—Held, that the 200*l.* was thereby satisfied. *Shadbolt* v. *Vanderplank*, 29 Beav. 405.

A testator, being by virtue of his marriage settlement under an obligation to pay the trustees 5,000*l.* in trust for his wife for life, by his will bequeathed 10,000*l.* to other trustees for his wife for life, and he also directed the payment of all his just debts:— Held, that the bequest was not a satisfaction of the 5,000*l.* and that the widow was entitled to both provisions. *Pinchin* v. *Simms*, 30 Beav. 119.

A testator on the marriage of his son, covenanted to pay an annuity of 100*l.* a year to his daughter-in-law, if she survived his son, *durante viduitate*. By his will, the testator bequeathed to her an annuity oft he same amount, but which differed in several respects, and he directed the payment of all his debts:—Held, that the latter annuity was not a satisfaction of the former. *Charlton* v. *West*, 30 Beav. 124.

A legacy by a debtor to a creditor held to be a *pro tanto* discharge of the debt, it appearing that the testatrix had made a proposal to that effect to her creditor, and that he had not objected to the arrangement. *Hammond* v. *Smith*, 33 Beav. 452.

A testator having covenanted on the marriage of his daughter F to pay to the trustees of her settlement, within twelve months after his death, a share of personalty equal to the share which the most favoured child and his issue should take by his will, gave one-fifth of his personal estate to each of two children and a daughter of a deceased child, one other fifth to the said trustees, and one other fifth upon trust for his son H for life, with a gift over for want of issue to the other three children and a grandchild, the shares of daughters and the grand-daughter to be for their separate use:—Held, that the whole will indicating an intention to put the families of the children on an equality, the contingent gift for the separate use of F was intended as a satisfaction of the covenant and was bound by the trusts of the settlement. *Davenport* v. *Hinchcliffe*, 1 Jo. & H. 713.

### (M) ADEMPTION.

A gift by a father of 1,000*l.* to the husband of his daughter on the day of their marriage will not, in the absence of evidence, be considered as in satisfaction of a legacy of the same amount given to the daughter by a will subsequently made, though the will contained a clause that daughters, who received portions during his lifetime, should not be entitled to receive any legacy given for their benefit. *M'Clure* v. *Evans*, 30 Law J. Rep. (N.S.) Chanc. 295.

Upon an intended marriage between B C and C W, which under the 5 & 6 Will. 4. c. 54. was void in its inception as being contracted with the husband of a deceased sister, C W assigned various mortgage debts, stocks and securities to trustees by way of settlement. She afterwards by will directed her trustees to hold all the trust moneys and the securities upon trust in the proportions mentioned for the several persons named who should be living

at the decease of B C; she then gave several legacies to persons by name. C W survived B C; she destroyed the settlement and also the assignment of some of the securities to the trustees, and took re-transfers of stock into her own name, and died without altering her will:—Held, that the legacies were not adeemed by the destruction of the deeds, but that they were adeemed to the extent to which she had called in, received and re-invested the trust moneys on new securities. *Jones* v. *Southall*, 32 Law J. Rep. (N.S.) Chanc. 130; 32 Beav. 31.

A testator, by his will, gave a legacy of 700*l.* to his daughter. He subsequently gave her 100*l.* as a wedding present before her marriage, and after her marriage he gave her husband 400*l.* He afterwards made a codicil to his will, and without noticing these gifts he confirmed his will:—Held, affirming a decision of the Master of the Rolls, that the gifts were not an ademption of the legacy; but, *dubitante Turner, L.J.*, as to the gift of the 400*l.* *Ravenscroft* v. *Jones*, 33 Law J. Rep. (N.S.) Chanc. 482; 32 Beav. 669.

A father gave a legacy to trustees for the benefit of his daughter and her husband and their children, and he directed that any money he should advance, lend, or pay to her or her husband beyond what was secured by their marriage settlement should be deducted from the legacy, and he ordered the sums advanced to be ascertained from his books of account, which were not to be questioned. The testator, upon the marriage of his daughter, had agreed with the husband's father, in addition to provisions made by settlement, to allow his daughter 150*l.* a year. The testator for thirteen years treated the 150*l.* a year in his books of account as a liability he was bound to discharge, but he afterwards altered his accounts by debiting the former payments thereof as advances, and thenceforth until his death he treated the payments in respect of the allowance as advances:—Held, that as the testator was in equity bound to pay the 150*l.* a year, the payments in respect thereof were not advances; that the Court was not bound to treat the entries in the books, founded as they were upon an obvious mistake, as conclusive; and, consequently, that the payments of the 150*l.* ought not to be deducted from the legacy. *Hargreaves* v. *Pennington*, 34 Law J. Rep. (N.S.) Chanc. 180.

A legacy by a parent or a person *in loco parentis* to a child, is not satisfied by occasional small gifts in the testator's life. Thus, a legacy of 2,500*l.* was held satisfied *pro tanto* by a gift of 1,000*l.* stock on marriage, but not by gifts of 80*l.* and 100*l.*, or by an annual allowance of 60*l.* a year. *Watson* v. *Watson*, 33 Beav. 575.

In order to create a case of satisfaction of a legacy given by a person *in loco parentis*, that relation must exist at the date of the will. Ibid.

A legacy being held *pro tanto* satisfied by a gift of stock,—Held, that its value must be ascertained as at the time of the gift. Ibid.

Bequest by a father of 7,000*l.* in remainder after the death of his widow, in trust for his daughter for life, with remainder to her children of any marriage:—Held, partially adeemed by a subsequent gift in possession of 19,000 rupees Indian stock, made by the father on the marriage of his daughter, and settled on her husband for life, with remainder to herself for life, with remainder to the children of that marriage. *Phillips* v. *Phillips*, 34 Beav. 19.

The testator, by his marriage settlement, covenanted to secure his wife a life annuity of 100*l.* a year. By his will, he gave her an annuity of 100*l.* a year.—The Court held, that this was in addition, and not in satisfaction, on three grounds: First, because the testator directed his debts to be paid; secondly, because he expressed it to be given as an addition to her own property; and, thirdly, because he gave it in full satisfaction of her dower, freebench and thirds upon his property. *Glover* v. *Hartcup*, 34 Beav. 74.

### (N) ABATEMENT.

A testatrix directed her trustees to call in the sum of 600*l.*, and after payment of debts to pay to her daughter Catherine 75*l.* and to her daughter Margaret 75*l.*, and the residue of the 600*l.* she directed to be paid to S C, his executors or administrators, who should invest the same and pay the interest for the benefit of her granddaughter, until she should attain seventeen, at which time the further sum of 100*l.* was to be paid to each of her daughters and the residue thereof to be invested, and the interest paid for the benefit of the granddaughter till twenty-one, when the same was to be appointed to her absolutely. Proceedings having been taken against the trustees, the 600*l.* was reduced by costs and expenses; and it was held, that the legacies to the daughters were not to abate, and the gift to the granddaughter carried only so much as might happen to be the residue. *Harley* v. *Moon*, 31 Law J. Rep. (N.S.) Chanc. 140; 1 Dr. & S. 623.

A testatrix bequeathed various sums of her Bank stock; part of 9,000*l.* like stock to several legatees, and all the residue of her said Bank stock to C C. The stock at her death was insufficient to pay the specified sums:—Held, that all these legacies, including the residue to C C, must abate in proportion. *Elwes* v. *Causton*, 30 Beav. 554.

### (O) LAPSE.

Under the 33rd section of the Wills Act, 1 Vict. c. 26, which excludes from lapse a bequest to the issue of the testator "where the legatee shall die in the lifetime of the testator leaving issue, and any such issue shall be living at the time of the death of the testator," it is not necessary, to prevent lapse, that the issue living at the time of the death of the testator should have been living when the legatee died. The legacy in such case must be considered the property of the deceased legatee, and passes to his representatives, and not to the issue. *In the goods of Parker*, 31 Law J. Rep. (N.S.) Prob. M. & A. 8.

A, by her will, bequeathed all her personal estate to her daughter B, who died a widow, and intestate, in the lifetime of the testatrix, leaving a daughter, C. C also died in the lifetime of the testatrix, intestate, leaving a husband and a daughter, D, her surviving. Upon the death of the testatrix in the lifetime of D, C's husband took out administration to his wife, and then applied for administration with the will of the testatrix annexed, as representative of B, his wife's mother:—Held, that as D, a grandchild of the legatee, was living at the time of the death of the testatrix, the legacy had not elapsed; and that C's husband was entitled to the grant as the representative of the legatee. Ibid.

Where a testator gave all his personal estate in equal shares to eight societies, of which three, viz., the East London School Society, the Anti-Slavery Society, and the African Society, had become extinct before the testator's death, the last before the date of the will, the Court declined to order the shares in the fund to be applied *cy-près*, and held the next-of-kin entitled. *Langford* v. *Gowland*, 3 Giff. 617.

Bequest of an annuity to husband and wife "during their natural lives." The wife predeceased the testator:—Held, that the husband was entitled to the annuity for his life. *Alder* v. *Lawless*, 32 Beav. 72.

By her will the testatrix gave her residue to H R, and nine others, as tenants in common; but if H R died, she gave 300*l.*, part of the residue, to his children. H R died, and the testatrix made a codicil giving his children 500*l.* out of his share of the residue, and she confirmed her will except as to any legacy which had lapsed by reason of the death of the legatee:—Held, that there was an intestacy as to one-tenth of the residue beyond the 500*l.* *In re Mary Wood's Will*, 29 Beav. 236.

## (P) PERIOD OF PAYMENT.

A testator appointed 10,000*l.* each to his younger children, and all the residue to his eldest son. And he directed the income of the whole, until the youngest should attain twenty-one, to be applied in the maintenance of the minors. In the event of a younger child dying under twenty-one, he appointed his share to the eldest son in addition to the residue:—Held, that the share of a younger child, who died under twenty-one, was not payable to the eldest until the youngest child attained twenty-one. *Duffield* v. *Currie*, 29 Beav. 284.

Bequest of residue to four sons equally, but the capital not to be divided until they should all become settled in life; the interest of their portions alone to be paid after they were all provided for, until they severally became thirty years old, when the capital was to be placed at their disposal:—Held, that the sons were entitled to payment of the capital on attaining twenty-one. *In re Jacobs's Will*, 29 Beav. 402.

A testator gave certain property, including a sum of 2,700*l.* stock, to his wife for life, and after his wife's decease, as to 800*l.*, part of the said stock, upon trust for his daughter A E Y, as therein mentioned, and after the decease of A E Y, in trust for her children *living at the time of her decease* equally. The testator subsequently gave 1,200*l.*, further part of the said stock, upon trust for his daughter S A V, in similar terms to those used with respect to the gift of the 800*l.* stock to his daughter A E Y; and after the decease of his said daughter S A V, upon trust to transfer the said 1,200*l.* stock to *all and every* the children of his last-mentioned daughter *at the same time and in the same manner* as was thereinbefore mentioned with respect to the sum of 800*l.* for the benefit of his daughter A E Y:—Held, that a child of S A V who predeceased her mother, took no share in the fund. *Swift* v. *Swift*, 32 Law J. Rep. (N.S.) Chanc. 479.

## (Q) REMOTENESS.

A testator bequeathed a legacy to his son, and after his decease, and on the youngest of the son's sons attaining twenty-one, to divide it equally between the son's sons, and the issue of deceased son's sons, who should attain twenty-one, the issue to take the share which their father would have taken if living. Whether the gift after the son's death is wholly void, or only as to the share of the issue—*quære*. *Salmon* v. *Salmon*, 29 Beav. 27.

Gift by will to daughters for life and afterwards to "pay and divide" amongst their issue (children) then living, at twenty-five, the whole interest being given in the mean time for their maintenance during minority:—Held, that the gift to the children was not too remote. *Tatham* v. *Vernon*, 29 Beav. 604.

A legacy to churchwardens to invest the money in government or real securities, and apply the interest to keep up, in the churchyard of the parish, the tombs of the testatrix and other members of her family,—Held to be void, as tending to a perpetuity. *In re Rickard; Rickard* v. *Robson*, 31 Law J. Rep. (N.S.) Chanc. 897; 31 Beav. 244.

A testator directed his trustees to set apart 2,000*l.* upon trust for B during her life, and after her death to pay and divide the principal among her children on attaining twenty-four, and in the mean time the dividends to be applied for their benefit:—Held, that the interest of a child was not dependent upon his attaining twenty-four, and the gift, therefore, was not void for remoteness. *Bell* v. *Cade*, 31 Law J. Rep. (N.S.) Chanc. 383; 2 Jo. & H. 122.

Gift of residue of real and personal estate to A for life, and after her decease, in trust for all her sons and daughters who should attain twenty-two equally, with a power to apply the "annual income or fund" for their maintenance or "benefit" during their "minority,"—Held, void for remoteness. *Thomas* v. *Wilberforce*, 31 Beav. 299.

A testator gave his real and personal estate to his seven brothers and to the survivor for life, and after the death of the survivor, in trust to apply the income yearly to such of their children as should appear to them to stand in need of the same, and after the law admitted of no such further division, then to convey to the eldest son of his brother B then living:—Held, that the trust for division ceased twenty-one years after the decease of the surviving brother. *Pownall* v. *Graham*, 33 Beav. 242.

Bequest of personal estate in trust when and as the child and children of A B should severally attain the age of twenty-one years, to pay and divide the same equally between them and the children of such of them (if any) as might depart this life under the age of twenty-one years; but so, nevertheless, that the children of any deceased child, on attaining the age of twenty-one, should take between them, and share only as the parent would have taken if living:—Held, not too remote. *Packer* v. *Scott*, 33 Beav. 511.

A testator declared that the bequests to one daughter (C) should be enjoyed by her for life and then be put in trust for the benefit of the children she might leave, and to be divided at twenty-five. And he in like manner directed the bequests to his second daughter (M) should be paid to her for life and after her death may be continued in trust, and may be divided equally between her children after they have attained the age of twenty-five:—Held, that the bequest to the children of M was not too remote, and that they took a vested interest at the birth. *Saumarez* v. *Saumarez*, 34 Beav. 432.

(R) INTEREST ON.

A testatrix directed a church to be built, and as soon as built she gave 5,000*l.* for the endowment of the minister, "but without any interest in the mean time." The building of the church was delayed several years by litigation, and no minister had been appointed. The Court declined to decide in the absence of the minister, whether any interest was payable on the legacy, but intimated that the interest before an appointment of a minister would not form part of the capital. *Fisher* v. *Brierley* (No. 4), 32 Beav. 602.

(S) RIGHTS AND DISABILITIES OF THE LEGATEES.

A testator bequeathed the residue of his personal estate (which included certain shares in the P and N I Gas Companies) to trustees, upon trust to permit his wife to enjoy the annual income thereof during her life, and after her death the testator directed his trustees to transfer into the name of C B twenty-six shares in the P Gas Company, and to transfer into the names of each of his nieces, E and M, fifty shares in the N I Gas Company; and into the name of J B the remaining fifty shares in the N I Gas Company; and the testator expressly authorized his trustees to permit his personal estate invested at his decease to continue in the same state of investment:—Held that having regard to the particular frame of the will, any calls made during the life of the widow in respect of the gas shares must be paid out of the general residuary estate. *In re Box's Trusts*, 33 Law J. Rep. (N.S.) Chanc. 42; 1 Hem. & M. 552.

(T) LEGACY DUTY AND INCOME-TAX.

The testator, a domiciled Englishman, born in England of English parents, was in 1856 appointed, by warrant in the usual form, Chief Justice of the island of Ceylon, to hold and exercise the said office during Her Majesty's pleasure, to reside within the said island, and to execute the office in person. The testator, after receiving the appointment, went with his wife and family to Ceylon, and while residing there and discharging his duties as Chief Justice, duly made his will, and died shortly afterwards on the island, up to the time of his death holding the office and discharging his duties as Chief Justice under the appointment. His widow and executrix obtained probate of his will from the District Court of the island, and also from the principal registry of the Probate Court in this country, but declined to pay legacy duty on the personal estate of the testator, on the ground that he was at the time of his death domiciled in Ceylon and not in England. The testator had left his law books in England, and by his will bequeathed them to relatives in England. He had invested large sums of money on mortgage in Ceylon, which by his will he directed his widow and executrix to collect and invest in English securities. On an information filed by the Attorney General on behalf of the Crown to obtain payment of the legacy duty on the testator's personal estate,—Held, *per Curiam*, that, the testator, for the purposes of payment of legacy duty, was at the time of his death domiciled in England, and that the duty was therefore payable. And *per Pollock, C.B.*—That the domicil of origin of the testator was England, and that domicil must be presumed to continue till another had been acquired, which could only be done by actual residence elsewhere with the intention of abandoning the domicil of origin; that the burthen of shewing that this change had been made *animo et facto* lay on the party asserting the change; that the only fact proved in support of this assertion was the acceptance by the testator of an office from and to be held during the pleasure of the Crown, which did not shew either in *fact* or *intention* that the domicil of origin was changed. Per *Bramwell, B.*—That the inference to be drawn from the facts was that the testator intended to stay in Ceylon till he had earned his pension, and ultimately to return to England; that, without determining the meaning of "a domicil," which might bear different meanings under different circumstances, for the purpose of exemption from legacy duty, the domicil of the testator ought to be taken to be in England, though for other purposes it might have been in Ceylon. Per *Wilde, B.*—That the onus of proof was on those who undertook to establish the foreign domicil; that the residence of the testator in Ceylon under his appointment did not of itself confer a domicil in that country; and that being the only fact in favour of the foreign domicil, the other facts pointing the other way, the domicil of origin ought to prevail. *The Attorney General* v. *Rowe*, 31 Law J. Rep. (N.S.) Exch. 314; 1 Hurls. & C. 31.

The estate of an ambassador or attaché to a legation, domiciled in this country, is not exempt from legacy duty. Such a functionary does not by his appointment to an embassy to this country lose a domicil previously acquired here. *The Attorney General* v. *Kent*, 31 Law J. Rep. (N.S.) Exch. 391; 1 Hurls. & C. 12.

The testator, whose domicil of origin was Portugal, came in 1818 to England as agent to a wine company, and was so employed until 1833, and from that time to his death in 1859 resided in England. In 1857 he was appointed, and continued to his death, an attaché to the legation of the King of Portugal in England, and in 1858, in respect of that appointment, he claimed and obtained exemption from assessed taxes. In a testamentary paper the testator stated that, as he was a foreigner who always intended to return to his country, and was besides an attaché to the legation of the King of Portugal, his property was not subject to legacy duty:—Held, that the testator acquired a domicil in this country, and did not lose it by the appointment of attaché, and that his estate was liable to legacy duty. Ibid.

Testator, who died in 1811, by his will, gave all his freehold and copyhold lands to his three nieces, as tenants in common in fee simple, subject to certain provisoes in case of marriage, with the further proviso that his nephew should have the option of becoming the purchaser of the whole in fee simple at the rate or price of 10,000*l.* 3*l.* per cent. consols; and that upon his said nephew investing the sum of 10,000*l.* consols in the names of himself and other trustees to be appointed by his said nieces, that then and from thenceforth the use in the said will before limited to the said nieces in the said lands should absolutely cease and determine, and the said lands should forthwith be and enure to the only absolute use of his nephew; and that then and from thenceforth his said nieces should, on request of his said nephew, convey the said lands to the use of his said

nephew. And the testator further declared that his said nephew and such other persons should thenceforth stand possessed of the said 10,000*l.* 3*l.* per cent. consols in trust for his said three nieces, and that after the marriage of all of them, or the death of the survivor of them, the said trustees should transfer the said principal 10,000*l.* to his said nieces and their respective executors, administrators, and assigns, in three equal shares. The nephew, in the year 1812, having exercised the option given him by the testator's will, entered into the possession of the estates, and forthwith thereupon transferred the sum of 10,000*l.* consols into the names of himself and two others as trustees for the testator's said nieces. The said nephew survived both his co-trustees, and died, leaving the defendant, his only son and heir-at-law and executor under his will, him surviving, who proved his father's will, and thereby became sole trustee of the said 10,000*l.* consols upon the trusts declared by the testator's will:—Held, that a duty at the rate of 2*l.* 10*s.* per cent. upon the said sum of 10,000*l.* consols became payable upon the transfer thereof into the names of the trustees as directed by the said will, and that the defendant was liable for that duty. *The Attorney General* v. *Wyndham*, 32 Law J. Rep. (N.S.) Exch. 1; 1 Hurls. & C. 563.

J B B, by will, devised real and personal property to trustees, upon trust to convert into money, and to pay the income thereof to his daughter, H M B, for her life; and in case she should die without having married, the said property, and the income thereof, were to remain and be upon such trusts as she should by her will appoint; and in default of any such appointment, in trust for devisor's brother, R B, and his sister, H B. H M B survived her father J B B, and died without having married, and by her will gave (subject to the payment of her debts, funeral and testamentary expenses, and certain legacies and annuities) all the residue of her property unto and equally between her uncle R B and her aunt H B; and appointed her uncle R B, one E L and one T T (who renounced probate) her executors:—Held (in an information against R B and E L, claiming legacy duty at the rate of 5*l.* per cent. in respect of so much of the residuary estate of J B B as was appointed and disposed of by the will of H M B in favour of her uncle, the defendant R B, and her aunt H B), that H M B, by making the fund in question liable to her debts, legacies, &c., dealt with it as her own, and exercised her power of appointment, and that R B and H B could not reject the appointment and elect to take under the gift from their brother J B B; and that they were therefore liable to legacy duty at the rate of 5*l.* per cent., being the rate according to their relationship to H M B. *The Attorney General* v. *Brackenbury*, 32 Law J. Rep. (N.S.) Exch. 108; 1 Hurls. & C. 782.

Testatrix, an unmarried Englishwoman, in 1849 went to reside abroad at the house of her married sister at B, in Germany. She resided there, contributing towards the expenses of housekeeping, until 1863, in which year she died. Her property consisted of money invested in English securities, but she also possessed a valuable library, which she caused to be transported to B. She occasionally came over to England with her married sister to visit her friends, and while in England in May, 1854, she made her will, describing herself as now on a visit to my sister C, bequeathing her property to trustees to pay the annual income to her sister for life for her separate use, without power of anticipation, and with a power of appointment to her sister by deed or will. The female defendant, as sole executrix, proved the will in the Probate Court. The testatrix told her sister that if she survived her she should continue to live in Germany, and that nothing would induce her to return to England, except on an occasional visit. She also named the churchyard where she wished to be buried, and where she was afterwards buried:—Held, that her acts and declarations did not shew a sufficient intention to change her domicil; and, assuming she intended to give up her English domicil, that until she acquired a new domicil, her English domicil continued; and that the Crown was entitled to legacy duty. *The Attorney General* v. *Blucher de Wahlstatt*, 34 Law J. Rep. (N.S.) Exch. 29; 3 Hurls. & C. 375.

Held, also, on the authority of *In re Capdevielle* and *Wallop's Trusts*, that the Succession Duty Act (16 & 17 Vict. c. 51.) applies to all persons wherever domiciled. Ibid.

Under the 8th section of the 13 & 14 Vict. c. 97, the Court will grant an attachment, absolute in the first instance, against a person withholding legacy duty, who has failed to shew cause why he should not pay the money to the Receiver General of Inland Revenue. *In re Eaton*, 34 Law J. Rep. (N.S.) Exch. 87; *nom. in re Evans*, 3 Hurls. & C. 562.

A fund given for charitable purposes is subject to legacy duty, though it is made distributable among objects of the charity in sums not exceeding 5*l.* *Harris* v. *Earl Howe*, 30 Law J. Rep. (N.S.) Chanc. 612; 29 Beav. 26.

Bequest of legacy "free from any charge or liability in respect thereof":—Held, that it was given free from the legacy duty. *Warbrick* v. *Varley* (No. 1), 30 Beav. 241.

A testator gave his residue, in trust to convert and divide into two equal parts, and he bequeathed one equal part to A free from any duty in respect thereof, and the other equal part to be given to his nephews (but without the addition of the latter words):—Held, that the legacy duty on the first moiety was payable out of any lapsed residue, and if none, out of the second moiety. Ibid.

A testatrix bequeathed a legacy of 6,000*l.*; she afterwards in a separate sentence said "I also give and bequeath the several legacies hereinafter mentioned" (specifying them), "all which legacies I direct to be free from legacy duty." She then proceeded: "I also give E R 200*l.*, T C 4,500*l.*, &c., "all which said legacies I direct shall be paid free of legacy duty":—Held, that the 6,000*l.* was not included in the legacies given free of duty. *Fisher* v. *Brierley*, 30 Beav. 265.

By his will, a testator bequeathed several annuities to relations in equal degree, and, therefore, subject to the same rate of legacy duty under the above act. The testator then gave all his real and personal estate to certain trustees for conversion and investment, and payment of the annuities out of the yearly produce, and for accumulation of the remainder. He directed that upon the death of any of the annuitants the trustees should pay, after making provision for the payment of the remaining annui-

ties, the capital among a class of persons in the same degree of relationship as the annuitants, and, therefore, subject to the same rate of legacy duty under the above act. In an administration suit a question arose as to the manner in which the legacy duty was payable. The Master of the Rolls was of opinion that the duty was payable at once upon the whole capital of the fund in respect of all the bequests; but, upon appeal, the Lords Justices differing from his Honour,—Held, that the duty was payable on the annuities, as annuities, within section 8. of the statute, by four equal payments, of which the first instalment was to be made at the end of the first year of the annuity, and not payable upon the whole capital under section 12. *Crow* v. *Robinson*, 31 Law J. Rep. (N.S.) Chanc. 516.

A testator gave the residue of his personal estate to trustees, upon trust to set apart 10,000*l.* consols, and pay the dividends to his sister for life, and after her decease to retain so much of the said sum of 10,000*l.* as should be sufficient to realize the clear yearly income of 150*l.*; and he directed the trustees to pay the dividends and other income of the stock so directed to be retained by them to his nephew:—Held, that the nephew took the annuity, subject to legacy duty. *Banks* v. *Braithwaite*, 32 Law J. Rep. (N.S.) Chanc. 35.

By a will, some legacies were given free of duty, and their amounts were varied by a codicil:—Held, that they were still exempt from duty. *Fisher* v. *Brierley*, 30 Beav. 267.

A testator directed his trustees, out of the rents and profits of his estates, to keep insured and to repair all the messuages, buildings and erections upon the hereditaments previously limited, in trust for his wife for life during the continuance of her interest therein, and also during the same period to pay and defray all taxes, parliamentary, parochial and otherwise, affecting the same hereditaments or any of them:—Held, that, under this clause, the trustees were bound to pay the property and income tax. *Lord Lovat* v. *the Duchess of Leeds*, 31 Law J. Rep. (N.S.) Chanc. 503; 2 Dr. & S. 62.

A bequest of an annuity "payable without any deduction whatsoever," is not equivalent to a bequest thereof free from income-tax, which consequently must, in such a case, be borne by the annuitant. *Abadam* v. *Abadam*, 33 Law J. Rep. (N.S.) Chanc. 593; 33 Beav. 475.

## LEGITIMACY DECLARATION ACT.

In proceedings under the Legitimacy Declaration Act, the Court will not take upon itself to decide who shall be cited to see proceedings. The petitioner should ask leave to cite some person specified, and shew that he is a person fit to be cited. *Upton* v. *the Attorney General*, 32 Law J. Rep. (N.S.) Prob. M. & A. 177.

A person not cited, who has no real interest in opposing a petition for a declaration of legitimacy, will not be allowed to intervene. Ibid.

## LIBEL.

[See SLANDER.]



### (A) DEFAMATORY WRITINGS.

The declaration set out a letter addressed by the defendant to the clerk of the guardians of a poor-law union in respect of an allowance by the said guardians towards the maintenance of the defendant's mother, being also the mother of the plaintiff, in part of which letter it was stated, "who" (meaning the plaintiff) "has for years, without the slightest cause, systematically done everything she can to annoy me" (meaning the defendant), "and I am sorry to say my mother is only too glad to assist her" (meaning the plaintiff). "Some years ago they" (meaning the plaintiff's and the defendant's said mother and the plaintiff) "dragged me into Chancery, and almost every term I am obliged to appear by counsel before the Vice Chancellor. They" (meaning the plaintiff's and the defendant's said mother and the plaintiff) "had no business to include me in the bill, as I make no claim to my late father's property; but of course it is a pleasure to my mother and Miss F" (meaning the plaintiff) "to put me to all the expense they" (meaning the plaintiff's and the defendant's said mother and the plaintiff) "can." "Doubting as I do my mother's extreme poverty, I think the proper test of it is an order for the workhouse, the expense of which should be borne proportionately between all her children, and as Miss F" (meaning the plaintiff) "is a lady of independence and a single woman, and can find the money for carrying on all sorts of law proceedings, she" (meaning the plaintiff) "should not be exempted":—Held, on demurrer, that the declaration was good, as the publication of the above letter tended to disparage the plaintiff's character, and was therefore libellous. *Fray* v. *Fray*, 34 Law J. Rep. (N.S.) C.P. 45; 17 Com. B. Rep. N.S. 603.

### (B) SPECIAL DAMAGE.

Where a person in publishing an account of his own goods compares them with those of another, describing his own as superior to them, but not making any false representation as to the quality and character of the latter, an action is not maintainable, although the declaration allege that the plaintiff has suffered special damage in consequence of the publication, and although the allegation of the superiority of his own goods may be false. *Young* v. *Macrae*, 32 Law J. Rep. (N.S.) Q.B. 6; 3 Best & S. 264.

### (C) JUSTIFICATION.

The plaintiff charged, as a libel upon him, a notice published by the defendants, a railway company, which stated that the plaintiff had been con-

victed by Justices of an offence against the defendants' by-laws and fined with an alternative of three weeks' imprisonment; the alternative in the conviction was really fourteen days:—Held, that it was a question for the jury whether the statement charged as libellous was or was not substantially true, and that the inaccuracy of the statement did not necessarily make it libellous. *Alexander* v. *the North-Eastern Rail. Co.*, 34 Law J. Rep. (N.S.) Q.B. 152; 6 Best & S. 340.

### (D) PRIVILEGED COMMUNICATIONS AND PROTECTED PUBLICATIONS.

Though a publication of the report of a trial in a court of justice, in the course of which a libel is read, would be privileged; a publication of the proceedings of a parish vestry, at which a libel is read, is not so privileged. *Popham* v. *Pickburn*, 31 Law J. Rep. (N.S.) Exch. 133; 7 Hurls. & N. 891.

A newspaper, in publishing an account of the proceedings at a parish vestry meeting, inserted without comment the report of an officer of health appointed under the provisions of the Metropolis Local Management Act, which report was read at the vestry meeting. The report contained a libel on the plaintiff. In an action for libel, against the proprietor of the newspaper, the pleas being not guilty and a justification, and the jury having found a verdict for the plaintiff,—Held, that although it would be the duty of the vestry, under the statute, to make the report of the officer of health public in the month of June, and to sell copies of it to any one applying for them; the defendant had no right to anticipate the publication, or to give it a wider circulation, and therefore was not justified in publishing it in his newspaper in February; nor could he justify the publication as that of a matter of public discussion on a subject of public interest. Ibid.

*Quære*—Whether, after the statutable publication, it would be lawful to publish the report, either with or without reasonable comments. Ibid.

A writer in a public periodical has no other right than that of any other person of freely discussing the public acts or writings of another, and he is not "privileged" in the proper sense of the word. If, therefore, an article in a newspaper commenting on public acts or writings contain imputations of sordid motives or dishonest conduct, and the acts or writings themselves do not afford a reasonable ground for such imputations, the *bona fide* belief of the writer that the imputations are well founded affords no defence to an action for libel. *Campbell* v. *Spottiswoode*, 32 Law J. Rep. (N.S.) Q.B. 185; 3 Best & S. 769.

The law allows the same liberty of criticizing handbills as it does in the case of books, and the criticism is equally privileged whether it be oral or written. *Paris* v. *Levy*, 30 Law J. Rep. (N.S.) C.P. 11; 9 Com. B. Rep. N.S. 342.

R, a tradesman, received a letter, purporting to come from the defendant, ordering a target to be sent to the head-quarters of a regiment of volunteers, of which the defendant was the honorary secretary and acting adjutant. In answer to inquiries from R, the defendant in writing denied that he had written the order for the target, and added, "On comparison of the order and others, with letters in the office, in the handwriting of Dr. C" (the plaintiff), "I have no hesitation in saying, as my firm opinion, that all the letters are in his handwriting; and if you take proceedings, I am willing to state this on oath." In an action for libel, the jury found that the defendant had written the above letter to R, and others to the same purport, with *bona fides*, without malice, and believing the statements therein contained to be true; and that the plaintiff was not the writer of the order for the target to R, or of any other of the fictitious orders:—Held that, on this finding, the defendant was entitled to a verdict on the plea of not guilty. *Croft* v. *Stevens*, 31 Law J. Rep. (N.S.) Exch. 143; 7 Hurls. & N. 570.

The defendant, having dismissed the plaintiff from his service as gardener, wrote to E, on whose recommendation he had originally engaged the plaintiff, stating *inter alia*—"On Saturday I had another scene with F (the plaintiff) in my garden. He was extremely violent, came towards me several times with an open clasp-knife in his hand, and his eyes starting from the sockets with rage, a perfect raving madman. I was fortunately accompanied by my upper servant. He accused me of having opened a letter of his, and said that he had written to the General Post Office about it, and would take proceedings, as it was an indictable offence. I think it right that you should be informed of F's (the plaintiff's) violent conduct, as you might unwittingly recommend him without being aware of his temper and faults." E, who was the superintendent of the Royal Horticultural Society, of which the defendant was a member, was in the habit of recommending gardeners, and the plaintiff had, as the defendant knew at the time he wrote the letter, applied to E to procure him another situation:—Held, that the letter could not be considered as a privileged communication, as there were expressions in it which went beyond what could be justified by such a communication. *Fryer* v. *Kinnersly*, 33 Law J. Rep. (N.S.) C.P. 96; 15 Com. B. Rep. N.S. 422.

*Quære*—If it would have been privileged had the letter been confined to a simple statement of the servant's conduct. Ibid.

The plaintiff, a member of the congregation of a church of which C was curate, was introduced by Mrs. H (also a member of the congregation) to the defendant, the incumbent of a country parish, in which the plaintiff was visiting, and where he became acquainted with a farmer, one of the defendant's parishioners. The farmer having afterwards sued the plaintiff for the price of a horse and other things which the plaintiff had had of him, and about which there were disputes, the defendant was applied to by C, at the plaintiff's instance, to arbitrate between the plaintiff and the farmer, and upon the defendant declining to do so, C earnestly appealed to him, as a clergyman, to act as peace-maker between the litigants and prevent what might otherwise be a scandal to the congregation of C's church. The defendant, in reply, wrote to C that, as one of his reasons for not interfering in the matter, the plaintiff's conduct was so bad that he should not like to have his name associated with his affairs, and he enumerated certain charges which he said he had heard against the plaintiff's moral character, adding that it grieved him much to make these statements respecting a man who evidently wished to be considered a religious man and a good churchman, but that he thought it was his duty to unmask him to C, and that he would be thankful to be enabled to tell some of his neigh-

bours that the plaintiff's position at C's church was not quite what the plaintiff had led them to suppose it to be. C gave this letter to the plaintiff, who thereupon brought an action for libel against the defendant. In an interview which the defendant afterwards had with Mrs. H, the defendant complained of the action being brought and spoke of what he had heard against the plaintiff, when Mrs. H assured him he was mistaken, and that she would question the plaintiff about the truth of the charges. She did so, and afterwards wrote to the defendant that she was confident he had been misinformed, as the plaintiff had assured her that there was not the slightest foundation for what was reported of him, giving the defendant the reasons the plaintiff had alleged in support of his character. The defendant wrote to Mrs. H in reply: "Time will shew whether I have been misinformed or not respecting Mr. W (the plaintiff). A writ has been served upon me, and a public investigation must therefore take place. If he states on oath in the witness-box what he has stated to you, especially as to the charge of assault, he will be most certainly prosecuted for perjury, for there is not a shadow of a doubt but that the complaint of the servant girl is correct. She is a person of unblemished reputation and a communicant, and no one can listen to her statement as I have done, without believing every word of it." An action for libel was also brought against the defendant in respect of this letter, which, as well as the letter to C, was written by the defendant *bona fide*:—Held, that both letters were privileged communications. *Whiteley* v. *Adams*, 33 Law J. Rep. (N.S.) C.P. 89; 15 Com. B. Rep. N.S. 392.

### (E) Accord and Satisfaction.

To an action for libel the defendant pleaded that, after the commencement of the suit, the plaintiff and the defendant agreed to accept certain mutual apologies to be published by the plaintiff and the defendant respectively, in certain weekly journals belonging to the plaintiff and the defendant respectively, in full satisfaction and discharge of all causes and rights of action in the declaration mentioned, and all damages and costs sustained by the plaintiff; and that in pursuance of the agreement the defendant did publish his part of the mutual apologies in the weekly journal belonging to him, and that the plaintiff did also in pursuance of the agreement publish his part of the apologies in the weekly journal belonging to him:—Held, that the plea was a bar to the action as an accord and satisfaction. *Boosey* v. *Wood*, 34 Law J. Rep. (N.S.) Exch. 65; 3 Hurls. & C. 484.

### (E) Execution against Sureties of Newspaper Editor.

By the statute 1 Will. 4. c. 73. s. 3, if a plaintiff, in any action for libel against any editor, conductor, or proprietor of a newspaper makes it appear, by affidavit, to the Court of Exchequer that he has not been able to procure satisfaction by writ of execution against the goods and chattels of a defendant, it shall be lawful for the Court, for the benefit of the plaintiff, to order such proceedings to be had on the recognizance entered into by sureties of the editor, &c., under 60 Geo. 3. c. 9, as would be taken to obtain any fines or penalties due to the Crown:—Held, that the duty of the Court of Exchequer, in giving leave to take such proceedings, is judicial and not merely ministerial, and that therefore the Court has a discretionary power to direct or withhold proceedings. *Jones* v. *Young, in re Chaplin*, 32 Law J. Rep. (N.S.) Exch. 254; 2 Hurls. & C. 270.

An action for libel against the editor of a newspaper was referred to arbitration. The arbitrator awarded a sum for damages, and also directed an apology to be inserted in the newspaper by a day named, and in default directed the verdict taken at Nisi Prius to stand for the larger sum claimed in the declaration. The plaintiff did not take up the award until the day for inserting the apology had long passed; and he afterwards signed judgment for the damages in the declaration. At the request of the defendant his attorney did not take any steps to set aside the award, and the defendant afterwards paid the plaintiff a larger sum than the reduced amount awarded. After an interval of some years the plaintiff issued a *fi. fa.* against the defendant for the balance, to which "*nulla bona*" was returned, and then applied to the Court of Exchequer, under the acts above mentioned, to issue execution against the defendant's sureties for the amount for which judgment was signed. The Court refused to allow such proceedings to be taken, and discharged a rule obtained for that purpose, with costs. Ibid.

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## LIEN.

[Equitable Lien, see Trover—For Freight, see Ship and Shipping.]

(A) In general.
(B) Innkeeper.
(C) Wharfinger.
(D) Claim against Owner for Care of Goods.

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### (A) In general.

H & Co., the owners of certain copper ore, employed T to convey it in T's barge from Liverpool to Birkenhead, and to deliver it there to L, to be crushed in his mills; L having agreed to indemnify H & Co. against all risk of such transit. The barge, with the ore on board, having afterwards, without any fault of T, sunk in the River Mersey, T informed H & Co. of the accident, and requested to be employed to raise the ore, when he was told that H & Co. had nothing to do with it, and that he should see L, who had the management of it. L, when applied to by T as to getting the ore up, said that he was insured with S, and that T must therefore go to S for orders. T having accordingly obtained from S directions to do the work, raised the ore, and afterwards conveyed it to Birkenhead, and then claimed a lien on it as against H & Co. for the expenses of raising it:—Held, that T had no right to such lien on the ground either of any contract with H & Co. or of general average loss, or of salvage. *Castellain* v. *Thompson*, 32 Law J. Rep. (N.S.) C.P. 79; 13 Com. B. Rep. N.S. 105.

Held also, that H & Co. had not estopped themselves from claiming the ore of T as the true owners, since no representation had been made with their authority that any other person than themselves was the owner. Ibid.

Where A B, in consideration of a sum of money to be advanced to him by C D, to enable him to complete a railway contract, agreed to give C D a share in the profits of the contract, and C D advanced a portion only of the stipulated sum, he and those claiming under him, were by one of the Vice Chancellors declared to have a lien on the profits derived by A B under the contract for the amount of the money advanced and interest; but upon appeal this decision was reversed, and the bill, which was filed by the assignee of C D, was dismissed, with costs. *Twynam* v. *Hudson*, 31 Law J. Rep. (N.S.) Chanc. 577.

A receiver in a legatees' suit, advertised furniture, in a leasehold house, for sale. The superior landlord claimed rent, but took no other step, and the furniture was sold:—Held, that the landlord had no lien on the proceeds of the sale, but must come in with the other creditors. *In re Sutton; Sutton* v. *Rees*, 32 Law J. Rep. (N.S.) Chanc. 437.

(B) INNKEEPER.

Where the owner of a racehorse went with it to an inn under circumstances sufficient to constitute him a guest, and remained at the inn with the horse for several months, it was held that he would be presumed, in the absence of evidence to the contrary, to continue to be there as a guest so as to give the innkeeper a lien on the horse for its keep, although during such time the owner constantly took the horse out for training, and was sometimes absent with it for several days at races at which the horse ran. *Allen* v. *Smith*, 31 Law J. Rep. (N.S.) C.P. 306; 12 Com. B. Rep. N.S. 638.

A claim by the innkeeper to detain a horse for its keep during the whole time he has had it in his stables, when he is only entitled to a lien thereon for a portion of that time, does not dispense with the necessity of a tender of the amount for which there is a lien. Ibid.

(C) WHARFINGER.

A dock company had power by their special act to detain until payment any goods on which the owner, consignor, or consignee should not have paid the charges for wharfage, warehouse-room, or rent, allowed by the act; and if the goods should have been removed without payment, to distrain and detain and sell any goods of the owner, consignor, and consignee. By a subsequent act, certain parts of the statute 10 Vict. c. 27. were incorporated; by s. 3. of which "owner" includes "any consignor, consignee, shipper, or agent for sale or custody of goods, as well as the owner thereof"; and by s. 45. power is given to a dock company, in the case of goods having been removed without payment of the rates due upon them, to arrest any other goods within the limits of the company's premises "belonging to the person liable to pay such rates." The company, having received timber, entered in or transferred into the names of C M & Co., who were merely agents and not the true owners, refused to deliver it to the real owners until the rates due on other goods entered in or transferred into the names of C M & Co. in the company's books had been paid:—Held, first, that, assuming the charges to be for wharfage, the company, having dealt under the special and general acts of parliament, had not any general lien which might have belonged to them as wharfingers at common law. Secondly, that neither under the special nor general act were they entitled to detain goods for charges due on other goods, really belonging to different owners, though all entered in the names of the same person. *Dresser* v. *Bosanquet*, 32 Law J. Rep. (N.S.) Q.B. 57; 4 Best & S. 460—affirmed in Ex. Ch. 32 Law J. Rep. (N.S.) Q.B. 374; 4 Best & S. 686.

*Quære*—Whether, even if the company had this power, where the agency was not disclosed, they could exercise it where they knew that the persons in whose names the goods were entered were only agents for other persons. Ibid.

(D) CLAIM AGAINST OWNER FOR CARE OF GOODS.

An artificer who, in the exercise of his right of lien, detains a chattel upon which he has expended his labour and materials, has no claim against the owner for taking care of the chattel while so detained. *Somes* v. *the British Empire Shipping Co.* (House of Lords), 30 Law J. Rep. (N.S.) Q.B. 229; 8 H.L. Cas. 338.

If the owner of the chattel (for instance, a ship) knew that he must pay for dock room, while his ship was undergoing repairs, and if, while he was unable to pay for those repairs, and the ship was detained in exercise of the shipwrights' lien, he received notice that he must pay dock room during the detention, such facts would not create an implied *assumpsit* on his part to pay it. Ibid.

## LIMITATIONS, STATUTE OF.

[Limitation of Action against Guardians of the Poor, see POOR.]



(A) WHEN THE STATUTE OPERATES AS A BAR.

(*a*) *In general.*

A tenant for life cut timber in excess of what he was entitled to cut; nearly twenty years after his death, the succeeding tenant for life filed a bill for an account, and to make the estate of the deceased tenant for life liable for the timber cut in excess:—Held, that the plaintiff was barred by lapse of time, and the bill was dismissed with costs. *Harcourt* v. *White*, 30 Law J. Rep. (N.S.) Chanc. 681.

A trust for the payment of debts will not prevent time from operating as a bar to a claimant who has been guilty of *laches* in making his claim. Ibid.

Where the right to relief in equity is founded upon fraud, lapse of time is no bar to a suit, so long as the person defrauded is ignorant of the fraud which has been committed. *Rolfe* v. *Gregory*, 34 Law J. Rep. (N.S.) Chanc. 274.

*Semble*—The Statute of Limitations is applicable to an action at law for dower. *Marshall* v. *Smith*, 34 Law J. Rep. (N.S.) Chanc. 189.

In 1824 a reversionary interest in funds, vested in trustees, was assigned to secure the payment of a sum in the following year. In 1860 the reversion fell in, no notice having been given to the trustee, nor any interest paid, nor acknowledgment made in the mean time:—Held, that the mortgagee's right against the funds was not barred by the Statute of Limitations or the lapse of time. *In re Lowe's Settlement*, 30 Beav. 95.

Where there is a mortgage with a covenant to pay principal and interest, the existence of such a covenant does not entitle the mortgagee to recover more than six years' interest as against the land. *Shaw* v. *Johnson*, 30 Law J. Rep. (N.S.) Chanc. 646; 1 Dr. & S. 412.

Where a term is created for the express purpose of a trust to secure principal and interest in a mortgage, the 42nd section of the 3 & 4 Will. 4. c. 27. does not operate as a bar to the recovery by the mortgagee of interest beyond six years. Ibid.

The case is not altered where the term, though in 1819 a dry satisfied term, was in that year clothed with an express trust, and assigned for the benefit of the mortgagee. Ibid.

Nor is such a term merged under the 8 & 9 Vict. c. 112. Ibid.

A mortgagee in a suit to foreclose can only recover arrears of interest for six years next preceding the suit, though the principal and interest are secured by the covenant and bond of the mortgagor. *Round* v. *Bell*, 31 Law J. Rep. (N.S.) Chanc. 127; 30 Beav. 121.

After the sale of the estate by a trustee for a mortgagee, under a power of sale, it was held, in a suit by the mortgagor to recover the surplus money, that the mortgagee could not under the 3 & 4 Will. 4. c. 27. retain more than six years' arrears of interest out of the purchase-money. *Mason* v. *Broadbent*, 33 Beav. 296.

A B, a trustee, misapplied a trust fund of which he was tenant for life, and he died in 1834. C D, who then became entitled to it, died in 1858, having taken no proceeding to recover it. A bill filed in 1863 by the representatives of C D against the representatives of A B, to recover the fund, was dismissed with costs on the ground of the lapse of time. *Hodgson* v. *Bibby*, 32 Beav. 221.

Upon a motion for a decree, the Statute of Limitations, if set up and insisted upon by the affidavit of the defendant, is sufficiently before the Court to enable it to give relief. *Green* v. *Snead*, 31 Law J. Rep. (N.S.) Chanc. 320; 30 Beav. 231.

It is not competent to an executor to maintain an action for a debt which accrued to his testator more than six years before the issuing of the writ. *Penny* v. *Brice*, 18 Com. B. Rep. N.S. 393.

A had a right of action against B for a debt in respect of which the Statute of Limitations began to run in September, 1856. A died on the 31st of May, 1862. His executor proved the will on the 12th of July, and commenced an action against B on the 5th of November:—Held, that the Statute of Limitations was a bar to the claim, notwithstanding a jury (or an abitrator) might think that the executor had commenced the proceeding within a reasonable time. Ibid.

C wishing to open an account with a banking company, the defendant, in 1855, as his surety, joined him in a joint and several promissory note for 200*l.*, payable on demand to the banking company, and at the same time both signed a memorandum stating that the note was given as a collateral security for the banking account intended to be kept by C with the company, and that the company should be at liberty at any time thereafter to recover from both or either of them, up to the full amount thereof, every sum in which C should at any time thereafter become indebted or liable to the company, for moneys paid or advanced to C; and in case of the company suing on the note, its production should be conclusive evidence of the amount claimed by them from C being due to them from him. An account was thereupon opened with C and advances made by the company to him; and on the 31st of December, 1855, C was indebted to the company, but no balance was struck. The account continued until 1861, when a balance of 172*l.* was due from C, who had from time to time made payments into the bank exceeding the amount of the note. The accounts were made up in June, 1856, and a balance struck every half-year afterwards. The note was not introduced into the banking account as a credit or otherwise, An action having been brought in March, 1862, against the defendant on the note,—Held, that the claim was not barred by the Statute of Limitations. *Hartland* v. *Jukes*, 32 Law J. Rep. (N.S.) Exch. 162; 1 Hurls. & C. 667.

(*b*) *Exception in Cases of Express Trusts.*

Trustees had by mistake paid to A B (one of the *cestuis que trust*) a portion of the trust funds to which he was not entitled. In a suit by another party interested against A B to make him refund,—Held, that the Statute of Limitations was inapplicable, that he was bound to repay though more than six years had elapsed, and that all his interest in the trust fund was liable to make good the amount. *Harris* v. *Harris* (No. 2), 29 Beav. 110.

If real estate is conveyed to trustees to secure the payment of an annuity, it is within the 3 & 4 Will. 4. c. 27. s. 25, which excepts the charge from the operation of the statute, and in a suit instituted by a third party for redemption of the estates, the annuitant was declared entitled to all the arrears which had been accumulating from the year 1839, though the trustees, on the reversion falling in, had omitted to take possession of the estates. *Lewis* v. *Duncombe*, 30 Law J. Rep. (N.S.) Chanc. 732; 29 Beav. 175.

Where a trust is created by the acts of the parties, no time is a bar to relief; but where there is no trust except such as is created by the decree of the Court on setting aside the transaction, time runs from the discovery of the circumstances which constitute the right to relief. *Clanricarde* v. *Henning*, 30 Law J. Rep. (N.S.) Chanc. 865; 30 Beav. 175.

A general charge of debts upon real estate, with a direction to raise sufficient "by mortgage or otherwise" to pay them, does not create an express trust in favour of creditors, or prevent the Statute of Limitations, 3 & 4 Will. 4. c. 27, from running against a specialty debt of the testator. *Dickinson* v. *Teasdale*, 32 Law J. Rep. (N.S.) Chanc. 37; 1 De Gex, J. & S. 52.

Payment of interest upon a specialty debt of a testator by one devisee of a moiety of his real estate will not prevent the Statute of Limitations from barring the debt as against the devisee of the other moiety. Ibid.

A devise of real estate, subject to and charged with the payment of legacies, does not create a trust for securing their payment or prevent the Statute of Limitations (3 & 4 Will. 4. c. 27.) from running against the legatees. *Proud* v. *Proud*, 32 Law J. Rep. (N.S.) Chanc. 125; 32 Beav. 234.

A trustee who holds possession of land to which he has a valid legal title, cannot by any act of his own make that possession adverse to his real *cestui que trust;* and so long as he is in possession the Statute of Limitations will not run against the *cestui que trust*, even though the trustee should, through error or other cause, treat himself as trustee for other persons and account to them for the rents of the land. *Lister* v. *Pickford*, 34 Law J. Rep. (N.S.) Chanc. 582.

A sequestration had issued against a debtor in Scotland, where he resided and carried on business, and creditors (also residing in Scotland) proved and received dividends under the sequestration. The debtor did not obtain any order of discharge, and more than six years from the payment of the last dividend he petitioned the Court of Bankruptcy in London for protection, having in the mean time carried on business in England; and a proposal for payment of a composition secured by inspectorship trusts was assented to, and confirmed according to the provisions of the Bankrupt Law Consolidation Act, 1849:—Held, that the Statute of Limitations was a valid objection to the claim of the Scotch creditors to be paid a composition on the unpaid portion of their debt under the inspectorship, the sequestration being held not to create a trust of subsequently-acquired property for the purpose of taking the debts provable under it out of the statute. *Ex parte Kidd*, 3 De Gex, F. & J. 640.

### (c) *Exception as to Persons under Disability or beyond Seas.*

A testator indebted on promissory notes resided in Jersey, and died there. By his will he appointed his wife executrix; she continued to reside in Jersey, and proved the will there. She did not prove the will in England, though she received money due to her husband. No interest was paid upon the debt from 1849 to 1860, but a writ was issued in England, and kept on foot till 1858. Upon a bill filed for the administration of the personal estate of the testator, —Held, that the Mercantile Law Amendment Act, 1856, was not retrospective; that the widow had not done any act which made her executrix in England; that there was no person whom the creditor could sue; and, consequently, that the debt was not barred by the Statute of Limitations. *Flood* v. *Patterson*, 30 Law J. Rep. (N.S.) Chanc. 486; 29 Beav. 295.

In 1833 A died intestate as to his real estate, but having appointed by will, never proved, his brother (B) his executor, and leaving two infant daughters his heirs in coparcenery. In 1834 one of the daughters, while still an infant, died, whereupon her moiety of her father's real estate descended upon her surviving sister, who married during infancy and was still under the disability of coverture. Upon the death of A, B entered into possession of the whole of A's real estate, and received the rents thereof from that period up to his death in 1858. B, during his possession, paid the interest on a mortgage created by A. Considerable sums had also been laid out in improvements by B. Upon B's death, his widow continued in possession of A's real estate, and she paid off and took a transfer to herself of the above mortgage. In 1860 a bill was filed by the surviving daughter of A and her husband against B's widow and administratrix and his infant heir for an account of the rents of A's real estate from his death in 1833. B's infant son, by his answer, claimed the benefit of the Statute of Limitations (3 & 4 Will. 4. c. 27.) as to the whole of A's real estate, but at the bar the right of the female plaintiff to the moiety of the lands which descended upon her from her father was admitted:—Held, that the entry of B, who was named as the executor in A's will, and was the uncle of his infant daughters, could not be considered as that of a stranger, and an account was directed of the rents of A's real estate received by B as bailiff from A's death up to his death in 1858, and by B's widow, as mortgagee in possession since the death of B, and an inquiry was also directed as to the sums laid out in improvements by B. *Pelley* v. *Bascombe*, 33 Law J. Rep. (N.S.) Chanc. 100; 4 Giff. 390; 34 Law J. Rep. (N.S.) Chanc. 233.

### (B) When the Statute begins to run.

If by the act of A an injury is occasioned to the foundations of the house of B, of which B has not at the time any knowledge, but which afterwards exhibits itself by creating actual mischief to B's house, B is not prevented by the Statute of Limitations from maintaining an action for damages, though more than six years have elapsed since the doing of the act which was in reality (though unknown at the time) the origin of the mischief, for the cause of action really accrued when the actual damage first exhibited itself. *Backhouse* v. *Bonomi* (House of Lords), 34 Law J. Rep. (N.S.) Q.B. 181; 9 H.L. Cas. 503.

### (C) When and how the Statute may be barred.

#### (a) *Promise or Acknowledgment.*

J P being indebted to the executors of M C in a sum of 1,100*l.*, to which A B was beneficially entitled, sent a letter to A B as follows:—"I have sent you a note for the money due to you which your mother left for you." Inclosed in this letter was a promissory note, on a receipt-stamp, for 1,100*l.*, and 4*l.* per cent. interest. At the time of this letter and note being sent, the debt was barred by the statute. It was held, affirming the decision of one of the Vice Chancellors, that there was not a sufficient acknowledgment by J P without referring to the note to see what was the promise made; and that this could not be done for want of a proper stamp. *Parmiter* v. *Parmiter*, 30 Law J. Rep. (N.S.) Chanc. 508; 3 De Gex, F. & J. 461.

In a letter to the holder of a bill of exchange the drawer said, "If in funds I would immediately pay the money and take the bill out of your hands":—Held, that this was insufficient to take the case out of the Statute of Limitations. *Richardson* v. *Barry*, 29 Beav. 22.

A debtor wrote to his creditor "I will pay you as soon as I get it in my power":—Held, that the Statute of Limitations did not commence running until the debtor became of ability to pay. *Hammond* v. *Smith*, 33 Beav. 452.

The insertion of a debt in the schedule to a deed of inspectorship executed for the purpose of distributing the estate of a debtor, is not, although the schedule be verified by the affidavit of the debtor, a sufficient acknowledgment to take the debt out of the operation of the Statute of Limitations, so as to entitle the creditor to prove for the debt under a subsequent distribution of the debtor's estate in bankruptcy. *Ex parte Topping, in re Levey & Robson*, 34 Law J. Rep. (N.S.) Bankr. 44.

Nor is the payment by the inspectors of a dividend upon the debt a sufficient part-payment for that purpose. Ibid.

In November, 1856, an acknowledgment in writing was signed by a devisee of a mortgagor, and given to a first mortgagee, whose mortgage was dated in May, 1831, that a large arrear of interest was due on such mortgage. Upon a bill filed in July, 1861, by the first mortgagee against the mortgagor and the subsequent mortgagees for payment of his mortgage-money and interest, or for a foreclosure,—Held, by *Stuart, V.C.*, that the above acknowledgment bound the property in mortgage as against the subsequent mortgagees, and entitled the first mortgagee to an account in respect of interest upon his mortgage-money for more than six years prior to the filing of the bill. But, upon appeal, this decision was reversed by *Westbury, L.C.* *Bolding* v. *Lane*, 32 Law J. Rep. (N.S.) Chanc. 219; 1 De Gex, J. & S. 122.

In 1853 H as principal and the defendant as surety gave a joint and several promissory note to the plaintiff payable on demand; in 1861 H made an assignment for the benefit of his creditors, and the defendant signed and gave the following letter to the plaintiff, "I consent to your receiving the dividend under H's assignment, and do agree that your so doing shall not prejudice your claim upon me for the same debt"; the plaintiff accordingly received a dividend on the note, and afterwards brought an action on it against the defendant for the balance, to which the defendant pleaded the Statute of Limitations:—Held, first, that the letter was not such an acknowledgment as barred the operation of the Statute of Limitations; and secondly, that the payment of the dividend coupled with the letter did not amount to more than "a payment only" by one co-debtor under the 19 & 20 Vict. c. 97. s. 14, and that therefore the defendant, the other co-debtor, was entitled to the benefit of the Statute of Limitations by virtue of that section. *Cockrill* v. *Sparke*, 32 Law J. Rep. (N.S.) Exch. 118; 1 Hurls. & C. 699.

In answer to an application for a debt barred by the Statute of Limitations the defendant wrote, "I have received a letter from Messrs. P & L, solicitors, requesting me to pay you an account of 40*l.* 9*s.* 6*d.* I have no wish to have anything to do with the lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851; but, as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly":—Held, that this was not such an absolute unqualified acknowledgment and unconditional promise to pay as to take the case out of the Statute of Limitations. *Buckmaster* v. *Russell*, 10 Com. B. Rep. N.S. 745.

Certain Commissioners, being in debt, appointed a finance committee to investigate the accounts and report thereon. The committee made a report, to which was appended a schedule of liabilities, in which the arrears of salary to the clerk were inserted. The Commissioners, by a minute of their proceedings, ordered "that the report be accepted, with thanks to the committee for the trouble taken in the preparation":—Held, that there was no acknowledgment by the Commissioners to take the case out of the Statute of Limitations. *Bush* v. *Martin*, 33 Law J. Rep. (N.S.) Exch. 17; 2 Hurls. & C. 311.

To an action by executors for salary due to their testator, as clerk to the Commissioners, a plea—that the Commissioners never had, at or since the accruing of the debt, funds applicable to the payment of the claim, and that they had applied according to the act all moneys which had come to their hands as such Commissioners, except a small sum set apart by them to satisfy certain other claims which accrued long after the plaintiffs' claim—was held, on demurrer, to be no answer, for that the plaintiffs were entitled to judgment, whether payment could be enforced or not. Ibid.

(*b*) *Part-payment; Interest.*

The plaintiffs, who were trustees of a marriage settlement, lent J W a sum of money which was settled to the separate use of his wife, H W, on the joint bond of J W and the defendant, dated the 1st of November, 1833. In 1847, no interest having been paid on the bond, it was arranged at an interview between the plaintiffs and J W and his wife that she should, as the interest on the trust-money became due to her from the plaintiffs, give the plaintiffs her receipt acknowledging the payment of such interest, and that the transaction should be considered by all the parties as a payment to the plaintiffs by J W of the interest due to them from him on the bond, and as a payment by the plaintiffs to H W of the interest due to her from the plaintiffs on the trust-money. In pursuance of this arrangement H W gave the plaintiffs from time to time receipts, the last of which, dated the 1st of February, 1861, was in the following form: "Received of Mr. James Amos all the interest due upon 816*l.* at 5*l.* per cent. interest on bond given by J W and James Smith up to the 1st of November, 1859, upon my marriage settlement. Signed H W." No money ever actually passed between the parties on any occasion:—Held, that the transaction between the parties amounted to a payment of interest sufficient to take the case out of the Statute of Limitations (3 & 4 Will. 4. c. 42). *Amos* v. *Smith*, 31 Law J. Rep. (N.S.) Exch. 423; 1 Hurls. & C. 238.

Payment of interest on an Irish mortgage made by a receiver appointed under the 11 & 12 Geo. 3. c. 10 (I.), over the estates mortgaged, is, within the terms of the 40th section of 3 & 4 Will. 4. c. 27, payment by "an agent" of the party liable. *Chinnery* v. *Evans*, 9 H.L. Cas. 151.

The words in the 40th section "by the person by whom the same shall be payable, or his agent," apply

equally to the making of a payment and the signing of an acknowledgment. Ibid.

M was possessed of estates in three counties, Cork, Kerry, and Limerick. In 1776 he mortgaged them to F. The interest on the mortgage was not regularly paid, and, on a petition presented by F, under the 11 & 12 Geo. 3. c. 10 (I.), a receiver was appointed. In form, his appointment embraced the three estates; in fact, he never entered into possession of any but the Limerick estate, from which alone he took the money necessary to keep down the interest on the mortgage. M afterwards (without any knowledge of the matter on the part of F) sold the Cork and Kerry estates to C, and certain outstanding terms and judgments were assigned and conveyed to a trustee for C to protect the title. After the lapse of nearly twenty years, since the last payment made by the receiver, F claimed to have a sale of all the estates included in the original mortgage in order to cover arrears of interest:—Held, affirming the judgment of the Court below, that the payment by the receiver out of the rents of the Limerick estate, was a payment which in law must be considered as made by the mortgagor in respect of the mortgage debt, and therefore prevented the Statute of Limitations operating as a bar to the demand as to any of the estates comprised in the mortgage. Ibid.

The assignment, to a trustee for the purchaser of an estate, of outstanding terms affecting it, and of judgments on which *elegits* had been issued, does not constitute the purchaser an incumbrancer within the meaning of the 42nd section of the 3 & 4 Will. 4. c. 27. so as to prevent the operation of the statute on the claim of the mortgagee:—Held, therefore, reversing the judgment of the Court below, that the mortgagee was only entitled to demand six years' arrears of interest up to the filing of his petition in which the holder of the estates sold was, for the first time, made a party to the suit. Ibid.

(D) Pleading.

A plea stating that a debt accrued more than six years ago, without stating that it did not accrue within the six years, does not amount to an informal plea of the Statute of Limitations. *Bush* v. *Martin*, 33 Law J. Rep. (N.S.) Exch. 17; 2 Hurls. & C. 311.

## LIS PENDENS.

[See Vendor and Purchaser—Title.]

A registered *lis pendens* does not create a charge or lien on the property, nor does it excuse a purchaser from completing his contract. It merely puts him upon an inquiry into the validity of the plaintiff's claim. *Bull* v. *Hutchens*, 32 Beav. 615.

## LOCAL GOVERNMENT ACTS.

[See Public Health and Local Government.]

## LONDON.

[The duties levied on coal and wine by the Corporation of London continued by 24 & 25 Vict. c. 42.]

## LOTTERY.

*What amounts to a Lottery.*

The programme of an entertainment stated, that at its conclusion the proprietor "would distribute among his audience a shower of gold and silver treasures on a scale utterly without parallel, besides a shower of smaller presents, all of which would be distributed impartially amongst the audience, and given away." The public were admitted on purchasing tickets, which were not numbered. The seats of the audience were numbered. At the conclusion of the entertainment the proprietor called out a number, and delivered one of the articles to the person occupying the seat so numbered; and in that way distributed all the articles amongst the audience:—Held, a lottery within the 42 Geo. 3. c. 119. s. 2. *Morris and Jeffs* v. *Blackman*, 3 Hurls. & C. 912.

*Indictment for keeping a Lottery.*

By the 1st section of the Lottery Acts, 10 & 11 Will. 3. c. 17. and 42 Geo. 3. c. 119, the keeping a lottery is declared a common and public nuisance. By other sections, a person who keeps a lottery is liable to a heavy penalty, or to be treated as a rogue and a vagabond:—Held, that such person is also liable to an indictment as for a misdemeanor. *R.* v. *Crawshaw*, 30 Law J. Rep. (N.S.) M.C. 58; Bell, C.C. 303.

If a man sells a ticket for a lottery and states that he knows the lottery is to be drawn for on a certain day, but that he does not know where, and afterwards delivers a sum of money to the purchaser of the ticket as a prize won in the lottery; evidence of these facts will justify a jury in convicting the seller of the ticket on an indictment for keeping a lottery. Ibid.

## LUNATIC.

[See Pauper Lunatic.]

[The Law relating to Commissions of Lunacy and Proceedings under the same amended by 25 & 26 Vict. c. 86.—The Law relating to Lunatics amended by "The Lunacy Acts Amendment Act, 1862" (25 & 26 Vict. c. 111).—The Lunacy Acts amended in relation to the building of Asylums for Pauper Lunatics by 26 & 27 Vict. c. 110.—The Act for making further Provision for the Confinement and Maintenance of Insane Prisoners (3 & 4 Vict. c. 54.) amended by 27 & 28 Vict. c. 29.—"The Lunatic Asylum Act, 1853," and "The Lunacy Acts Amendment Act, 1862," explained and amended by 28 & 29 Vict. c. 80.]

(A) Jurisdiction.
(B) Contracts and Conveyances.
(C) Maintenance [See Pauper Lunatic].
(D) Who entitled to Estate.
(E) Care and Treatment of.
(F) Removal of Insane Prisoner.
(G) Trustee and Mortgagee.
(H) Superseding Commission.
(I) Costs of Inquiry.
(K) Practice.

### (A) JURISDICTION.

Under the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), the Lord Chancellor has power to appoint persons to recover and receive funds of a lunatic without inquisition and in a summary manner, in the alternative either of his income being under 50*l.*, or his property not exceeding 1,000*l.* in value. *Harvey* v. *Trenchard*, 34 Beav. 240.

A report made by the Master after the death of the lunatic cannot be acted on, but the costs incurred after the death may be ordered to be taxed. *In re Way*, 30 Law J. Rep. (N.S.) Chanc. 815; 3 De Gex, F. & J. 175.

Where property belonging to a person of unsound mind, not found lunatic by inquisition, is under the control of the Court of Chancery, application respecting it should be made to the Court in its ordinary jurisdiction, and not in lunacy. *In re Macfarlane*, 31 Law J. Rep. (N.S.) Chanc. 335; 2 Jo. & H. 673.

Various costs were incurred in the lunacy of Mrs. C C, who, before her death, took steps to traverse the lunacy. She died in June, 1853, intestate, equitably seised of an estate tail in copyhold estates; and in February, 1854, Mr. T, her solicitor in the lunacy, obtained an order for the taxation of his bill of costs; and the taxation was completed in February, 1855. In October, 1860, he presented a petition under the 29th section of the statute 23 & 24 Vict. c. 127, praying for an order charging the lunatic's real estate with the costs; but the Lords Justices held, that whether the right of the petitioner to recover his costs accrued on the death of the lunatic or when the order for taxation was obtained, his case was within the proviso of the 29th section, and that therefore his remedy under the statute against the real estate was barred. *Ex parte Turner, in re Cumming*, 30 Law J. Rep. (N.S.) Chanc. 29.

### (B) CONTRACTS AND CONVEYANCES.

Where freehold land of a lunatic had been taken by a corporation under the provisions of the Lands Clauses Consolidation Act, and the committee petitioned for leave to convey to the corporation and to have the purchase-money carried over to the credit of the lunacy and invested,—Held, that the next-of-kin of the lunatic were proper parties to the application; and that their costs, as well as those of the heir-at-law, must be paid by the corporation. *In re Briscoe*, 2 De Gex, J. & S. 249.

A statutory enactment which authorizes the appointment of a person to execute a conveyance, in the name and on behalf of another, cannot be made applicable when the latter person is a married woman; acknowledgment and separate examination being essential to the conveyance of real estate by a married woman, and being acts which from their nature cannot be performed vicariously. *In re Stables*, 33 Law J. Rep. (N.S.) Chanc. 422.

Consequently, the Lord Chancellor cannot, under the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), which confers the same powers of conveyance as the 116th section of the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), authorize an effectual statutory conveyance of the legal interest in the real estate of a married woman alleged to be a lunatic. The Lord Chancellor has, however, power to make such an order as will bind her beneficial interest, and will also be binding on her heir after her death. Ibid.

A decree having been made for partition of lands, an undivided share in which was vested in a lunatic as tenant in tail, an order was made in lunacy and in Chancery directing the committee to execute all necessary assurances for giving effect to the partition. *In re Sherard*, 1 De Gex, J. & S. 421.

For a form of order enabling the administrator to proceed against a defaulting committee, see *In re Hill*, 1 De Gex, J. & S. 487.

The stock of a railway company, though transferable only by deed under 8 Vict. c. 16. s. 14, is included in the description of "stock" as defined by the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), and an order may therefore be made under the 140th section of the latter act for the transfer into the name of the Accountant General of stock of that description belonging to a lunatic. *In re Ives*, 32 Law J. Rep. (N.S.) Chanc. 673.

### (C) MAINTENANCE.

[See PAUPER LUNATIC.]

The father and next friend of a lunatic, not so found by inquisition, having expended 700*l.* on his past maintenance, obtained—on undertaking to maintain him for the future—an order for the transfer of the whole fortune of the lunatic, amounting to 379*l.* consols. *In re Law*, 30 Law J. Rep. (N.S.) Chanc. 512.

Where the next-of-kin of a lunatic are unknown, a petition in lunacy ought to be served, not on the Solicitor to the Treasury, but on the Attorney General. *In re Bourke*, 2 De Gex, J. & S. 426.

A sum of stock was standing in the names of G and H, as trustees for a lunatic. G died in 1864, and E was his executor. H had died long previously, but no such proof of his death as the Bank would act upon could be furnished. An order was made under s. 22. of the Trustee Act, 1850, appointing the officer of the Bank to concur with E in transferring the stock into court:—Held, that such order could not be made on the petition of the commitee alone. Ibid.

A medical gentleman in whose care a lunatic had been placed presented a petition during her life for payment out of her estate of the balance claimed to be due to him for her maintenance:—Held, that an order for that purpose could not be made on his application; but the committee appearing and asking for an inquiry as to what was due to the petitioner, such inquiry was directed. *In re Townshend*, 2 De Gex, J. & S. 519.

*Romilly, M.R.*, ordered a sum of 390*l.*, being the whole property to which a lunatic (not so found by inquisition) aged fifty was entitled to be paid to her mother, who had previously maintained her, on the mother undertaking to maintain her for the future. *Williams* v. *Allen*, 33 Beav. 241.

Under special circumstances the Court made an allowance out of a lunatic's estate to one of the two next-of-kin (a first cousin) of the lunatic, the other next-of-kin consenting. *In re Croft*, 32 Law J. Rep. (N.S.) Chanc. 481.

### (D) WHO ENTITLED TO ESTATE.

Where freehold property descended upon a lunatic, subject to a mortgage, and the Court

ordered the mortgage debt to be paid off out of the personal estate of the lunatic, a question was made upon his decease, between the real and personal representatives, as to the repayment of the money so applied; and the Court decided that the amount ought to be raised out of the real estate, and paid to the personal representatives of the lunatic. *In re Henry Leeming*, 30 Law J. Rep. (N.S.) Chanc. 263; 3 De Gex, F. & J. 43.

Where the real estate of a lunatic has been sold, the proceeds of the sale are, as between the real and personal representatives of the lunatic, to be treated for the purpose of transmission as realty; but for other purposes the proceeds are to be considered as personalty, and will, with the consent of married women, the real representatives, and without their executing a deed under the Fines and Recoveries Act, be paid out of court to their husbands. *In re Trevylyan*, 31 Law J. Rep. (N.S.) Chanc. 560.

### (E) CARE AND TREATMENT OF.

If a man voluntarily takes upon himself the care and charge of a lunatic brother, and keeps him in his private house and wilfully neglects him, he is indictable for a misdemeanor under s. 9. of 16 & 17 Vict. c. 96. *The Queen* v. *Porter*, 33 Law J. Rep. (N.S.) M.C. 126; 1 L. & C. 394.

### (F) REMOVAL OF INSANE PRISONER.

A prisoner for debt in the Queen's Prison who becomes insane may be removed to Bethlehem Hospital by a warrant of a Secretary of State, upon the proper medical certificates, under s. 14. of the Queen's Prison Act, 5 & 6 Vict. c. 22. That section impliedly repeals s. 102. of 1 & 2 Vict. c. 110. as to such prisoners, and is not itself repealed or affected by 16 & 17 Vict. c. 96. *Gore* v. *Grey* (Ex. Ch.), 33 Law J. Rep. (N.S.) C.P. 109; 15 Com. B. Rep. N.S. 567.

### (G) TRUSTEE AND MORTGAGEE.

A mortgagee died intestate as to estates whereof he was mortgagee, leaving an heir-at-law, who was a lunatic. The costs of obtaining a vesting order, and of all proceedings necessary to effect a reconveyance, were directed to be borne by the mortgagor. *In re Jones, and in re the Trustee Act*, 1850, 30 Law J. Rep. (N.S.) Chanc. 112.

The Court held that the lunatic husband of a married woman (who was sole surviving trustee of a fund) was a trustee, within the meaning of the Trustee Act, 1850; and, on her petition, ordered the appointment of new trustees; and ordered the costs of all parties, including those of the committee of the husband, to be paid out of the fund. *In re Wood, and in re the Trustee Act*, 1850, 30 Law J. Rep. (N.S.) Chanc. 453; 3 De Gex, F. & J. 125.

A lady, before lunacy, became the mortgagee of certain premises. After her lunacy committees were appointed, and one of them called in the mortgage money and served the mortgagor with a petition praying that the committees might be appointed to reconvey the mortgaged estate to him. The Court decided that the mortgagor was entitled to his costs of appearance out of the lunatic's estate. *In re Rowley*, 32 Law J. Rep. (N.S.) Chanc. 158; 1 De Gex, J. & S. 417.

The costs of applications to the Court, in respect of trust property, necessitated by the lunacy of a bare trustee, will not be ordered to be paid either by or to the lunatic's estate. *In re Garden*, 34 Law J. Rep. (N.S.) Chanc. 466.

### (H) SUPERSEDING COMMISSION.

A lunatic petitioned for the supersedeas of a commission, under which he had been found lunatic, his petition being supported by medical evidence that he had recovered. The committee opposed the petition, and filed his own affidavit and those of medical witnesses. The Lords Justices had several interviews with the lunatic. Ultimately they ordered all proceedings under the commission to be suspended for a stated period, giving the lunatic his personal liberty and the full possession and control over his property in the mean time; with liberty to apply. At the expiration of the period the commission was superseded. *In re Blacknore*, 32 Law J. Rep. (N.S.) Chanc. 436.

### (I) COSTS OF INQUIRY.

In a case where the Court directed an inquiry as to a man's soundness of mind, the jury returned a verdict in his favour; and the Court, considering that upon the whole evidence there was reasonable ground for questioning the sanity, refused to order the applicants for the inquiry to pay the costs of the alleged lunatic. It is at least doubtful whether in such a case the Court has jurisdiction to order them to pay such costs. *In re Windham; Windham* v. *Giubilei*, 31 Law J. Rep. (N.S.) Chanc. 720.

*Semble*—That from an order directing such an inquiry an appeal lies to the Privy Council. Ibid.

The wife of a gentleman alleged to be a lunatic, and who was separated from her, presented a petition praying an inquiry into the state of his mind. The petition being ordered to stand over, the husband in the mean time recovered; and it was held, that unless there were grave reasons against such a course, the costs of the petition must be paid by the alleged lunatic. *In re F——*, 33 Law J. Rep. (N.S.) Chanc. 333; 2 De Gex, J. & S. 89.

### (K) PRACTICE.

[See PRACTICE, AT LAW—SERVICE.]

According to the practice in lunacy, all persons claiming to be interested in any documents deposited in the office are entitled to free access to the same. *In re Wood; Banner* v. *England*, 33 Law J. Rep. (N.S.) Chanc. 334.

Upon a petition by persons who had filed a bill in the character of representatives of the next-of-kin of a deceased lunatic against the representatives of a person who long previously on the death of the lunatic had been certified to be his sole next-of-kin, an order was made for inspection by the petitioners, and for the production, at the hearing of the cause, of the documents which had remained in the custody of the officers in lunacy. Ibid.

The defendant, being sued for a sum which he admitted to be due to the plaintiff, paid the money into court under a Judge's order. The plaintiff, before and at the time of action brought and of the present application, was suffering from temporary derangement and was an inmate of Bethlehem Hospital, but no commission of inquiry into the state of

his health had been issued, and no committee of his estate or person had been appointed. On application by the plaintiff's wife, this Court ordered the money to be paid out to her, or to the plaintiff's attorney in the action. *Gliddon* v. *Treble*, 30 Law J. Rep. (N.S.) C.P. 160; 9 Com. B. Rep. N.S. 367.

## MAGISTRATES.

[Towns and boroughs of twenty-five thousand inhabitants and upwards enabled to appoint stipendiary magistrates by 26 & 27 Vict. c. 97 ("The Stipendiary Magistrates Act, 1863").]

## MALICIOUS INJURIES.

[The statute law of England and Ireland relating to malicious injuries to property consolidated and amended by 24 & 25 Vict. c. 97.]

## MALICIOUS PROSECUTION.

*Reasonable or Probable Cause.*

The defendant, in an action for maliciously and without reasonable or probable cause procuring the plaintiff to be apprehended on a charge of felony, cannot rely on circumstances of mere suspicion as evidence of reasonable or probable cause. *Busst* v. *Gibbons*, 30 Law J. Rep. (N.S.) Exch. 75.

The existence of reasonable or probable cause is to be decided by the Judge. Ibid.

A robbery had been committed by S, who immediately absconded. The plaintiff, his fellow-workman, had said that he had heard, a few hours after the robbery, that S had absconded; and that S had previously told him that he intended to go to Australia. S had also been seen, early in the morning after the robbery, coming from a public entry leading to the back door of the plaintiff's house. The defendant, the plaintiff's master, having been informed of these circumstances, caused him to be apprehended, and charged before magistrates with the robbery:—Held, no evidence of reasonable or probable cause justifying the defendant in making the charge. Ibid.

M, in a suit brought by him against F in a county court, produced a paper purporting to be signed by F, and knowingly and falsely swore that F signed it in his presence. The Judge, partly in consequence of M's evidence, and partly because he was dissatisfied with F's evidence in other matters, disbelieved F, and directed M to be bound over to prosecute F for perjury. M in consequence preferred an indictment against F for perjury at the assizes: F was acquitted:—Held, by *Cockburn, C.J., Bramwell, B., Channell, B. (dissentientibus Wightman, J.* and *Blackburn, J.)*, that F might on these facts maintain an action against M for maliciously and without reasonable or probable cause causing him to be indicted for perjury, and prosecuted on such indictment. *Fitzjohn* v. *Mackinder* (Ex. Ch.), 30 Law J. Rep. (N.S.) C.P. 257; 9 Com. B. Rep. N.S. 505.

## MANDAMUS.

(A) When it lies.
(B) Writ of.

### (A) When it lies.

A writ of mandamus which orders the vestry of a parish subject to the operation of the Metropolis Local Management Acts, to make immediately such sewers and works as may be necessary for effectually draining a particular part of the parish, without shewing that a reasonable time has elapsed, or that there is a present duty to drain that particular part at once, or that the approval of the Metropolitan Board of Works has been obtained, is defective and cannot be supported. *R.* v. *St. Luke's, Chelsea*, 31 Law J. Rep. (N.S.) Q.B. 50; 1 Best & S. 903.

The action of mandamus, like the writ of mandamus, does not lie where there is any other remedy. *Bush* v. *Beavan*, 32 Law J. Rep. (N.S.) Exch. 54; 1 Hurls. & C. 500.

The Commissioners under a local improvement act (2 & 3 Vict. c. lxiii.) were empowered to appoint a clerk and other officers, and to pay them reasonable salaries out of the moneys to be collected under the act; power was given to levy rates for the purpose *inter alia* of paying the salaries of officers. The plaintiffs, executors of B, sued the Commissioners' clerk, the declaration alleging that the Commissioners were indebted to B in debts and moneys for his agreed salary for his services as the clerk to the Commissioners, and upon their retainer, and for other work done by B, as the attorney and solicitor of, and otherwise for, the Commissioners, at their request, in and about the business of the Commissioners, and for money paid by him for their use and on accounts stated; and that the said debts and moneys were a charge upon any moneys and funds in the hands of the Commissioners collected under the act; and if they should not have in their hands any such moneys and funds, then the same debts became and were a charge upon a rate and assessment leviable under the act; and the plaintiffs being, as executors, personally interested therein within the meaning of the Common Law Procedure Act, 1854, demanded of the Commissioners to pay the moneys due out of the funds in their hands, or to levy a rate under the act; and claiming a writ of mandamus commanding the Commissioners to pay or assess a rate:—Held, that the declaration was bad, it being consistent with the allegations that to part, at least, of the claim, the Commissioners were personally liable, and the remedy by mandamus being therefore inapplicable. Ibid.

Held also, that the pleas of the Statute of Limitations and of the Attorneys' Act, to so much of the alleged debts and moneys as became due upon simple contract, were good. Ibid.

A mandamus will not lie to the Lords Commissioners of the Treasury to compel them to pay a debt incurred by a county court; and this even although Parliament has, upon an estimate made by the Commissioners of the Treasury, voted a sum for the salaries and expenses of the county courts for the year. *Ex parte Walmsley*, 1 Best & S. 81.

Where, after judgment for the Crown, on a return to a writ of mandamus, the defendants have volun-

tarily, and with the consent of the prosecutor, done the act enjoined, the Court will quash a peremptory writ of mandamus, as being unnecessary and an abuse of the process of the Court. *R.* v. *the Saddlers' Co.*, 33 Law J. Rep. (N.S.) Q.B. 68; 4 Best & S. 570.

Under 21 & 22 Vict. c. 90. s. 29. the General Council of Medical Education and Registration are sole judges whether a registered medical practitioner has been guilty of infamous conduct in a professional respect; and the Council having after due inquiry so adjudged, and ordered the name of the medical practitioner to be removed from the register accordingly, this Court cannot interfere. *Ex parte La Mert*, 33 Law J. Rep. (N.S.) Q.B. 69; 4 Best & S. 582.

(B) WRIT OF.

A mandamus recited local acts of parliament, by which certain dues were to be paid to the Commissioners of the port of S, the proceeds to be applied, first, in paying one-fifth to the corporation of S, and the residue in keeping the docks, &c. of the harbour in repair; and other acts by which the S Dock Co. was incorporated and empowered to build docks in the harbour and levy dues, and the dock company were, in each year after the docks were opened, to pay such a sum to the Commissioners as should make up any deficiency below 1,000*l.* consequent upon such opening, in their receipts of dues under the former acts; the mandamus further recited that the docks had been opened, and that a deficiency below 1,000*l.* had occurred in each of the twelve years ensuing, making in the whole 3,710*l.*; that no part of such deficiency had been paid in any year by, or been demanded of, the company by the Commissioners for the time being, and that they had not paid any part of the one-fifth to the corporation; it then commanded the defendants (the present Commissioners) to "take the necessary and legal measures and proceedings for obtaining and recovering payment from the dock company of the said deficiency," and to pay over one-fifth to the prosecutors (the corporation):—Held (by *Crompton, J.* and *Blackburn, J., dissentiente Cockburn, C.J.*), that the mandatory part of the writ was not too large, as it did not necessarily import that the defendants were to commence litigation with the dock company, which might be unreasonable without an indemnity from the prosecutors. *R.* v. *the Harbour Commissioners of Southampton*, 30 Law J. Rep. (N.S.) Q.B. 244; 1 Best & S. 5.

*Quære*—Whether a mandamus lies to compe one party to commence legal proceedings against another. Ibid.

*Semble*—That a mandamus may issue against a party for a matter in respect of which he is liable to an action or suit. Ibid.

## MANOR.

The demesne lands of a manor previously granted in fee do not become re-united to the manor, if purchased by the lord, as they would do if they had reverted to him by escheat. *Delachero* v. *Delacherois*, 11 H.L. Cas. 62.

If the demesne lands of a manor are treated, in a conveyance of them in fee, as a distinct property, as for instance by being conveyed by the lord in fee without being accompanied by a declaration of the feoffor's title as lord, or without being described as lands held of the manor, but only as lands situate, lying, and being within the manor, they are severed from the manor, and cease to form part of it, although the rents and dues may remain. Ibid.

On re-purchase by the lord of the fee simple, he will hold them of the chief lord. Ibid.

They will not on such re-purchase, again form part of the manor, so as to pass under that description in a will dated anterior to the purchase. Ibid.

In the reign of Charles I., a grant was made by patent to Viscount Montgomery of a manor to be held in fee and common socage, with power to create as many separate manors, and to appoint as many tenemental lands to each manor as the grantee should think fit, and also with licence to grant in fee simple or for lesser estates any of the lands belonging to such manors, to be held thereof respectively by suit of Court, and such other services or rents as he, his heirs, &c., should think fit, *non obstante* the Statute *Quia Emptores*. This patent was validated and confirmed by Acts of the Irish Parliament. The heir of the grantee, in the year 1721, granted by indenture of lease and release to A, in fee farm, certain of the tenemental lands of the manor. They were described as "situate, lying, and being in the manor," and were to be held at a rent of 6*l.* suit and service to the manor, payment of small sums for leet money, and an obligation to grind corn at the manor mills; performance of each of which things was secured by covenant; and the grantor also reserved a power of distress:—Held, that the lands thus granted out were severed from the manor. Ibid.

In March, 1836, the owner of the manor executed a will devising "the manor" to the younger of his two nephews. In 1842 he purchased the tenemental lands which had been granted out in 1721. He died in October 1850, without having altered or republished his will:—Held, that these lands were not by the purchase re-annexed to the manor so as to pass by the will, but devolved upon the testator's heir-at-law. Ibid.

## MANSLAUGHTER.

*Duty of Parent to Child.*

A young woman, eighteen years of age and unmarried, who usually supported herself by her own labour, being about to be confined, returned to the house of her step-father and mother. The girl was taken in labour (the step-father being absent at his work). The mother did not take ordinary care to procure the assistance of a midwife, though she could have got one, had she chosen; and in consequence of the want of such assistance, the daughter died in her confinement. There was no evidence that her mother had any means of paying for the services of the midwife:—Held, that there was, under the circumstances, no legal duty on the part of the mother to call in a midwife, and consequently no such breach of duty as to render her liable to be convicted of the manslaughter of her daughter. *R.* v. *Shepherd*, 31 Law J. Rep. (N.S.) M.C. 102; 1 L. & C. 147.

*Servant under Control of Master.*

If a mistress culpably neglect to supply proper food and lodging to her servant, at a time when the servant is reduced to such an enfeebled state of body or mind as to be helpless and unable to take care of herself, or is so under the dominion and restraint of the mistress as to be unable to withdraw herself from her control, and the death of the servant be caused and accelerated by such neglect, the mistress is liable to be convicted of manslaughter. *R.* v. *Smith*, 34 Law J. Rep. (N.S.) M.C. 153; 1 L. & C. 607.

*Negligence as regards Vicious Horse.*

If a commoner turn out on a common, across which there are public footpaths, a horse which he knows to be vicious and dangerous, and the horse kick and kill a child, the commoner is liable to be convicted of manslaughter, even though the child has strayed on to the common a little way off the path. *R.* v. *Dant*, 34 Law J. Rep. (N.S.) M.C. 119; 1 L. & C. 567.

## MARGINAL LETTER OF CREDIT.

The indorsee of a marginal letter of credit not being, on the face of it, a document of credit, is not bound, in the absence of notice, to inquire whether the same is being used for the purposes for which the credit was issued. *Maitland* v. *the Chartered Mercantile Bank of India*, 2 Hem. & M. 440.

## MARINE INSURANCE.

[See SHIP AND SHIPPING.]

## MARINE STORES.

[The business of dealers in old metals regulated by 24 & 25 Vict. c. 110.]

## MARKET.

(A) DISTURBANCE OF.
(B) TOLLS AND STALLAGE.
(C) RIGHTS OF SALE.
(D) BY-LAWS.

### (A) DISTURBANCE OF.

The bare proof of a sale of goods by sample in a shop near a market on a market-day, and of delivery on a subsequent market-day, does not constitute proof of a disturbance of the market. *The Mayor, &c. of Brecon* v. *Edwards*, 31 Law J. Rep. (N.S.) Exch. 368; 1 Hurls. & C. 51.

The plaintiffs, the corporation of a borough, were entitled to a market, and a local act gave them market tolls and imposed a penalty on persons selling or exposing to sale corn, &c. within the borough in any place other than the market-place. The defendant's son, acting on his behalf, came on a market-day to the house of H, occupying a house and shop in the borough near to the market-place, and there sold by sample to H twenty sacks of oats, which were not at the time exposed for sale in bulk, but were brought into the borough and delivered to H by the defendant on a subsequent market-day. On a special case stating these facts as having been proved at a trial and stating the question to be whether there was evidence for the jury that the defendant had infringed the plaintiffs' right of market, —Held, that there was no evidence to go to the jury. Ibid.

*Semble*—A special case is not the proper form in which to raise the question whether there was evidence to go to a jury. Ibid.

The corporation of B were owners of an ancient market, and also lords of the manor in which the borough of B was situate. The market had from time immemorial been held in and near the High Street. The plaintiff had a house in that street, and he and the previous owners and occupiers of the house in which he lived, as well as several other occupiers of houses in the same street, had from time immemorial erected, on market-days, stalls opposite their houses, and either used the stalls themselves, or let them to others. No tolls were ever taken in respect of the goods sold at these stalls, though they were formerly taken for similar produce exposed in the market elsewhere. In an action against the corporation of B for removing the market to another place within the borough,—Held, that the right to the stalls was a right which might reasonably be supposed to have been granted by the owners of the market to the owners and occupiers of the houses, and that it was sufficiently connected with the enjoyment of the houses to be claimed as appurtenant thereto. *Ellis* v. *the Mayor of Bridgnorth*, 32 Law J. Rep. (N.S.) C.P. 273; 15 Com. B. Rep. N.S. 52.

Held also, that if the original grant were, presumably, to hold the market at any place within the borough, still the corporation could not now remove it, as to do so would be in derogation of their own grant of the right now claimed. Ibid.

### (B) TOLLS AND STALLAGE.

By a local act, the local board and their lessees were empowered to take from any person occupying any shop, stall, stand, bench, or ground space in any market-place under the management of such board, and used as a general market, such toll as the board might appoint, not exceeding the tolls specified in a schedule to the act, which schedule contained a list of tolls to be taken "from the occupier of every stall raised above the ground" for the sale of articles, "according to the size or dimension of such stall, namely, for each lineal foot of frontage thereof," &c.: —Held, that the act imposed the toll on the stall or space occupied only, and not on the article sold. *Casswell* v. *Cook*, 31 Law J. Rep. (N.S.) M.C. 185; 11 Com. B. Rep. N.S. 637.

*Semble*—That s. 13. of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), which imposes a penalty on selling, in any place within the prescribed limits, except in a person's own dwelling-place, articles in respect of which tolls are by the special act authorized to be taken in the market, means by "prescribed limits" the boundaries of the borough, and not the limits of the market. Ibid.

The continuous occupation of a portion of a market by an erection placed there for the purpose of selling goods, is a stall for which stallage is payable, although the soil be not interfered with. *The Mayor, &c., of Great Yarmouth*, v. *Groom; The same* v. *Daniel*, 32 Law J. Rep. (N.S.) Exch. 74; 1 Hurls. & C. 102.

Therefore, a wooden or wicker basket, called in Norfolk a "ped," having a lid which turns back, and which when supported by a stool, or pieces of wood, not fixed in the soil, forms a table, upon which provisions brought to market are exposed for sale, is a stall. Ibid.

What constitutes a stall, is a question of fact for the jury. Ibid.

(C) Rights of Sale.

By a local act for establishing a market, power was given to the proprietors of the market to take tolls on horses brought into the market-place; and by one clause it was enacted, that every person who should sell at any place within the limits of the act (other than in the market-place, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls were by the act authorized to be taken, other than eggs, butter and fruits, should forfeit a sum not exceeding 40*s*., provided that nothing therein should restrain any person from crying or selling from door to door within the limits of the act, any such article as aforesaid, provided such person should have first paid for such articles the regular market tolls, and provided such articles should first have been brought into the market for inspection there:—Held, that a horse was an article within the meaning of such clause, and that a sale of horses, within the limits of the act, by a licensed auctioneer, in a yard which formed part of the dwelling-house and premises of a third person, subjected the auctioneer to the penalty of 40*s*., the place of sale not being within the exception contained in such clause. *The Llandaff Market Co.* v. *Lyndon*, 30 Law J. Rep. (N.S.) M.C. 105; 8 Com. B. Rep. N.S. 515.

A local act for establishing a market imposes a penalty on any person who sells at any place within the limits of the act other than in the market-place, "or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house." The General Markets and Fairs Clauses Act (10 & 11 Vict. c. 14), which is incorporated with such local act, except so far as it is not expressly varied by the local act, prohibits any one selling elsewhere than in the market, "except in his own dwelling-place or shop":—Held, that a sale in a shop attached to any dwelling-house is within the exemption of the local act, and protects the seller from the penalty, although the dwelling-house is not his, and although the sale be a sale by auction. *Wiltshire* v. *Willett*, 31 Law J. Rep. (N.S.) M.C. p. 8 and p. 10, n.; 11 Com. B. Rep. N.S. 237, 240.

In *Wiltshire* v. *Baker*, upon the construction of the same local act, it was held that a vessel moored to a wharf on a canal is not a dwelling-house or shop attached to or part of a dwelling-house within such exemption. Ibid.

In order to ascertain whether a structure of wood be a person's "own shop" within the exception of the 13th section of the Markets and Fairs Clauses Act, 1847, the proper elements to take into consideration are: whether it is of a substantial character; whether it is merely an alteration of a stall in order to evade the provisions of the act; whether it would admit of a purchaser coming inside, and would protect goods from the weather, and admit of their being sufficiently secured if left in it at night; and also the nature and duration of the holding from the owner by the person using the structure for the sale of goods. *Pope* v. *Whalley*, 34 Law J. Rep. (N.S.) M.C. 76; 6 Best & S. 303.

(D) By-Laws.

A local act of 3 Geo. 4. prohibited the sale of goods in the public highways of the town of B, under a penalty, but provided that no person should be liable to this penalty for selling goods in such parts of the town as had been theretofore used for that purpose at the time of the usual fairs and markets. The Markets and Fairs Clauses Act, 1847, s. 42, gives power, in those boroughs to which it applies, for regulating the use of the market-place and fair, and the buildings, stalls, pens and standings therein, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto. The 16 & 17 Vict. c. 24. constituted a local board of health for the town of B, and repealed considerable portions of the local act, but left the provisions of that act above referred to unrepealed. These provisions of the local act it incorporated, and it also conferred on the local board by reference to the Markets and Fairs Clauses Act, 1847, the same power of regulating the market as is conferred by that act. The local board, acting under these provisions, made a by-law that no meat should be sold in a particular part of the market held at B:—Held, that this was a valid by-law which the local board had power to make, and for a breach of which a penalty might be enforced, notwithstanding the provision of exemption incorporated from the local act. *Savage* v. *Brook*, 33 Law J. Rep. (N.S.) M.C. 42; 15 Com. B. Rep. N.S. 264.

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## MARRIAGE.

[See Divorce.]

[Doubts respecting the validity of certain marriages contracted in Her Majesty's possessions abroad removed by 28 & 29 Vict. c. 64.]

(A) Validity of.
(B) Settlement.
(C) Breach of Promise of.

(A) Validity of.

The forms of entering into the contract of marriage are regulated by the *lex loci contractus*, the essentials of the contract depend upon the *lex domicilii*. If the contract is in essentials contrary to the law of the domicil, the marriage (though duly solemnized elsewhere) is void in the country of domicil. *Brook* v. *Brook*, 9 H.L. Cas. 193.

The Marriage Act, 26 Geo. 2. c. 33, only applies to the forms of certain marriages celebrated in this country; it does not touch the essentials of the contract. It is, therefore, only territorial. Ibid.

The 5 & 6 Will. 4. c. 54. affects all domiciled English subjects wherever they may be transiently resident. It does not affect them when actually domiciled in British colonies acquired by conquest, where a different law exists. Ibid.

The marriage of a man with the sister of his deceased wife is declared by the 28 Hen. 8. c. 7. to be contrary to God's law; and though that statute itself is repealed, its declarations are renewed in the 28 Hen. 8. c. 16. and 32 Hen. 8. c. 38, which are in force. Ibid.

Being forbidden by our law, such a marriage contracted by British subjects, temporarily resident abroad, but really domiciled in this country, though valid in the foreign country, and duly celebrated according to the forms required by the law of that country, is absolutely void here. Ibid.

A and B, British subjects, intermarried; B died; A and C (the lawful sister of B), being both at the time lawfully domiciled British subjects, went abroad to Denmark, where the marriage of a man with the sister of his deceased wife is valid, and were there duly, according to the laws of Denmark, married:—Held, that under the provisions of the 5 & 6 Will. 4. c. 54, the marriage in Denmark was void. Ibid.

It being settled by the decision in *R.* v. *Millis*, that to constitute a valid marriage by the common law of England, it must have been celebrated in the presence of a clergyman in holy orders, the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make the marriage valid. *Beamish* v. *Beamish*, 9 H.L. Cas. 274.

As to the manner in which a marriage is to be celebrated, the law does not admit of any difference between the marriage of a clergyman and of a layman. Ibid.

A marriage contracted with the daughter of the sister of a deceased wife is void, and no settlement can be derived through such a marriage. It makes no difference whether the sister of the deceased wife be or be not legitimate. *R.* v. *the Inhabitants of Brighton*, 30 Law J. Rep. (N.S.) M.C. 197; 1 Best & S. 447.

## (B) SETTLEMENT.

In marriage articles in 1802 (which were to be, but never were, followed by a formal settlement), two separate estates, one belonging to the intended husband, the other to the intended wife, were included. Both were vested in trustees, in trust to permit the husband and wife to receive the profits during life, and (as to her portion), should she survive her husband, "to such of her *issue male* by her said husband as she may, by her last will and testament, notwithstanding her coverture, direct, limit, or appoint;" and in case of no appointment, to the "issue male" of the husband and wife; and in case of no issue male, then to go amongst her daughters; "and in case of failure of issue male or female then to go to such person or persons" as she should appoint. There were two children of the marriage, a son and a daughter. The wife survived the husband many years, and made a will, which, reciting the power reserved to her by the articles, appointed her property to her grandson, the son of her daughter, describing him as "issue male" of her marriage:—Held, that the articles were executory; that if in accordance with them a settlement had been executed, the estate would have been put in strict settlement; and that the power reserved by them was not well exercised; the grandson, the son of a daughter, not coming within the description of "issue male" therein contained. *Lambert* v. *Peyton*, 8 H.L. Cas. 1.

The lady married again, and in the settlement on this second marriage, the surviving trustee of the articles "granted, released and confirmed" to the trustees under the second settlement, "all his right" to "the use and behoof of" the widow as under the articles:—Held, that setting up a claim to the estate under the appointment by her, the grandson could not, as an objection to a suit to compel him to convey the estate in specific performance of the marriage articles, insist that the legal estate was not in him; nor could he object to the decree in this suit that it dealt only with the property over which the wife had assumed to exercise a power of appointment, and not with the whole property included in the marriage articles. Ibid.

The decree directed a conveyance, but did not, in form, declare the rights of the parties:—Held, that this was defective. Ibid.

There had been an objection to the competency of the appeal. The appeal committee directed that objection to be heard before the House. The question of competency was decided in favour of the appellant. The appeal was then heard, and was dismissed on the merits, with costs. The costs incurred by the objection to the competency of the appeal were directed to be deducted from the general costs. Ibid.

"Unmarried" is a word of flexible meaning, to be construed with reference to the plain intention of the instrument where it is used. *Clarke* v. *Colls*, 9 H.L. Cas. 601.

A marriage settlement gave a fund to trustees for M F (the intended wife) for life, and after her decease, as to one moiety for the husband, and as to the other moiety for the children, at such ages, &c. as the wife, notwithstanding her coverture, should appoint, and in default of appointment, among the children, as tenants in common, to be vested at twenty-one or marriage; and if there should be no child, as to the whole, for the husband for life; and after his decease for any person the wife, notwithstanding her intended or any future coverture, might appoint; and in default of appointment, "for the person or persons, who at the decease of M F, should be of her blood and in kin to her, and who, in their own right, or in right of their representatives, would have been entitled to the same under the Statutes for Distribution, in case the said M F had died possessed thereof *intestate and unmarried*." The wife died with her first child, which survived her only one day. She had not exercised the power of appointment:—Held, that "unmarried" in this settlement meant being without a husband at the time of death; that consequently the fund went to the child, as the wife's next-of-kin, and on its death passed to its father. Ibid.

A widow had a child by her first husband before her marriage with him. After his death, on the occasion of her second marriage, she executed a marriage settlement, which recited that she was seised in fee of certain lands, and that on the treaty for the intended marriage it was agreed that the lands

should be settled as thereinafter mentioned, and then conveyed the land to trustees on trust for her separate use for life, as to part of the lands remainder to her intended husband for life, remainder in fee to the child (described as her son by her late husband begotten), and as to the residue of the lands remainder to the child in fee. The husband and wife afterwards joined in mortgaging the estates, and died, and the mortgagees ultimately sold the property:—Held *(dissentiente Williams, J.)*, that the limitation in favour of the child was valid, and was not avoided in favour of purchasers for value by the statute 27 Eliz. c. 4. *Clarke* v. *Wright* (Ex. Ch.), 30 Law J. Rep. (N.S.) Exch. 113; 6 Hurls. & N. 849.

A became a party to a settlement, executed on the marriage of his nephew, and granted to the intended wife an annuity, to commence after his death, charged on lands of which he declared himself entitled at law or in equity to an estate in fee simple. He gave her a power of distraining on these lands for the annuity (subject, however, to any charge on them which he had created or might create for his own wife), and he also created a term of years in the same lands, which he assigned to trustees to hold for the purpose of satisfying the annuity by entry and distress, subject as aforesaid. On A's death proceedings were instituted by other parties in Chancery, and a decree was pronounced declaring that he was only entitled to a life estate in the lands which he had charged. The annuity fell into arrear:—Held, affirming a decree of *Chelmsford, L.C.*, and reversing a previous decree of *Wood, V.C. (dissentiente Lord St. Leonards)*, that the settlement gave the annuitant a right to proceed against the personal estate of the grantor for satisfaction of the annuity. No costs of the appeal were given. *Monypenny* v. *Monypenny* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 269; 9 H.L. Cas. 114.

On the occasion of settling personal property upon a marriage, it is the professional usage for the lady's solicitor to draw the settlement and for the husband to pay for it, although the only property settled is the husband's. And where nothing has taken place to exclude such usage the husband is legally liable, in the event of the marriage taking place, to pay the lady's solicitor his costs of the settlement if the retainer was by the lady, or else to indemnify whoever on her part properly incurred expense by retaining a solicitor to prepare such settlement. *Helps* v. *Clayton*, 34 Law J. Rep. (N.S.) C.P. 1; 17 Com. B. Rep. N.S. 553.

### (C) Breach of Promise of.

After a promise of marriage the defendant discovered that the plaintiff had, before the promise, been a lunatic, and confined as such, and on that ground he refused to marry:—Held, on the authority of *Hall* v. *Wright*, that these facts formed no answer to an action for breach of the promise. *Baker* v. *Cartwright*, 30 Law J. Rep. (N.S.) C.P. 364; 10 Com. B. Rep. N.S. 124.

In an action for breach of promise of marriage an exoneration by the plaintiff from the promise may be implied from the conduct and demeanour of the parties. The total cessation of intercourse and correspondence is, therefore, some evidence for the jury in support of a plea of such exoneration and discharge from an agreement to marry. *Davis* v. *Bomford*, 30 Law J. Rep. (N.S.) Exch. 139; 6 Hurls. & N. 245.

## MASTER AND SERVANT.

[The law of misappropriation by servants of the property of their masters amended in certain cases by 26 & 27 Vict. c. 103.]

(A) Contract of Service; Covenant not to "displace."
(B) Rights of the Master and Servant.
  (*a*) *Wrongful Dismissal.*
  (*b*) *Wages.*
  (*c*) *Master's Rights in respect of Injury to Servant.*
(C) Duty and Liability of the Master.
  (*a*) *For Acts and Negligence of the Servant.*
  (*b*) *For Injuries occasioned to Servants.*
    (1) *By the Master's Negligence.*
    (2) *By the Negligence of Fellow-Servants.*
(D) Offences by Servants.
  (*a*) *Leaving and Neglecting the Service.*
  (*b*) *Disobedience of Orders.*
  (*c*) *Threats and Intimidation.*

### (A) Contract of Service; Covenant not to "displace."

S, the agent of an insurance company, being indebted to the company, and being pressed for payment, it was arranged that the plaintiff should pay the money to the company, and that the company should appoint him and S as joint agents, with the same rates of payment and remuneration as before. A deed was executed, containing a covenant that in case the company should at any time hereafter "displace" S from his appointment as agent, then that they should and would forthwith repay to the plaintiff the money so paid by him. Subsequently, the company transferred the whole of their business and liabilities to another company, and refused to pay the plaintiff the money so advanced by him:—Held, in an action to recover the amount, that there was an implied covenant on the part of the company that they would not do anything of their own voluntary act, by which it should be impossible for them to keep S in their employ any longer, and therefore they were liable in the action by the plaintiff. *Stirling* v. *Maitland*, 34 Law J. Rep. (N.S.) Q.B. 1; 5 Best & S. 840.

### (B) Rights of the Master and Servant.

#### (*a*) *Wrongful Dismissal.*

The plaintiff, who was known to be acting in the capacity of a "lace-buyer," was engaged by the defendant, a lace-dealer, under the following memorandum:—"M agrees to engage P for the term of three years, from Monday, the 15th of August, 1859, at the yearly salary of 500*l.*, payable monthly, P to give the whole of his services, and to be advised and guided by M, if necessary." In an action by P against M for a wrongful dismissal pending the term, on the alleged ground of disobedience of lawful orders,—Held, that evidence was admissible to shew

the capacity in which the plaintiff was engaged, viz., as "lace-buyer"; and that it was properly left to the jury to say whether or not the orders which he was alleged to have disobeyed were such as a person in that position was bound to obey. *Price* v. *Mouat*, 11 Com. B. Rep. N.S. 508.

(*b*) *Wages.*

In order to give Justices jurisdiction to hear a complaint as to the non-payment of wages, under the 20 Geo. 2. c. 19. s. 1, it is only necessary that the relation of master and servant should exist between the parties, and the contract of service need not be for any specific time. *Taylor* v. *Carr*, 31 Law J. Rep. (N.S.) M.C. 111.

Upon a complaint under 20 Geo. 2. c. 19. s. 1, by an artificer against his employer, for wages alleged to be due to him, the Justices are at liberty to take into account the quality of the work done; and if the employer has sustained loss by the badness of the work, they may deduct the amount of such loss from the wages claimed. *Sharp* v. *Hainsworth*, 32 Law J. Rep. (N.S.) Q.B. 64; 3 Best & S. 139.

A huntsman is a menial servant, and therefore, though he be hired at yearly wages and with the right to receive perquisites which cannot be fully received until the end of a year's service, the hiring is presumed to be subject to the condition that it may be determined by a month's notice at any time. *Nicoll* v. *Greaves*, 33 Law J. Rep. (N.S.) C.P. 259; 17 Com. B. Rep. N.S. 27.

(*c*) *Master's Rights in respect of Injury to Servant.*

A master cannot maintain an action *per quod servitium amisit* against a railway company for an injury to his servant, whilst a passenger on the company's railway, caused by neglect of their duty to safely carry the servant according to their contract with him as such passenger, unless the master was a party to the contract. *Alton* v. *the Midland Rail. Co.*, 34 Law J. Rep. (N.S.) C.P. 292; 19 Com. B. Rep. N.S. 213.

(C) DUTY AND LIABILITY OF THE MASTER.

(*a*) *For Acts and Negligence of the Servant.*

The conductor of the defendant's omnibus had, as part of his general employment, authority from the defendant to remove from it passengers who misconducted themselves. The plaintiff, who had been drinking, having got into the omnibus, the conductor deeming him an improper person to remain in it, carelessly and with unnecessary violence dragged the plaintiff out and threw him on the ground, and thereby inflicted on the plaintiff a serious injury. It was held, that the defendant was responsible for the act of his servant, the conductor. *Greenwood* v. *Seymour*, 30 Law J. Rep. (N.S.) Exch. 327; *Seymour* v. *Greenwood*, 7 Hurls. & N. 355, 359.

A servant employed by the defendants to drive their omnibus drew his omnibus across the road, in front of a rival omnibus of the plaintiff, to obstruct the passage of the latter, and in so doing ran against and injured the plaintiff's omnibus. The defendants' servant had express directions from his masters not to obstruct other omnibuses, or to annoy their drivers or conductors. The defendants' servant said that he did it on purpose, and to serve the plaintiff's driver as the latter had served him. On the trial of the action for the injury the Judge directed the jury, that if the defendants' driver, being irritated, acted carelessly, recklessly, wantonly or improperly, but in the course of his employment, and in doing that which he believed to be for the interests of the defendants, then the defendants were responsible for the act of their servant; that the instructions given by the defendants to the driver, not to obstruct other omnibuses, if he did not pursue them, were immaterial as to the question of the masters' liability, but that if the true character of the driver's act was that it was an act of his own, and in order to effect a purpose of his own, then the defendants were not responsible: —Held, by the Court (*dissentiente Wightman, J.*), that the direction was proper. *Limpus* v. *the London General Omnibus Co.* (*Lim.*) (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 34; 1 Hurls. & C. 526.

If the keeper of a place of public resort leave his premises in the management of a servant, and prostitutes be suffered to meet together and remain in the house, contrary to the 2 & 3 Vict. c. 47. s. 44, the mere relation of master and servant neither makes the servant an aider and abettor in the offence nor prevents him from being such; and if the servant in knowingly suffering the prostitutes to meet together and remain is carrying out the master's orders, the master is guilty as principal and the servant as aiding and abetting, and the latter may be convicted under the 11 & 12 Vict. c. 43. s. 5. *Wilson* v. *Stewart*, 32 Law J. Rep. (N.S.) M.C. 198; 3 Best & S. 913.

If a stranger invited by a servant to assist him in his work, is, while engaged in giving such assistance, injured by the negligence of another servant of the same master in the course of his employment, the stranger cannot hold the master responsible. The stranger, by volunteering his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant; and if the master takes care that his servants are persons of competent skill and ordinary carefulness, he is not liable for any injury that one of them may receive from the negligence of another. *Potter* v. *Faulkner*, 31 Law J. Rep. (N.S.) Q.B. 30 (Ex. Ch.); 1 Best & S. 800.

The defendant, a builder, contracted in writing with local Commissioners to make a sewer. He verbally underlet to N the excavation and brickwork at a fixed price per yard, including fencing, watching and lighting, the defendant supplying the bricks in his own carts and removing the surplus clay from the cutting. N employed men under him by the day. The defendant's name as contractor was over the door of an office near the works, but the Commissioners employed the clerk of the works. The defendant stated that if the work were not done to his satisfaction he should have dismissed N. Owing to the insufficient lighting, the plaintiff fell into an unfenced part of the excavated trench, and was injured. After the accident N put up a fence and a light:—Held, that on these facts the defendant was liable. *Blake* v. *Thirst*, 32 Law J. Rep. (N.S.) Exch. 188; 2 Hurls. & C. 20.

(*b*) *For Injuries occasioned to Servants.*

(1) *By the Master's Negligence.*

Where, by the negligence of the master, an injury is caused to a servant in the course of his employ-

ment, the master is liable, although he was employed as a workman at the time, and was working with the servant. If one member of a partnership is guilty of such an act of negligence, and if it occurs in a matter within the scope of the common undertaking of the partnership, all the partners will be liable for the injury caused to the servant. *Ashworth* v. *Stanwix*, 30 Law J. Rep. (N.S.) Q.B. 183; 3 E. & E. 701.

The plaintiff was employed by the defendants as a miner to work in their coal mine. In the course of his employment he received an injury by reason of the sides of the shaft being left in an insecure condition. One of the defendants was the superintendent of the mine, and although he knew of the condition of the shaft, continued it in such condition. The plaintiff was ignorant that the shaft was unsafe: —Held, that an action was maintainable against the defendants. *Mellors* v. *Shaw*, 30 Law J. Rep. (N.S.) Q.B. 333; 1 Best & S. 437.

From the mere relation of master and servant no contract can be implied on the part of the master to take due and ordinary care not to expose the servant to extraordinary danger and risk in the course of his employment. *Riley* v. *Baxendale*, 30 Law J. Rep. (N.S.) Exch. 87.

An administratrix suing under the 9 & 10 Vict. c. 93, alleging in her declaration that the deceased entered the service of the defendants as a porter, "on the terms that the defendants would take due and ordinary care not to expose him to extraordinary danger and risk in the course of his employment," and that he was, from want of such care, exposed to extraordinary danger and risk and killed; but not proposing to give any evidence of an express contract on such terms, was held to have been rightly nonsuited. Ibid.

Per *Pollock, C.B.*—The decision in *Priestley* v. *Fowler*, limiting the responsibility of the master to the servant for injuries to the latter in the course of his employment, ought to be maintained. Ibid.

Where machinery is required by statute to be fenced, and the protection is removed by decay or otherwise, the owner, having notice of the defect, is responsible to a servant who, having entered into the employ when the machinery was fenced, continues in the service in the reasonable expectation of the defect being repaired, and who, without negligence on his part, sustains a personal injury. *Holmes* v. *Clarke*, 30 Law J. Rep. (N.S.) Exch. 135; 6 Hurls. & N. 349—affirmed in Ex. Ch., 31 Law J. Rep. (N.S.) Exch. 356; 7 Hurls. & N. 937.

The "mill-gearing," which, under the 7 & 8 Vict. c. 15. ss. 21, 73. and the 19 & 20 Vict. c. 38. s. 4, must be fenced, includes the machinery, except the part which is necessarily exposed for the purposes of manufacture, and is not confined to those parts by which the motion of the moving power is first communicated to the machine. Ibid.

The first count alleged that the defendant E was a contractor for the supply of beef to the Royal Navy, and supplied beasts to be slaughtered at one of the dockyards, at which the defendant C was the superintendent of E's business, and that it was the defendants' duty to take care that healthy and sound beasts were supplied and slaughtered; yet the defendants supplied and slaughtered certain diseased cattle, whereby the plaintiff, who had been employed to cut up the carcasses of the cattle, was infected by the disease and suffered damage therefrom. The second count alleged that the defendants by representing certain carcasses of beasts to be sound and healthy procured the plaintiff to cut them up, and the carcasses being diseased the plaintiff contracted the disease and was permanently injured. The third count alleged that the defendants, well knowing that certain carcasses were diseased and infectious, employed the plaintiff, who was ignorant of their being diseased, to cut them up, whereby the plaintiff became infected and was injured:—Held, that the first and second counts did not disclose a cause of action, but that the third did. *Davies* v. *England*, 33 Law J. Rep. (N.S.) Q.B. 321.

A workman cannot recover damages from his employers for injury sustained by him while at work in their mill, and resulting from the building having been originally negligently constructed, unless personal negligence be proved against his employers themselves (or against some person acting by their orders), either in having given directions how the building should be constructed, or in having knowingly entrusted the execution of the work to an incompetent person. *Brown* v. *the Accrington Cotton Spinning and Manufacturing Co. (Lim.)*, 34 Law J. Rep. (N.S.) Exch. 208; 3 Hurls. & C. 511.

(2) *By the Negligence of Fellow-Servants.*

Where servants are engaged in one common object the injury sustained by one servant in consequence of the negligence of another servant does not give a right of action against the master. *Waller* v. *the South-Eastern Rail. Co.*, 32 Law J. Rep. (N.S.) Exch. 205; 2 Hurls. & C. 102.

The guard of a train and the plate-layers, whose duty it is to attend to the rails over which the train passes, are engaged in one common object,—the safe conduct and transit of the train,—and therefore no action can be maintained against the company by the representative of a guard of a train killed by the train running off the line in consequence of the neglect of the "ganger" of the plate-layers to renew the decayed metals which fasten the chairs to the sleepers of the railways. Ibid.

The plaintiff was employed by the defendants, a railway company, as a carpenter and joiner. In the course of such employment he was engaged in painting an engine-shed, near which was a turntable. The servants of the company, in the course of managing the traffic, so negligently turned a carriage upon the turn-table that a ladder supporting a plank upon which the plaintiff was standing was thrown down, and the plaintiff was consequently injured:—Held, by *Blackburn, J.* and *Mellor, J.*, that he could not recover in an action against the defendants, inasmuch as his safety, in the ordinary and natural course of things, must have depended upon the care and skill of those servants who were managing the traffic, and that the risk of injury from the carelessness of such servants was such a risk as must be taken to be included in the risks which were to be considered in his wages. *Morgan* v. *the Vale of Neath Rail. Co.*, 33 Law J. Rep. (N.S.) Q.B. 260; 5 Best & S. 570.

Held, also, by *Cockburn, C.J.*, that the plaintiff could not recover; but solely out of deference to the authority of *Hutchinson* v. *the York, Newcas-*

*tle and Berwick Rail. Co.* and *Waller* v. *the South-Eastern Rail. Co.* Ibid.

A labourer employed by a railway company to assist in filling trucks with ballast from a ballast pit, and in pushing the trucks afterwards along a temporary tramway to the main line of the railway company,—and plate-layers, whose duty it was, under the superintendence of the company's foreman, to shift the tramway from time to time as the ballast was got away from the pit, are, together with such foreman, fellow-servants under the company, engaged in one common object, namely, the getting and carrying away of ballast; and therefore, in the absence of neglect by the company to appoint competent persons, the company are not responsible to such labourer for an injury sustained by him in consequence of the insufficient manner of laying the plates of the tramway. *Lovegrove* v. *the London, Brighton and South Coast Rail. Co.; Gallagher* v. *Piper*, 33 Law J. Rep. (N.S.) C.P. 329; 16 Com. B. Rep. N.S. 669.

A labourer employed by builders in erecting a scaffolding fell from the scaffolding whilst engaged in the work, in consequence of there not being a sufficient number of planks to make his standing there properly safe. The builders had no personal knowledge of the deficiency of planks, but their foreman, who managed all their works, with power to retain or dismiss the men, and whose duty it was to supply the materials required for making the scaffolding, knew of such deficiency and expressly refused to furnish more planks:—Held *(Byles, J. dissentiente)*, that such labourer and foreman were fellow-servants, and that consequently no action was maintainable against the builders for the injury the labourer sustained from the fall, without negligence on their part in appointing the foreman. Ibid.

The plaintiff, a workman in a coal mine of the defendants, received damage from the fall of a stone from the roof of the mine, which had lost its support by reason of the removal of the coal below in the ordinary course of working the mine. The defendants' underlooker, whose duty it was to superintend the mining operations, had negligently, though the danger had been pointed out to him, omitted to prop up the roof. The removal of the coal and the propping up of the roof ought, in the exercise of due and reasonable care, to be nearly contemporaneous operations:—Held, that as there was no evidence that the defendants had not exercised due care in the selection of their underlooker, nor in putting the mine into a proper condition before the miners were sent into it, they were not answerable for the injury caused to the plaintiff by the negligence of the underlooker, his fellow-labourer. *Hall* v. *Johnson* (Ex. Ch.), 34 Law J. Rep. (N.S.) Exch. 222; 3 Hurls. & C. 589.

Where there are two modes of doing a work in a public highway from which damage may result to a passer-by, the one mode more dangerous than the other—though both are usual modes,—it is for the jury to say whether the adoption of the former mode amounts under all the circumstances to negligence. A passer-by who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a volunteer assistant, so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work. *Cleveland* v. *Spicer*, 15 Com. B. Rep. N.S. 399.

To render a master liable for an injury to one in his employ, through the negligence of another person also in his employ, it must be shewn that the latter was placed by the master in such a position of trust and authority as to be fairly considered as his representative in the establishment. *Murphy* v. *Smith*, 19 Com. B. Rep. N.S. 361.

## (D) OFFENCES BY SERVANTS.

### (a) *Leaving and Neglecting the Service.*

An agreement in writing was entered into between W and B, on behalf of himself and partners, constituting the "R. Company, limited," whereby W, in consideration of wages to be paid to him fortnightly by the company, agreed to serve the company exclusively as a collier from the date of the agreement until the expiration of any notice thereinafter mentioned, and not to leave the service without giving twenty-eight days' notice, nor until after the expiration of such notice; and the company, in consideration of such faithful service, agreed that W should not be discharged by them without twenty-eight days' notice. An information was laid, under the 4 Geo. 4. c. 34. s. 3, against W by F, as agent of "B and his partners," alleging that W had contracted "with B and others," instead of stating the name of the company, and charging W with absenting himself from the service without lawful excuse. On the hearing, the Justices held the variance immaterial by reason of the 11 & 12 Vict. c. 43. s. 1, and adjudged W guilty of the said offence, and committed him to prison for one month; and further adjudged (it having been proved before them) that no wages were then due to W: as he had been paid for all the work done up to that time, and that the contract as proved being that W was to be paid by piecework, no wages could be earned by him or would be payable during his imprisonment:—Held, that the contract was not void for want of mutuality, as the employers were bound under it by implication to pay reasonable wages and to find work; and that the Justices were right as to the variance; and that the conviction was good under the statute 4 Geo. 4. c. 34. s. 3. *Whittle* v. *Frankland*, 31 Law J. Rep. (N.S.) M.C. 81; 2 Best & S. 49.

The respondents, potters, engaged the appellant to work for them, at specified work, in their manufactory, for a year, at daily wages. The same day the respondents engaged R to work for them by piecework for the same period. The work which the appellant had to do was, in fact, included in the piece-work of R, and R paid the appellant's wages out of the amount paid by the respondents to R for the piece-work:—Held, that the contract of master and servant subsisted between the respondents and appellant, notwithstanding the fact of the payment of his wages by the hands of R, and that, consequently, the appellant was liable to be convicted, under the 4 Geo. 4. c. 34, for neglecting his service with the respondents. *Willett* v. *Boote*, 30 Law J. Rep. (N.S.) M.C. 6; 6 Hurls. & N. 26.

Although if a servant leave his employment or refuse to perform his contract under a *bona fide* belief that he has a right to do so, he cannot be convicted under the statute, yet, to entitle the servant to a judgment on that ground, upon a case stated for

the opinion of the Court, the facts must reasonably shew that the desertion or neglect complained of was in pursuance of that supposed right, and it is not sufficient that it was merely possible that he acted under it. Ibid.

The appellant agreed to work for the respondents, as a journeyman cutler, for three years, by piecework, and was subsequently convicted and committed to the house of correction for twenty-one days for absenting himself from his masters' service, such absenting arising from some dispute as to the description of work on which he was employed. On coming out of prison he went to work elsewhere, and said he was earning more money, and should not return to the respondents. The latter again summoned him for absenting himself without leave or lawful excuse, and on that occasion he was advised by his attorney not to return to his employment. The Justices thereupon convicted him, and sentenced him to one month's imprisonment. The second conviction was expressly founded on the 6 Geo. 3. c. 25: —Held, that the conviction was bad; the 6 Geo. 3. c. 25. s. 4. was, *quoad* this offence, impliedly, although not expressly, repealed by the 4 Geo. 4. c. 34.—Held, also, by *Pollock, C.B.* and *Martin, B. (Bramwell, B. dissentiente)*, that the second conviction was bad, on the ground that it appeared the first conviction was for leaving the service absolutely, and the appellant ought not therefore to be convicted a second time.—Held, by *Pollock, C.B.* and *Bramwell, B.*, that the facts did not establish a wilful absenting, and that, therefore, the conviction was improper on that ground also. *Youle* v. *Mappin*, 30 Law J. Rep. (N.S.) M.C. 234: *nom. R.* v. *Youle*, 6 Hurls. & N. 753.

T, with six others, agreed to complete an iron vessel in L's yard. L was to employ them all, and they were exclusively to serve him. They were to be at liberty to employ other workmen of inferior skill under them, who, as well as themselves, were to be subject to the regulations of L's yard. They were to be paid at the rate of 5*l.* per ton for the work executed:—Held, that T and his fellows were "artificers" or "handicraftsmen," within the meaning of the 4 Geo. 4. c. 34. s. 3, and were liable to be convicted, if they absented themselves from their work. *Lawrence* v. *Todd*, 32 Law J. Rep. (N.S.) M.C. 238; 14 Com. B. Rep. N.S. 554.

### (*b*) *Disobedience of Orders.*

A person, engaged by the owner of a farm, to keep the general accounts belonging to such farm, to weigh out the food for the cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to carry out the orders given to him, is not a servant in husbandry within section 3. of 4 Geo. 4. c. 34, so as to be liable to conviction under that section for refusing to obey an order given to him by the owner of the farm. *Davies* v. *Lord Berwick*, 30 Law J. Rep. (N.S.) M.C. 84; 3 E. & E. 549.

### (*c*) *Threats and Intimidation.*

A threat made by a workman in conjunction with others that they will all cease work immediately unless the master discharge certain other workmen who are in his employ under particular terms, is a threat of carrying out an unlawful combination, and is, therefore, a threat within the 6 Geo. 4. c. 129. s. 3, which makes it unlawful by "threats" to endeavour to force a master to limit the description of his workmen. *Walsby* v. *Anley*, 30 Law J. Rep. (N.S.) M.C. 121; 3 E. & E. 516.

A dispute having arisen in a working-men's society, on the ground that L, one of the members, was working for K, who employed men not qualified, by the rules of the society, to do the work, O'Neill, one of the members, said he would use his influence to have L turned out of the society, if he did not leave his employ. L still continuing his work, a meeting was called, to which he was summoned. The business of the meeting was, whether L would leave K's or remain in his employ and be turned out of the society; and O'Neill, being in the chair, Galbraith, another of the members, reported what had occurred at an interview which he, as a deputation from the society, had had with K, and O'Neill then asked L whether he intended to remain an honourable member and leave K's shop, or stay at the shop, be despised by the club, and have his name sent round all over the country in the report of the society, and be put to all sorts of unpleasantness:—Held, that this was evidence on which O'Neill might be convicted of unlawfully, by threats and intimidation, endeavouring to force L to depart from his hiring under the 6 Geo. 4. c. 129. s. 3; but that against Galbraith the evidence was not sufficient. *O'Neill* v. *Longman*, 32 Law J. Rep. (N.S.) M.C. 259; 4 Best & S. 376.

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## MEDICINE AND SURGERY.

[The General Council of Medical Education and Registration of the United Kingdom incorporated by 25 & 26 Vict. c. 91.]

(A) College of Physicians.
(B) Medical Act, 21 & 22 Vict. c. 90.
  (*a*) *Registration, when necessary, and Effect of Non-Registration.*
  (*b*) *Fraudulent Registration.*
  (*c*) *Assumption of Title "Doctor of Medicine."*
  (*d*) *Retrospective Operation of the Act.*

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### (A) College of Physicians.

The College of Physicians having, under their charter and divers acts of parliament, power to grant licences for the practice of physic, passed by-laws restraining the licentiates of the college from selling medicines. Afterwards the Society of Apothecaries was established, and by an act of parliament passed in 1815, the right of supplying medicines in medical cases was vested exclusively in the Society of Apothecaries, and persons qualified by them, saving the rights of the College of Physicians. The College of Physicians having afterwards resolved to grant licences to practise physic to persons who should not be restricted by any by-law from supplying medicines to their patients, an information was filed at the relation of the Society of Apothecaries to restrain them:—Held, on demurrer, that the information could not be sustained, it being too doubtful whether the act of 1815 had taken away the power of the College to relax its by-laws in that respect, and it being clear that the "Medical Act, 1858," had not

done so. *The Attorney General* v. *the Royal College of Physicians*, 30 Law J. Rep. (N.S.) Chanc. 757; 1 Jo. & H. 561.

(B) MEDICAL ACT, 21 & 22 VICT. c. 90.

(*a*) *Registration, when necessary, and Effect of Non-registration.*

*Quære*—Whether the application of galvanism by a galvanic operator is the performance of an operation within the act. *Thistleton* v. *Frewer*, 31 Law J. Rep. (N.S.) Exch. 230.

T and S were in partnership as surgeons and apothecaries. At the time when the services were performed, and the goods supplied for which the present action was brought, T was duly registered under the 21 & 22 Vict. c. 90, but S was not. S was registered on the morning of the day on which the cause was tried:—Held, that the requirements of s. 32. were complied with, and that it was not necessary that both S and T should have been registered at the time the services were performed, or when the writ was issued. *Turner* v. *Reynall*, 32 Law J. Rep. (N.S.) C.P. 164; 14 Com. B. Rep. N.S. 328.

Held, also, per *Erle, C.J.* and *Byles, J.*, that even if S had not been registered at all, T being duly registered, the action was maintainable. Ibid.

Defendant, the medical officer of a foreign ship of war lying in the Thames, agreed to pay the plaintiff, who was a foreign medical man domiciled and practising in England, a certain monthly sum for the latter's medical attendance on the sick crew of the ship during defendant's temporary absence. The agreement was made on board the ship, but the plaintiff was not registered under the Medical Act, 21 & 22 Vict. c. 90, the 32nd section of which disentitles a person from recovering any charge for medical attendance, unless he prove upon the trial that he is registered under that act:—Held, that the act applied though the agreement was made between two medical men, and that the plaintiff's inability to prove his registration prevented him from recovering, even though the ship where the agreement was made were considered as a foreign terrritory. *De la Rosa* v. *Prieto*, 33 Law J. Rep. (N.S.) C.P. 262; 16 Com. B. Rep. N.S. 578.

(*b*) *Fraudulent Registration.*

The 26th section of the Medical Act (21 & 22 Vict. c. 90),—which enacts that any entry, which shall be proved to the satisfaction of the general or branch Council to have been fraudulently or incorrectly made, may be erased from the register by order in writing of the Council,—applies to cases in which the registration has taken place under the dispensing power conferred on the Council by the 46th section, as well as to the registration by the registrar under the 15th section. *R.* v. *the General Council of Medical Education and Registration*, 30 Law J. Rep. (N.S.) Q.B. 201; 3 E. & E. 525.

Section 29,—which enacts, that, if any registered medical practitioner shall be convicted of any felony or misdemeanor, or shall, after due inquiry, be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such practitioner from the register,—extends to conduct of which the practitioner has been guilty *before* registration. Ibid.

(*c*) *Assumption of Title "Doctor of Medicine."*

The offence under the Medical Act (21 & 22 Vict. c. 90. s. 40), of wilfully and falsely pretending to be, or taking, or using the name or title of, a physician, doctor of medicine, &c., is not established by the mere fact of a wrongful assumption of the title, if it appears to have been done under a supposed right. Therefore where a surgeon, duly registered as such under the act, prefixed the title "DR." to his name on his door, but upon the hearing of an information under s. 40, produced a document purporting to be a grant of a diploma from a German University, the Justices rightly dismissed the information. And, per *Bramwell, B.*—The wilful and false assumption of the title Doctor of Medicine, by a person duly registered as a surgeon, is an offence within the Medical Act. *Ellis* v. *Kelly*, 30 Law J. Rep. (N.S.) M.C. 35; 6 Hurls. & N. 222.

(*d*) *Retrospective Operation of the Act.*

By s. 32. of 21 & 22 Vict. c. 90. no person shall, after the 1st of January 1859, recover any charge for any medical or surgical advice, &c., unless he shall prove upon the trial that he is registered under the act:—Held, that this does not apply to an action in respect of work done before the 1st of January, 1859. *Wright* v. *Greenroyd*, 31 Law J. Rep. (N.S.) Q.B. 4; 1 Best & S. 758.

The above section, which (as amended by subsequent acts) enacts that after the 1st of January, 1861, no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this act, does not apply to an action commenced before but tried after the 1st of January 1861. *Thistleton* v. *Frewer*, 31 Law J. Rep. (N.S.) Exch. 230.

## MERCANTILE LAW AMENDMENT ACT.

A co-debtor, who has paid the entire debt, in respect of which judgment had been recovered against himself and the other co-debtors, is entitled, under s. 5. of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), to an assignment of such judgment; and it is no defence to an action by him against the judgment creditor, for refusing to assign it, that the judgment had become satisfied by payment by the co-debtor, after he had been taken in execution on the judgment. *Batchellor* v. *Lawrence*, 30 Law J. Rep. (N.S.) C.P. 39; 9 Com. B. Rep. N.S. 543.

## MERCHANT SHIPPING ACT.

[See SHIP AND SHIPPING.]

## MERGER.

When the owner of an estate in fee simple becomes entitled to a charge on that estate, *prima facie* the charge, in equity at least, merges in the inheritance, unless the owner of the estate does some act to keep it alive, or unless, from the circumstances of the case, it would be for his interest that it should continue to be a subsisting charge. *Swinfen* v. *Swinfen* (No. 3.), 29 Beav. 199.

Devise by the owner in fee, without mentioning a charge on it, to which he was absolutely entitled,—Held, to be some indication of his intention to merge it. Ibid.

The testator was owner in fee of an estate on which there was a charge of 6,000*l.*, to which he was absolutely entitled, and a subsequent charge of a jointure in favour of B. The testator devised the estate in fee to B:—Held, that she took discharged of the mortgage. Ibid.

A and B were owners in fee as tenants in common of freehold property. On the death of B, a building lease of a portion of the freehold property was granted by A and the devisees of B to a person who afterwards assigned all his interest under that lease to A alone. On the death of A, his devisees and the devisees of B granted a building lease of another portion of the freehold property to a person who assigned his interest under the lease to A's trustees alone. The legal estate in all the property was outstanding in a mortgagee who, subsequently to the above transactions, reconveyed the mortgaged premises to the trustees of A and B:—Held, that there was no merger of the leasehold interests in the reversion in fee of A, and the leases were consequently still existing. *Brandon* v. *Brandon*, 31 Law J. Rep. (N.S.) Chanc. 47.

T J, and J A L were trustees of a sum of 9,200*l.* as to the whole fund upon trust for J M for life, and after his decease as to 5,000*l.* upon trust for H E C M, and as to 4,200*l.* upon trust for T J the trustee. The fund was advanced to T J, who gave a mortgage for the amount on property belonging to him in fee; and by the mortgage deed trusts were declared of the mortgage money for J M for life, and after his decease as to the 4,200*l.* for T J, *his executors, administrators and assigns*. J M died, leaving T J surviving, who died, seised of the property and absolutely entitled to the 4,200*l.*, without expressing any intention either that the charge should or should not merge:—Held, that the declaration, of trust for T J, *his executors, administrators and assigns*, was to be regarded merely as a statement of the trust then affecting the fund, and not as affording any indication of an intention to keep the charge on foot, and that T J, the owner of the estate, having subsequently become absolutely entitled to the charge, the charge must be treated as having merged. *Tyrwhitt* v. *Tyrwhitt*, 32 Law J. Rep. (N.S.) Chanc. 553; 32 Beav. 244.

Portions having been charged on a reversion in fee, and a person entitled to one of the portions having become also entitled to the reversion, the Court refused to presume an intention to merge his portion, it appearing that the effect might be to give priority to those entitled to the remainder of the portions. *Sing* v. *Leslie*, 33 Law J. Rep. (N.S.) Chanc. 549; 2 Hem. & M. 68.

A mortgage security executed by two (and the wife of the third) of three persons indebted to the mortgagee in a simple contract debt, does not operate as a merger of the claim on the simple contract in the specialty. *Sharpe* v. *Gibbs*, 16 Com. B. Rep. N.S. 527.

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## METROPOLIS LOCAL MANAGEMENT ACTS.

[The Metropolis Local Management Acts amended by 25 & 26 Vict. c. 102.—The act relating to the Main Drainage of the Metropolis extended by 26 & 27 Vict. c. 68.]

(A) Construction of the Acts.
(B) Powers of the Metropolitan Board of Works.
(C) Liabilities of the Metropolitan Board of Works.
(D) Powers of District Boards.
(E) Powers of Vestries.
(F) Inclosed Ground in Squares.
(G) Sewers and Drains.
(H) Rates.
(I) Obstructing Voters.

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### (A) Construction of the Acts.

In a proceeding before the magistrate, under s. 75. of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), for erecting an "erection" beyond the general line of buildings in a street, the certificate of the superintending architect of the Metropolitan Board of Works as to what line is "the general line of buildings" does not preclude the magistrate from questioning and determining whether such line be the true general line of buildings in that street or not. *The Vestry of St. George, Hanover Square*, v. *Sparrow*, 33 Law J. Rep. (N.S.) M.C. 118; 16 Com. B. Rep. N.S. 209.

A small conservatory having been erected over a projecting shop-front in a street, and the magistrate having decided that it was not an erection within the meaning of the above section, the Court refused to review his decision. Ibid.

The 98th section of the Metropolis Management Amendment Act, 1862, provides that "no existing road, passage or way being of a less width than forty feet shall be hereafter formed or laid out for building as a street, for the purposes of carriage traffic, unless such road, passage or way be widened to the full width of forty feet," the measurement to be taken half on either side from the centre or crown of the roadway to the external wall or front of the house, or to the fence or boundary of the forecourt, if any:—Held, that this does not apply where the buildings abut in the rear upon an old lane less than forty feet wide. *The Metropolitan Board of Works* v. *Cox*, 19 Com. B. Rep. N.S. 445.

### (B) Powers of the Metropolitan Board of Works.

The Metropolitan Board of Works have authority, under s. 141. of the 18 & 19 Vict. c. 120, to name streets and number houses within the city of London; the powers conferred on the Commissioners

of Sewers for the city of London by the 11 & 12 Vict. c. clxiii. being superseded in that respect by the powers more recently conferred on the Metropolitan Board of Works. *Daw* v. *the Metropolitan Board of Works*, 31 Law J. Rep. (N.S.) C.P. 223; 12 Com. B. Rep. N.S. 161.

By the Metropolis Local Management Act, 18 & 19 Vict. c. 120. s. 181, the Metropolitan Board of Works has power, in default of the overseers, to appoint a person to make a rate over parishes beyond the metropolis, but within the limits of the repealed Metropolitan Sewers Act, 11 & 12 Vict. c. 112, for the purpose of paying off debts due under the last-mentioned statute. *R.* v. *Glossop*, 32 Law J. Rep. (N.S.) Q.B. 91.

No power is conferred on the Metropolitan Board of Works of erecting any works in the soil or bed of the River Thames by the statute 18 & 19 Vict. c. 120. s. 135. That power is conferred by the statute 21 & 22 Vict. c. 104. s. 2, subject, by section 27, to the consent of the Admiralty being previously obtained in respect of all works below high-water mark which may interfere with the navigation. Where, therefore, a contractor, by direction of the Metropolitan Board, had placed piles in the bed of the river to protect sewage works there, without having obtained the consent of the Admiralty, the Metropolitan Board and the contractor were held liable to damages in an action brought by the owner of a vessel, which had been injured by grounding on the piles. *Brownlow* v. *the Metropolitan Board of Works* (Ex. Ch.), 33 Law J. Rep. (N.S.) C.P. 233; 16 Com. B. Rep. N.S. 546.

The 57 Geo. 3. c. xxix. contains (amongst other things) powers for the suppression of nuisances, within a certain district of the metropolis, and by s. 68. the keeping of pigs within forty yards of any street is prohibited, whether the same be a nuisance or not. By 25 & 26 Vict. c. 102. s. 73, the powers of improving and regulating streets and for the "suppression" of nuisances contained in the 57 Geo. 3. c. xxix. are applied to a larger district:—Held *(dubitante Keating, J.)*, that s. 68. of 57 Geo. 3. c. xxix., containing a power of prevention and not of suppression, did not apply to the larger district. *The Chelsea Vestry* v. *King*, 34 Law J. Rep. (N.S.) M.C. 9; 17 Com. B. Rep. N.S. 625.

### (C) Liabilities of the Metropolitan Board of Works.

The right of prosecution given to the Home Secretary by 21 & 22 Vict. c. 104. s. 31. does not supersede the right of private persons aggrieved by the nuisance to an injunction. *The Attorney General* v. *the Metropolitan Board of Works*, 1 Hem. & M. 298.

Distinction between parliamentary powers to do acts which necessarily involve the commission of nuisances and powers which may possibly be exercised without giving rise to nuisances. Ibid.

### (D) Powers of District Boards.

By s. 76. of 18 & 19 Vict. c. 120. a district Board of Works is empowered, in default of a certain notice being given by the owner before he commences building a house, to order the house to be demolished or to make such other order as the case may require:—Held, that under this section the district board cannot legally demolish a house without giving to the owner an opportunity of shewing cause why it should not be demolished. *Cooper* v. *the Wandsworth Board of Works*, 32 Law J. Rep. (N.S.) C.P. 185; 14 Com. B. Rep. N.S. 180.

### (E) Powers of Vestries.

In a suit by the Ecclesiastical Commissioners against a vestry, in regard to the erection of a church within one of the metropolitan districts, it was held, by *Stuart, V.C.*, that s. 143. of the Metropolis Local Management Act does not confer on the vestry of a parish the power of controlling the Ecclesiastical Commissioners in the plan and mode of building churches, inasmuch as s. 3. of the Metropolis Local Management Amendment Act provides that, where at the time of the passing of the first-named act there were Commissioners who had powers and duties to execute relating to the affairs of the Church, they should be exempted from its operation; but this decision was reversed, on appeal, by *Campbell, L.J. The Ecclesiastical Commissioners* v. *the Vestry of Clerkenwell*, 30 Law J. Rep. (N.S.) Chanc. 454.

The parish of St. John, Southwark, was, previous to the passing of the Metropolis Local Management Acts, governed by certain local acts, by which it was provided that the vestrymen should appoint governors and directors of the poor, who should make out the poor-rates for the said parish:—Held, that since the passing of the above-mentioned acts, the old vestry had no longer the power of appointing the governors and directors, but that the power of doing so was vested in the new vestry. *R.* v. *Rendle*, 30 Law J. Rep. (N.S.) M.C. 135.

Under s. 81. of the Metropolis Local Management Act, the vestry or district board may require the owner or occupier of a house to provide a sufficient water-closet; and if he does not comply with such requirement the vestry or district board may cause it to be constructed, and may recover the expenses incurred by them in so doing from the owner of the house. *The Vestry of St. Luke's* v. *Lewis*, 31 Law J. Rep. (N.S.) M.C. 73; 1 Best & S. 865.

The northern boundary of the parish of St. Anne, Soho, extends to the centre of Oxford Street for the whole distance between Crown Street on the east and Wardour Street on the west. *R.* v. *the Board of Works for the Strand* (Ex. Ch.), 33 Law J. Rep. (N.S.) Q.B. 299; 4 Best & S. 551.

Where an order of the Metropolitan Board of Works has been made, under s. 140. of the 18 & 19 Vict. c. 120, ordering that the whole of a street situate in more than one parish should be under the exclusive management of a particular vestry, and that vestry makes an order, under s. 160, upon one of the other districts for contribution towards the expenses, it is no good answer to a mandamus, requiring the latter district to pay the sum required by the vestry for defraying the expenses of the act in question, that the order includes improper items, but the mandamus must go if any sum be due. Ibid.

The mandamus does not direct the payment of any particular amount, but the order of vestry cannot be questioned before the auditors appointed under the act,—and *quære*, whether the order is not conclusive as to the amount. Ibid.

(F) Inclosed Ground in Squares.

By an act of parliament the whole area of Grosvenor Square was placed under the management of trustees, and they many years ago, in pursuance of powers contained in the act, borrowed money, which, together with interest, was charged on the rates to be levied under the act, such rates being payable one half by the owner and the other by the occupier of each house in the square:—Held, that "The Metropolis Local Management Act" (sections 90, 93, 94, 180. and 239), though it left in the trustees the inclosed ground and footway round it, together with all duties and powers in relation to the future maintenance of such ground, &c., and to levy rates for defraying the expenses incurred in the execution of such duties and powers, transferred the debt charged on the rates under the special act to the vestry of the parish: and the Court granted a peremptory mandamus to the vestry to take the necessary steps under "the Metropolis Local Management Act" for paying the principal and interest. *R.* v. *the Vestry of St. George, Hanover Square,* 32 Law J. Rep. (N.S.) Q.B. 160.

(G) Sewers and Drains.

By 11 & 12 Vict. c. 112. s. 38. power was given to the Metropolitan Commissioners of Sewers to construct sewers under any lands whatsoever, "making compensation for any damage done thereby," and by other clauses of that act the Commissioners were empowered to levy rates retrospectively, as well as prospectively, for the payment of such compensation. By the Metropolis Local Management Act (18 & 19 Vict. c. 120.) the powers of such Commissioners are put an end to, and the Metropolitan Board of Works is to stand in their place; and by s. 148. the property vested in such Commissioners is transferred to the Board of Works, and all persons who owe money to the Commissioners are to pay the same to such Board, and all moneys recoverable from the Commissioners are to be recoverable from the Board; and by s. 181. "all mortgages, annuities, securities, and other debts and liabilities," which before the determination of the 11 & 12 Vict. c. 112. might be charged on or payable out of any rates authorized to be levied thereunder, are to continue in full force and be a charge on the districts in which such rates would have been authorized to be levied:—Held, that a liability of such Commissioners to make compensation for land taken by them for a construction of a sewer under the powers of the 11 & 12 Vict. c. 112, was transferred by the 18 & 19 Vict. c. 120. to the Metropolitan Board of Works, and was, therefore, recoverable from such Board, although at the time of the determination of the powers of the Commissioners the existence of such liability was not known, and no claim was made for compensation until several years afterwards. *Pettiward* v. *the Metropolitan Board of Works,* 34 Law J. Rep. (N.S.) C.P. 301; 19 Com. B. Rep. N.S. 489.

By s. 181. of 18 & 19 Vict. c. 120. all liabilities which, under 11 & 12 Vict. c. 112, are chargeable upon the rates authorized to be levied under such latter act, are to be raised by the Metropolitan Board of Works in like manner as the expenses of such Board in the execution of that act. *Pew* v. *the Metropolitan Board of Works,* 34 Law J. Rep. (N.S.) M.C. 97; 6 Best & S. 235.

Before 18 & 19 Vict. c. 120. the Commissioners of Sewers, acting under 11 & 12 Vict. c. 112, had borrowed money, of which 67,000*l.* had been expended on drainage works for the benefit of the Surrey and Kent Sewerage District formed under the powers given to the Commissioners. The district comprised parts of nineteen parishes, and in one of them (C) 519*l.* had been expended on works locally situate there, and the whole benefit derived amounted to 1,074*l.* 6*s.* 10*d.*:—Held, nevertheless, that the proper mode of raising the money to defray the liabilities of the Commissioners of Sewers was to apportion the amount of such liabilities among the different parishes in the sewerage district, according to the rateable value of the property in each, and then to make a rate for such proportion upon C and the other parishes respectively. Ibid.

The plaintiff was the owner of land through which the P river flowed, such land being beyond the district of the board of works for L. The board executed drainage works within their district, by means of which the sewage was carried into a stream which flowed into the P river. The sewage had for many years been carried into the stream, but only so as to pollute the water in an inappreciable degree. The result of the new works of the board was to do substantial injury to the plaintiff:—Held, by the Court of Queen's Bench, that under the 86th section of the "Metropolis Local Management Act, 1855," the plaintiff had a right to obtain compensation for the damage done in the manner provided by the act, and therefore that the board were not liable in an action. But held, by the majority of the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, that the local board were not authorized by any provision of the Metropolis Local Management Act, 1855, to carry the sewage of the district by means of a new system of sewers into the plaintiff's stream, and that the plaintiff was entitled to maintain an action against them for the nuisance. *Cator* v. *the Board of Works for Lewisham* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 74; 5 Best & S. 115, 127.

A vestry of a parish mentioned in Schedule (A.) to 18 & 19 Vict. c. 120. having resolved, under s. 73, that the drainage of several houses into an old sewer was insufficient, and that such sewer should be discontinued, gave notice to the owners of such houses to make new drains into a new sewer; and upon default of the owners, the vestry made them themselves. They then attempted to recover the expense from the house-owners (by summons against the occupier under s. 96. of 25 & 26 Vict. c. 102.) before a magistrate, on the ground that they were acting under s. 73. The magistrate decided that the facts brought the case within s. 69, and refused to make any order:—Held, that there was nothing to shew that the drains were insufficient; that the vestry could not by their finding conclusively bring the case within s. 73; that it was competent for the magistrate to refuse his order on the ground that the case fell within s. 69; and that his decision on this matter (which was partly a question of law and partly one of fact) was right, as the facts shewed that the new drains were rendered necessary by the draining into the new sewer, and

not by the insufficiency of the old drains. *The Vestry of St. Marylebone* v. *Viret*, 34 Law J. Rep. (N.S.) M.C. 214; 19 Com. B. Rep. N.S. 424.

### (H) Rates.

In assessing property to the sewer-rate under the Metropolis Local Management Act (18 & 19 Vict. c. 120), the old law of sewers must in general prevail,—that if property be situate within the area benefited by the sewers it must contribute without any reference to the amount of benefit derived; and if the property does not fall within the classes mentioned in s. 163, nor within any exemption or reduction mentioned in s. 164, it must be assessed at its full value as ascertained by the poor-rate for the time being. Therefore, the mains and pipes of a gas company, laid in the ground for the purpose of supplying gas to customers, must be assessed at their full value, and are not entitled to any deduction on the ground of deriving less benefit from the sewers than house property. *R.* v. *Head and the Metropolitan Board of Works*, 32 Law J. Rep. (N.S.) M.C. 115; 3 Best & S. 419.

The parish of A, not being one of the parishes within the area of the Metropolis Local Management Act (18 & 19 Vict. c. 120), but being liable to a mortgage debt under the Metropolitan Sewers Act (11 & 12 Vict. c. 112), the Metropolitan Board of Works, intending to act under s. 181. of the 18 & 19 Vict. c. 120, issued their precept to the overseers of A to pay a certain sum "for defraying the expenses of the board in the execution of the act," and a rate was made accordingly "for levying the sum required by the Metropolitan Board of Works for the purposes of the said act":—Held, that the precept and rate were bad on the face of them, as purporting to be made for purposes for which A was not liable to be rated; and that the rate therefore could not be enforced. *R.* v. *Ingham*, 32 Law J. Rep. (N.S.) M.C. 214; 4 Best & S. 205.

By a local act for a parish the vestrymen, governors and directors of the poor, or any nine of them, or on their failure the churchwardens, were to make a rate on the parish, called the composition-rate, for raising a sum for payment of the rector's stipend, and for the repairs and expenses of the church. By a prior act the governors and directors of the poor were made vestrymen:—Held, that the power of making this rate was by the Metropolis Local Management Acts, 18 & 19 Vict. c. 120. s. 90. and the 19 & 20 Vict. c. 112. s. 3, transferred to the new vestry elected under those general statutes; though it may be that, if the new vestry fail to make any rate, the churchwardens may still make one under the powers of the local act. *R.* v. *Stretfield*, 32 Law J. Rep. (N.S.) M.C. 236.

The rate was voted in vestry on the 25th of June, and duly signed on the 10th of July:—Held, that a written demand of payment of the sum assessed, stating a demand of the sum as for the composition-rate for the current year made at Midsummer, was a sufficient demand, and that the error in the date of the rate was immaterial. Ibid.

### (I) Obstructing Voters.

The 21st section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, enacts that, "if any person knowingly personate and falsely assume to vote in the name of any parishioner entitled to vote in any election under this act, or forge, or in any way falsify any name or writing in any paper purporting to contain the vote or votes of any parishioner voting in any such election, or by any contrivance attempt to obstruct or prevent the purposes of any such election, the person so offending shall, upon conviction, be liable," &c.:—Held, that an intentional obstruction of the voting by actual violence is an offence within the act. The duty of the Court, upon a case stated under 20 & 21 Vict. c. 43, is simply to answer the question of law put to them by the magistrates. *Buckmaster* v. *Reynolds*, 13 Com. B. Rep. N.S. 62.

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## METROPOLITAN BUILDING ACT.

[The Metropolitan Building Act (1855) amended by 24 & 25 Vict. c. 87.]

(A) What Buildings are within the Rules for Construction of Buildings; Churches.
(B) Party Walls.
(C) Dangerous Structures.
(D) Notices.

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### (A) What Buildings are within the Rules for Construction of Buildings; Churches.

The rules contained in the Metropolitan Building Act, 1855, for the construction of buildings, do not apply to public buildings such as churches, but such public buildings are to be constructed in such manner as may be approved of by the district surveyor, subject, in the event of disagreement, to the determination of the Metropolitan Board of Works. *Quære*—The remedy under s. 45. *R.* v. *Carruthers*, 33 Law J. Rep. (N.S.) M.C. 107; 4 Best & S. 804.

### (B) Party Walls.

For many years before the Metropolitan Building Act, 1855, came into operation, the houses Nos. 66 and 67 in A had been united by means of an opening in the party-wall between them. In June, 1862, B being the occupier of these two houses, and of No. 6 in L Lane, made two openings in the wall separating it from No. 66. The three houses together contained more than 216,000 cubic feet, but Nos. 6 and 66 taken alone did not contain 216,000:—Held, that the two houses Nos. 66 and 67 must be considered as one building, and that the openings between Nos. 6 and 66 must be made in accordance with the requirements of the 28th section of the Metropolitan Building Act, 1855. *Ashby* v. *Woodthorpe*, 33 Law J. Rep. (N.S.) M.C. 68.

The lessee of a house for a long term of years, who has underlet it in different portions to different tenants, and who is in receipt of the rents from such underlettings, is the "owner" of the party-wall of such house within the meaning of the Metropolitan Building Act (18 & 19 Vict. c. 122), notwithstanding the underlettings create a greater interest in the under-tenants than that of a yearly tenancy; and he is liable as such owner to pay to the adjoining owner a proportion of the expenses incurred by the latter in repairing the wall in obedience to the requisition

of the Commissioners of Sewers made under that act. *Hunt* v. *Harris*, 34 Law J. Rep. (N.S.) C.P. 249; 19 Com. B. Rep. N.S. 13.

A tenant who has been compelled by the "building owner" to pay the proportion of the expenses of a party-wall or structure which was payable (under the Metropolitan Building Act, 1855,) by his landlord, the "adjoining owner," may maintain an action against the latter to recover the sum so paid; and he is not bound (though entitled) to deduct it from rent due or accruing due. *Earle* v. *Maugham*, 14 Com. B. Rep. N.S. 626.

(C) Dangerous Structure.

By s. 73. of the 18 & 19 Vict. c. 122, expenses incurred by the Commissioners in taking down, repairing, or otherwise securing dangerous structures shall be paid by the *owner* of such structure. By s. 3. "owner" shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will:—Held, that where the appellants were seised in fee of a building used as a chapel, and which they had let on lease for twenty-one years, they were not liable to pay the expenses incurred as above by the Commissioners, but that the lessee was the "owner" within the meaning of the act, and as such owner was the person intended to be liable. *Mourilyan* v. *Labalmondiere*, 30 Law J. Rep. (N.S.) M.C. 95; 1 E. & E. 533.

(D) Notices.

A tenant in possession, having an equitable interest only under an agreement for a lease for a term, is, in equity, an "adjoining owner" under the Metropolitan Building Act (18 & 19 Vict. c. 122), and three months' notice must be given to him before any alteration affecting his premises can be commenced by his neighbour, under the powers of that act. *Cowen* v. *Phillips*, 33 Beav. 18.

## METROPOLITAN BURIALS.

[See Burial.]

By 15 & 16 Vict. c. 85. s. 32. the burial-ground provided under the act is to be the burial-ground of the parish for which it is provided, "and every incumbent or minister of the parish," "for which such burial-ground is provided, shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorize, perform the duties, and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received"; and by the interpretation clause to the act, "parish" is to "mean every place having separate overseers of the poor and separately maintaining its own poor," and "incumbent" or "minister" is, "in respect of any fee made payable to an incumbent or minister under the act" to mean "the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial-ground of the parish from which it came, or in the burial-ground of the ecclesiastical district, in case such district had a burial-ground at the passing of this act." Where, prior to this act, a township, which was a parish within the meaning of the interpretation clause, was divided into ecclesiastical districts, with separate burial-grounds, and afterwards a burial-ground was provided under the act for the whole township, it was held, that each incumbent of such district was entitled to the burial fees in respect of the burial service performed by him in the burial-ground provided under the act to which he would have been entitled before the act if the body had been buried in the burial-ground attached to his district. *Day* v. *Peacock*, 34 Law J. Rep. (N.S.) C.P. 225; 18 Com. B. Rep. N.S. 702.

## METROPOLITAN POLICE.

[Street music within the metropolitan police district regulated by 27 & 28 Vict. c. 55.—The closing of public and refreshment houses within the metropolitan police district, the City of London, certain corporate boroughs, and other places, regulated by 27 & 28 Vict. c. 64.]

*Turning Cattle loose in Thoroughfare.*

S. 54. of the Metropolitan Police Act (2 & 3 Vict. c. 47.)—which makes it an offence, *inter alia*, to turn loose any horse or cattle in any thoroughfare,—does not apply to the case of cattle turned out with a boy to look after them. *Sherborn* v. *Wells*, 32 Law J. Rep. (N.S.) M.C. 179; 3 Best & S. 784.

*Superannuation Allowance.*

A superannuation allowance granted to a police officer, pursuant to the order of the Secretary of State under the 23rd section of 2 & 3 Vict. c. 47, on his being incapable from ill health of discharging his duties, is revocable at the discretion of the Secretary of State. *R.* v. *the Receiver for the Metropolitan Police*, 33 Law J. Rep. (N.S.) Q.B. 52; 4 Best & S. 593.

## MILITIA.

[The making of lists and the ballots for the Militia of the United Kingdom suspended by 24 & 25 Vict. c. 120; by 25 & 26 Vict. c. 77; by 26 & 27 Vict. c. 53; by 27 & 28 Vict. c. 63, and by 28 Vict. c. 46.]

## MINE.

(A) Lease.
(B) Working.
  (*a*) *Rights and Duties of adjoining Owners.*
  (*b*) *Right of Surface Owner to Support of Subjacent Land.*
  (*c*) *Right to Lateral Support through Intervening Land.*
  (*d*) *Nuisance and Injury.*
  (*e*) *Violation of Rules of Working.*
(C) Reservation of Mines and Minerals in Grant or Lease.

### (A) LEASE.

A lease of two seams of coal, "and all other the seam and seams of coal under the D estate," will authorize the opening an unworked seam; and after the decease of the grantor, the rents and profits of the same mines under a new lease will belong to the tenant for life under his will. *Spencer* v. *Scurr*, 31 Law J. Rep. (N.S.) Chanc. 334.

A lease of coal-mines and ironworks contained a covenant by the lessee, to yield up to the lessor, at the expiration or other sooner determination of the term, all "ways and roads" in or under the demised hereditaments in such good order, repair and condition as that the said coal and ironworks might be continued and carried on by the lessor. *Stuart, V.C.* considered that tram-plates fastened to iron or wooden sleepers which were not let into the ground, but rested thereon, were protected by the covenant, and granted an injunction restraining the taking up, sale or removal of such tram-plates by a judgment creditor of the lessee; but, on appeal, *Knight Bruce, L.J.* and *Turner, L.J.* held that the movable chattels were not included in the terms "works" or "ways" or "roads," and that the injunction must be dissolved. *The Duke of Beaufort* v. *Bates*, 31 Law J. Rep. (N.S.) Chanc. 481; 3 De Gex, F. & J. 381.

By an agreement for the lease of certain ironworks and mines between the plaintiff and the defendants, the plaintiff was to grant a lease of the works and mines for twenty-one years, with the usual and customary clauses. The lessees were to pay, in each year, royalties at so much per ton, and sufficient dead rent to make up 500*l.* for each of the first two years, and 1,500*l.* for each successive year of the lease; but, if necessary, deductions were to be made so as not more than an average rent of 500*l.* should be paid for the first two years and 1,500*l.* per annum for the remainder of the term. The lessees were also to pay a rent of one-third of the profits for the use of the plant, not exceeding 7,000*l.* per annum. The lessees were to commence operations within three months, and for the first three months no royalties or dead rent were to be payable. If within the second three months the lessees did not pay royalties, or a sum in anticipation of royalties, to the amount of 125*l.*, or if the lessees should at any time cease to carry on the works with due diligence, the lessor was to be at liberty to put an end to the tenancy by a month's notice, without prejudice to his claim for rent. The lessees were to be at liberty "at any time" to determine the agreement, or the lease thereby agreed to be granted, "on giving to the lessor six months' notice in writing of their intention so to do." *Bridges* v. *Potts*, 33 Law J. Rep. (N.S.) C.P. 338; 17 Com. B. Rep. N.S. 314.

The defendants entered into possession of the mines and works on the 19th of August, 1861, under the agreement. No lease was ever granted. The rent of 125*l.* for the second quarter was paid by the lessees, and subsequently a further sum of 250*l.* for the six months ending the 19th of August, 1862. On the 10th of August, 1863, the defendants gave six months' notice of their intention to determine the agreement and the tenancy on the 10th of February, 1864. On the 21st of November, 1863, the defendants paid to the plaintiff the sum of 500*l.* in respect of rent for the year ending the 19th of August, 1863: — Held *(dubitante Williams, J.)*, that, looking to all the provisions of the lease, the defendants had a right to give this notice at any time, and were not bound to give such a notice as tenants from year to year are generally bound to give, namely, a notice expiring at a date corresponding with the commencement of the tenancy. Ibid.

Held, also, that the dead rent was to be apportioned for the period between the 19th of August, 1863, and the 10th of February, 1864. Ibid.

*Semble*, per *Williams, J.*, that 4 & 5 Will. 4. c. 22. s. 2, as to apportionment, would not apply to this case; per *Byles, J.*, that it would. Ibid.

By a mining lease, the lessees covenanted, amongst other things, that they would "from time to time and at all times during the said term work the said pits, mines and shafts in a workman-like manner, and leave pillars of the said stone of sufficient strength to support the roofs of the said mines, and get and clear the said stone in the usual and best way in which the same is done in other works of a like character in Clayton. They also covenanted to pay for surface damage, and at the expiration of the term to fill up the pits and shafts, and restore the surface to a state fit for agricultural purposes:— Held, that the lessees were liable to the reversioner for damage done to the surface of the land by its cracking and subsiding, in consequence of the want of sufficient pillars of stone being left to support the roofs of the mines, notwithstanding they might have worked the mines in an usual and a workman-like manner. *Hodgson* v. *Moulton*, 18 Com. B. Rep. N.S. 332.

### (B) WORKING.

#### (*a*) *Rights and Duties of adjoining Owners.*

The owner of the upper of two adjoining mines is not liable for injury by water flowing by gravitation into the lower mine from works conducted by him in the usual and proper manner for the purpose of getting mineral from any part of his mine; but he must not interfere with such gravitation so as to make it more injurious to the lower mine or more advantageous to himself; for if he do so, and be thereby an active agent in sending water to the lower mine, an action will lie against him by the owner of the lower mine for the injury done. *Baird* v. *Williamson*, 33 Law J. Rep. (N.S.) C.P. 101; 15 Com. B. Rep. N.S. 376.

#### (*b*) *Right of Surface Owner to Support of Subjacent Land.*

A railway company, under their compulsory powers, purchased of A B in 1837, land under which there was a drained mine. By their act all minerals were reserved to the owner, who might work them so as to do no damage to the railway; and in case of damage, reparation was to be made by the owner. But if such workings came within twenty yards of any masonry or building of the company, notice was to be given to the company, and they might purchase the same; but if they did not purchase, the owner might work the mineral under the masonry or building, provided the same were worked in the usual and ordinary

manner of working mines, and no avoidable damage were done to the masonry or buildings. A B's land had been purchased for the purpose of building a bridge, and in 1859 a lessee of the mine commenced works with a view of pumping the water from the drained mine. An injunction was granted by *Wood, V.C.* to restrain the lessee from taking coal, &c. from under the land purchased of A B within twenty yards of any masonry or building of the company without giving them notice as required by their act, and from working minerals under any land not within the twenty yards in such a manner as to affect the stability of the bridge and railway; and an appeal from the order was dismissed, with costs by *Lord Campbell, C. The North-Eastern Rail. Co.* v. *Elliott*, 30 Law J. Rep. (N.S.) Chanc. 160.

An act of parliament authorized Commissioners to allot certain commons and commonable lands. Under these lands it was believed that mines existed. The act authorized the Commissioners to allot the lands "amongst persons who, at the time of executing the award, should be entitled to or interested therein, either in right of the soil or of any other right or interest whatever, and with a just regard to any mines, &c. supposed to be under the same." The act then provided for proportioning the allotments, and for securing the necessary right to work the mines. The Commissioners made their award, allotting to A land and to B mines, specially naming mines of coal under A's land. The award then contained a covenant that "the mines so allotted shall be enjoyed by the persons to whom the same are assigned, and be worked and gotten accordingly without molestation, denial or interruption of any other persons parties to these presents, and those claiming under them, owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action on account of working and getting the same by reason that the surface of the lands may be rendered less commodious by sinking in hollows or being otherwise defaced and injured,"—"the parties to these presents and interested in the disposal of lands and mines under the circumstances aforesaid having agreed with each other, and being willing and desirous to accept their respective allotments, subject to any inconvenience and incumbrance which may arise from the cause aforesaid." A signed the award, and thus executed the covenant it contained. B did not sign it. B's assignee of the mines worked the mines. A's assignee of the lands built houses on the lands. By degrees, without any imputation of negligence in the working of the mines or of working them in an unusual manner, the surface of the ground and the houses upon it became injured. A's assignee of the lands brought an action against B's assignee of the mines for compensation or damages:—Held, that the award was valid; that the right to work mines was an incident to the grant of mines; that though the covenant could not operate as a release of the general right of a surface owner to the support of the subjacent soil, it did operate as a grant of the right to work the mines, and thereby injure the surface, provided such injury was not the result of negligence or wilfulness. *Rowbotham* v. *Wilson* (House of Lords), 30 Law J. Rep. (N.S.) Q.B. 49; 8 H.L. Cas. 348.

*Prima facie*, the owner of land is entitled to the surface itself, and all below it, *ex jure naturæ;* those who seek to derogate from that right must do so by virtue of some grant or conveyance. Ibid., 8 H.L. Cas. 348.

The rights of the grantee of the minerals depend on the terms of the deed by which they are granted. Under a grant of minerals, a power to get them is a necessary incident. Ibid.

In 1770 a private act of parliament was passed to provide for the allotment of commons and commonable lands, &c. These lands were described as having mines under the surface. Commissioners were appointed to allot (having due regard to the mines) according to the rights of the various persons interested in the lands, some of which were divided into small parcels. The Commissioners, by their award, allotted the lands, so that some of the mines allotted to A were situated under portions of the land allotted to B. The persons interested executed this award, which (reciting that this mode of allotment had been necessary) contained a clause, declaring that the proprietors agreed with each other, and their heirs, that the lands so allotted should be lawfully held and enjoyed by the allottees without molestation, and without any mine owner being subject to any action for damages on account of working and getting the mines, or by reason that the lands might be "rendered uneven and less commodious to the occupiers thereof, or by sinking in hollows, and being otherwise defaced and injured where such mines shall be worked . . . . the several proprietors having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or incumbrance which may arise from the cause aforesaid." The mines were worked by A, his assignee, and the surface of the land was thereby (but without negligence) injured:—Held, that whatever be the general right in the surface to support, this clause in the award operated as a grant of a right to disturb the surface of the land, and B therefore could not maintain an action for damage on that account. Ibid.

*Quære*—Whether this clause could operate as a release of the right to support. Ibid.

The circumstance that (some years after the award, but many more than twenty years before the injury complained of) houses were erected on the land was held not to make any difference with regard to the relative rights of the parties under the award. Ibid.

### (c) *Right to Lateral Support through Intervening Land.*

When the working of mines, in however careful a manner, has occasioned the subsidence of the land of another, although not immediately adjoining, damages may be recovered in respect of injury to buildings thereon erected or enlarged within twenty years, provided their weight did not occasion or contribute to the subsidence. *Hamer* v. *Knowles* and *Stroyan* v. *Knowles*, 30 Law J. Rep. (N.S.) Exch. 102; 6 Hurls. & N. 454.

In 1833 a manufactory was erected on a close, G, and in 1841 and subsequent years additional works were erected. In 1842 the close, which was then in lease, was conveyed by S, the owner, to C, who died in 1849, and whose devisees, in 1851, on the expira-

tion of the lease, conveyed it in fee to the plaintiff, who, previous to 1849, had acquired possession as assignee of the lease. In 1849 and 1850 the defendants in getting coal from their land (near, but not immediately adjoining G), caused the surface of the latter to subside, by which the manufactory was injured. C's devisees did not in fact sustain any damage, as they incurred no expense and continued to receive the full rent for the premises, and on the sale obtained the full value without reference to any injury (of which they were ignorant) by the mining operations. Subsequent to the conveyance to the plaintiff, the mining operations of the defendants, in land near but not adjoining, caused a further subsidence of the manufactory, which subsidence continued after the termination of the workings in 1852 and down to a period subsequent to August, 1855. The mining operations were skilfully conducted, and the weight of the manufactory did not contribute to the injury. The plaintiff having brought an action in August, 1855, against the defendant,—Held, that he was entitled to recover damages for the deterioration in value of the manufactory, for injury to the machinery and for loss of profits both in respect of his interest as occupier before 1851 and subsequently, and as well after the commencement of the action as before. Ibid.

Held also, that an action was maintainable in the name of the devisees of C for the injury to their reversion in 1849 and 1850. Ibid.

*(d) Nuisance and Injury.*

The plaintiff obtained a verdict and judgment against the defendant, a shareholder in a "cost-book" Copper Mining Company, in an action for a nuisance caused by working the mine. The plaintiff having afterwards obtained a rule *nisi* for an injunction under the 82nd section of the Common Law Procedure Act, 1854, the Court discharged the rule, it appearing by affidavit that the defendant had *bona fide* sold his shares before notice of the application for an injunction. *Matthews* v. *King*, 3 Hurls. & C. 910.

By deed of 1857, A, who was tenant for life under the will of one S, conveyed (under a power) land to B in fee, with a reservation of "all and every the seam or seams of coal and other minerals under the land with power to win, work, and carry away the same under or over any part of the said land, the said A, or the persons for the time being entitled thereto, and his or their assigns, paying to the said B, his heirs and assigns, compensation for any damage which he or they might sustain thereby," and a covenant by A that he had not done or permitted any act or thing whereby the premises, or the title thereto, should or might be incumbered or prejudicially affected. And B covenanted, for himself, his heirs and assigns, "that the said hereditaments and premises hereby conveyed, or any buildings now or hereafter to be erected thereon, shall not at any time hereafter be used for the manufacture, sale, or storing of any combustible matter, or for the purpose of any offensive trade or business, the side walls to be not less than eighteen feet high, and to be in uniformity with the street," &c. In 1844, S, A's testator, had demised to C and D, "a colliery and coal mines, and seams of coal, as well opened as not opened," (including and comprising all seams of coals under the land conveyed by the deed of 1857,) with full power to the lessees, their executors, administrators and assigns, to win, work, and carry away the said seams of coal for a term of years not yet expired. The plaintiff became possessed of the land comprised in the deed of 1857, and built four houses thereon; and, whilst he was so possessed, the houses were injured by the working and carrying away by the assignees, under the lease of 1844, of the seams of coal thereunder. He thereupon brought an action against A, claiming compensation under the reservation contained in the deed of 1857. A pleaded, as to so much of the count as related to the damage and injury done to the part of the said piece of ground on which the said houses were built, and to the said houses, and to the compensation claimed by the plaintiff in respect thereof, that such damage and injury were occasioned by reason of the said houses having been erected thereon:—Held, that the compensation clause in the deed of 1857, extended to houses thereafter built upon the land, and consequently that this plea was no answer to the declaration. *Berkley* v. *Shafto*, 15 Com. B. Rep. N.S. 79.

*(e) Violation of Rules of Working.*

By a special rule made pursuant to 23 & 24 Vict. c. 151, for regulating a certain coal-mine, the chartermaster was to be the responsible manager of the pit, and the banksman was to take care that the persons descending the pit should in no case exceed eight. Where a banksman violated such rule by lowering more than eight persons into the pit at one time, and there was evidence that the chartermaster was close to the pit and cognizant of the banksman (who was his servant) so lowering more than eight persons down,—Held, that such chartermaster might be convicted of aiding and abetting the banksman to commit a violation of such rule. *Howells* v. *Wynne*, 32 Law J. Rep. (N.S.) M.C. 241; 15 Com. B. Rep. N.S. 3.

(C) RESERVATION OF MINES AND MINERALS IN GRANT OR LEASE.

Upon a sale, in 1801, of lands in Northumberland, the conveyance reserved to the vendor "all mines and seams of coal, and other mines, metals or minerals, as well opened as not opened, within and under the closes or parcels of ground thereby granted, with full liberty to search for, dig, bore, sink, win, work, lead and carry away the same":—Held, by *Knight Bruce, L.J.* and *Turner, L.J.*, that "freestone," which could only be worked by means of an open quarry, was included in this reservation. *Bell* v. *Wilson*, 35 Law J. Rep. (N.S.) Chanc. 337—overruling the decision of *Kindersley, V.C.* in 34 Law J. Rep. (N.S.) Chanc. 572; 2 Dr. & S. 395.

Whether stone and other substances which can be worked by an open quarry only are or are not included in an exception of "minerals," may depend on the special circumstances under which the exception is made; and such a reservation, contained in an Inclosure Act, may be allowed a wider operation in favour of the lord of a manor than where found in a deed of conveyance executed by a vendor. Ibid.

A lease of waste land of a manor recently inclosed by the lessee, contained a reservation to the lessor,

the lord of the manor, of the mines and quarries, with full power to win and work the same, with free wayleave and passage to, from and along the same, on foot or on horseback, with all manner of carriages, and a covenant by the lessor that in working the mines and using the liberties and privileges reserved, he would do as little damage and spoil to the soil and herbage of the premises demised as he conveniently could do:—Held, that the lessor and those claiming under him were entitled not merely to a right of way for the purpose of working the reserved minerals, but to an absolute wayleave which might rightfully be used for the purpose of working minerals not under the demised property. *Proud* v. *Bates*, 34 Law J. Rep. (N.S.) Chanc. 406.

Held also, that the lessee was entitled to support for the surface of the land as incident to the demise thereof. Ibid.

The upper veins of coal of a tract in the Forest of Dean, were "galed" by the Crown under the Forest of Dean Act (1 & 2 Vict. c. 43.) to the plaintiffs, with a reservation that the underlying veins might be galed to other parties, "but to be worked so as not to impede or injure the working of tracts already allotted." The veins underlying the plaintiff's colliery were afterwards galed to the defendants, who sank a shaft through the plaintiffs' works:—Held, that the restriction applied only to the working of the lower seams, when reached, and did not abridge the right of the defendants to sink a shaft through the upper veins. Whether the Commissioners had any power under the act to impose on existing gales rules and conditions which would diminish the rights which they enjoyed before the act—*quære*. *Goold* v. *the Great Western Deep Coal Co.*, 2 De Gex, J. & S. 600.

## MONEY HAD AND RECEIVED.

(A) Failure of Consideration.
(B) Money paid under Mistake of Fact.
(C) Money paid under Duress or Coercion.

### (A) Failure of Consideration.

K had chartered a vessel of the defendant at the hire of 30*l.* a week, payable every four weeks in advance, with liberty for the defendant in case of non-payment to re-take the ship. A month's payment of 120*l.* in advance being due, K applied to the plaintiff to assist him, and the plaintiff gave K. a cheque for 60*l.* payable to the defendant or order, on the terms that K should inform the defendant that the cheque was given on the consideration of the defendant's allowing the vessel to proceed on a certain voyage. K paid the cheque to the defendant, but did not tell him of the plaintiff's conditions. As the whole of the 120*l.* was not paid, the defendant stopped and re-took the vessel. The cheque being presented at the plaintiff's bankers, on the part of the defendant, was duly cashed:—Held, that as the defendant had received the plaintiff's cheque, which was a negotiable security, without notice of any conditions, and for a valuable consideration, the debt due to him from K, the plaintiff was not entitled to recover from the defendant any portion of the proceeds. *Watson* v. *Russell* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 93; 5 Best & S. 968—affirming the judgment below, 31 Law J. Rep. (N.S.) Q.B. 304; 3 Best & S. 34.

The plaintiff instructed the defendants, who were brokers, to purchase for him 50 bales of cotton, and paid them 800*l.*, part of the purchase-money. The defendants made a contract in their own names for the purchase of a much larger quantity, viz., 300 bales, on account of the plaintiff and other principals:—Held, in an action for money had and received, that the plaintiff was entitled to recover back the money paid, as the defendants had not made a contract on which the plaintiff could sue as a principal. *Bostock* v. *Jardine*, 34 Law J. Rep. (N.S.) Exch. 142; 3 Hurls. & C. 700.

### (B) Money paid under Mistake of Fact.

Certain bales of cotton were consigned by merchants at Madras to London, for the account of their correspondents, the plaintiffs, who were merchants at Liverpool, under bills of lading having in the margin, (pursuant to course of business at Madras), a note of the measurement and the amount of freight. On the ship's arrival, the plaintiff's brokers sent the cotton to a wharf with a copy of the bills of lading, another copy of the bills of lading being forwarded to the plaintiffs. According to the ordinary practice, the wharfinger, on receiving the cotton, measured it and sent a note of the measurement to the defendants, who were the ship's brokers (one of them also being the owner). The defendants, as brokers, made out a freight-note, adopting the measurement from the wharfinger's note, which, in consequence of the swelling of the bales on the voyage, was considerably more than the Madras measurement in the margin of the bills of lading. The freight-note so made out was sent by the defendants to the plaintiff's brokers, who, assuming it to be correct, paid the amount and received credit for it in their account with their principals; and the defendants settled the ship's accounts upon the supposition that all was right. The plaintiffs, on balancing their accounts with the Madras house at the end of the following year, discovered for the first time that they had overpaid the defendants to the extent of 88*l.* 8*s.* 3*d.*, and brought an action to recover it back:—Held that, the money having been paid under a mistake of fact, the plaintiffs were entitled to recover it back from the owner of the ship, but not as against the two defendants as ship's brokers, who had settled accounts with the owner in the *bona fide* belief that the payment had been rightly made. *Shand* v. *Grant*, 15 Com. B. Rep. N.S. 324.

### (C) Money paid under Duress or Coercion.

The plaintiff being indebted to the defendant and other creditors, offered a composition of 5*s.* in the pound, which some of the creditors assented to. The defendant at first refused, but ultimately was induced to sign the deed by the plaintiff giving him a bill of exchange and 50*l.* in money, in addition to the composition money. Some of the creditors had refused to sign unless the defendant signed, and of this the defendant was aware:—Held, that the plaintiff was entitled to recover back the 50*l.* from the defendant. *Atkinson* v. *Denby* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 362; 7 Hurls. & N. 934—affirming the decision below, 30 Law J. Rep. (N.S.) Exch. 361; 6 Hurls. & N. 778.

A mortgagee having agreed to assign his security on payment of principal, interest and costs, made a claim for costs to which he was not entitled. The assignee, on the mortgagee refusing to execute the assignment on any other terms, by the direction of the mortgagor, paid the whole sum claimed under protest:—Held, that the mortgagor might recover the excess in an action for money had and received, not as money paid under duress in the strict legal sense of the term, but as a payment made involuntarily under undue pressure. *Fraser* v. *Pendlebury*, 31 Law J. Rep. (N.S.) C.P. 1.

Held also, that the mortgagor was not estopped from setting up this claim by the recital in the assignment to which he was a party that the whole sum paid was due for principal, interest and costs; for that a recital, although an estoppel upon the parties to the deed, where the matter of the deed itself is in dispute, is not so in a matter which is collateral to the main object of the deed. Ibid.

## MORTGAGE.

[See BARON AND FEME.—FIXTURES.]

[Certain companies enabled to issue mortgage debentures founded on securities affecting land, and provision made for the registration of such mortgage debentures and securities, by "The Mortgage Debenture Act, 1865," 28 & 29 Vict. c. 78].

(A) VALIDITY OF.
(B) EQUITABLE MORTGAGE.
(C) MORTGAGOR AND MORTGAGEE.
(D) RIGHTS OF MORTGAGEE AND HIS ASSIGNS.
(E) RIGHTS OF MORTGAGOR AND HIS ASSIGNS.
(F) POSSESSION; RIGHTS AND LIABILITIES OF MORTGAGEE IN RESPECT THEREOF.
(G) OUTSTANDING TERM.
(H) RELIEF AGAINST FRAUD.
(I) POWER OF SALE.
(K) PRIORITY.
(L) TACKING.
(M) RIGHT TO REDEEM.
(N) FORECLOSURE AND SALE.
(O) COVENANT TO PAY BY INSTALMENTS.
(P) ACCOUNTS.
(Q) INTEREST.
(R) RECEIVER.
(S) COSTS.
(T) PRACTICE.

### (A) VALIDITY OF.

Where a mortgage professes to be made in consideration of a sum down, and which is by the deed made immediately payable, whereas the contract was for annuity, and the consideration was not to be payable till after the death of a person named, such mortgage is fraudulent and void as against a mortgagor who joined therein as surety only. *Spaight* v. *Cowne*; *Edwards* v. *Spaight*, 1 Hem. & M. 359.

A sole trustee of shares executed a transfer, and delivered it, with the certificate of the shares, to a mortgagee who had no notice of the trust. The mortgagee did not register his transfer until after notice of the trust:—Held, that the transfer could not be impeached. The certificate shewed that the shares had formerly stood in the names of two persons:—Held, that this was not enough to put the mortgagee on inquiry or fix him with notice. *Dodds* v. *Hills*, 2 Hem. & M. 424.

### (B) EQUITABLE MORTGAGE.

Where title-deeds are deposited by way of equitable mortgage, a memorandum merely stating the purpose for which they are deposited is not an agreement for a mortgage, and need not be stamped. *Meek* v. *Bayliss*, 31 Law J. Rep. (N.S.) Chanc. 448.

A customer deposited with his bankers a deed of conveyance, including two distinct properties, giving to them at the same time a memorandum, pledging one of the properties, as security for a specific sum advanced, and also for his general balance:—Held, that as the deposit of the deed of conveyance was for the special purpose of giving a security upon one property only, the bankers could claim no general lien, by the custom of bankers, on the other property. *Wylde* v. *Radford*, 33 Law J. Rep. (N.S.) Chanc. 51.

A B, being entitled to three properties, the title-deeds of one of which were held by his bankers as a security, deposited the title-deeds of the other two with C D as a security for a debt, and he gave him an order to the bankers (written by himself, but not signed) to deliver over the deeds of the third property when their lien had been satisfied:—Held, that this gave C D a valid equitable mortgage on the property mortgaged to the bankers. *Daw* v. *Terrell*, 33 Beav. 218.

M, a solicitor, having in his hands 2,000*l.* belonging to the estate of J, of which E and A were trustees, and 600*l.* belonging to the estate of R, of which A and B were trustees, and being pressed by A to give security for the two sums, in A's presence, placed a parcel, which he represented to contain deeds of his own, worth 4,000*l.*, in a box belonging to the estate of J, and a parcel, which he represented to contain other deeds of his own, sufficient to secure 600*l.*, in a box belonging to the estate of R, both boxes being in his custody as solicitor to the respective trusts. At the death of M it was found that both parcels had been removed from the boxes; and thereupon M's widow, who afterwards took out administration with the will annexed to his estate, deposited with A deeds belonging to M's estate as a security for the 2,000*l.* due to the estate of J:—Held, first, that the deposit of deeds by M in the box belonging to the estate of R was a sufficient change of possession to give A and B a lien on the deeds deposited; and that as these deeds had been taken away, and could not be identified, A and B were entitled to a lien for the 600*l.* on all deeds belonging to M at the time of the deposit; secondly, that the deposit by M's widow gave to A a lien for the 2,000*l.* on the deeds deposited by her; and that these deeds were exempted from the lien of A and B for the 600*l.*; thirdly, that A, by accepting the deposit from the widow, abandoned his right to a general lien for the 2,000*l.* on all the deeds belonging to M at the time of the original deposit. *Mason* v. *Morley*, 34 Law J. Rep. (N.S.) Chanc. 422; 34 Beav. 471, 475.

John S entered into an agreement with E for securing payment of sums of money owing by him to E. In this agreement there was a covenant (amongst others) that John S would give to E, as

part of the securities, a mortgage on the lots of a particular estate, and James S, the brother of John and therein described as being the owner of lot No. 1, was to join in the mortgage of it. By a subsequent agreement, under seal, to which John S, E, and James S were parties, after reciting the first agreement, John S covenanted that he would, before a certain time, convey, or cause to be conveyed, to E, Lot 1, to be held by E in fee: "And it is hereby agreed by and between the parties hereto," that if John S shall pay E the moneys due to him, E shall re-transfer "all securities of whatever nature or kind." Provided, that if payment shall not be made, E may by "entry, foreclosure, sale, or mortgage of any part or parts of the said lands, &c.," levy the deficiency. "And each of them, John S and James S, for himself, his executors, &c.," covenanted to pay any deficiency, so that out of the interest or dividends on railway shares (previously deposited), or by cash payments of John S or James S, there should be received a certain sum every year. All the three parties duly executed this agreement:—Held, that this amounted to an equitable mortgage binding on the estate of James S. *Eyre* v. *M'Dowell*, 9 H.L. Cas. 619.

James S, on the 6th of October, 1855, made an equitable mortgage of his estate to E. This mortgage was not registered. On the 25th of August, 1856, D obtained a decree in the Court of Chancery against the estate of James S, and on the 7th of November, 1856, registered this decree as a mortgage under the 13 & 14 Vict. c. 29 (I.):—Held, that this registration had not the effect, under the provisions of that statute, of giving a priority to the decree over the equitable mortgage to E. Ibid.

A registered judgment under the provisions of the 3 & 4 Vict. c. 105 (I.), and the 13 & 14 Vict. c. 29 (I.), only affects such property as the debtor at the time of the judgment lawfully possessed as of his own right, and over which he had the power of disposition, and therefore does not displace the interest of a previous equitable mortgagee. Ibid.

### (C) MORTGAGOR AND MORTGAGEE.

A solicitor was employed by a client to invest a sum of money. Without informing the client, the solicitor retained the money, and executed a mortgage of estates, of which he was the owner, and sent his client a bundle of deeds, which, from the indorsement thereon, purported to contain the deeds of the estates mortgaged. It omitted to state the name of the mortgagor, and the client, who confided in his solicitor, omitted to examine the contents of the bundle. It was afterwards discovered that the deeds relating to one estate were not in the bundle, and it was found that the solicitor had sold that estate, and had delivered the deeds relating thereto to the purchaser. Upon a bill by the mortgagee to obtain the benefit of his mortgage,—Held, that the legal estate was conveyed to the mortgagee, and that he had not been guilty of any laches which could deprive him of the benefit of his security. *Hunt* v. *Elmes*, 30 Law J. Rep. (N.S.) Chanc. 11, 255.

There is no rule in equity which disables a mortgagee from purchasing or accepting a release of the equity of redemption of the mortgagor; and the circumstance that the purchase is made subject to a right of re-emption by the mortgagor within a given time makes no difference in this respect. *Gossip* v. *Wright*, 32 Law J. Rep. (N.S.) Chanc. 648.

The owner of a large estate, mostly moorland, in the vicinity of an old and dry river, borrowed various sums on mortgage, for the purpose of dry-warping the moorland, and ultimately conveyed the estate to the mortgagee for 42,000*l.*; and by a contemporaneous agreement, a right of re-emption was reserved if exercised within six years, on repayment of the purchase-money, together with all expenses and moneys laid out on the property. The time was, by consent of the mortgagee, extended for three years longer, and propositions were made for carrying out the warping by means of a company. These having failed, the mortgagor, notwithstanding the expiration of the nine years, claimed a right to redeem, and filed a bill, alleging that the transaction was in fact meant to be a mortgage and not a purchase. At the bar the transaction was also impeached on the grounds, that as a general proposition a mortgagee could not purchase of his mortgagor, and that the 42,000*l.* was grossly under the value, advantage being taken of the mortgagor's necessitous circumstances:—Held, that the relation of mortgagor and mortgagee formed no objection to the purchase; and the Court having arrived at the conclusion that the allegations as to the intention of the parties and the undervalue were not sustained, the bill was dismissed with costs. Ibid.

A second incumbrancer, being not an ordinary mortgagee, but a trustee for sale, is incapacitated from purchasing. *Parkinson* v. *Hanbury*, 2 De Gex, J. & S. 450.

There is no rule in equity which precludes a puisne mortgagee from purchasing the mortgaged property on the occasion of the exercise by a prior mortgagee of his power of sale, and a puisne mortgagee so purchasing acquires as against the mortgagor an absolute irredeemable title. *Shaw* v. *Bunny*, 34 Law J. Rep. (N.S.) Chanc. 257; 2 De Gex, J. & S. 468; 33 Beav. 494.

There is no rule in equity which precludes a puisne mortgagee (even although he be in possession, and although his mortgage be in the form of a trust for sale) from purchasing the mortgaged property on the occasion of the exercise by a prior mortgagee of his power of sale. *Kirkwood* v. *Thompson*, 34 Law J. Rep. (N.S.) Chanc. 305, 501; 2 De Gex, J. & S. 613.

Real estate was sold by the first mortgagees under the power of sale in their mortgage-deed. The second mortgagees, being in possession, purchased the property. The second mortgage was in the form of a trust for sale. On a bill being filed by the representatives of the mortgagor to redeem the property,—Held, that the sale to the second mortgagees was valid, and conferred an indefeasible title as against the mortgagor. Ibid.

The owners of building land, in consideration of the plaintiff paying off certain of their creditors, conveyed the land, discharged from all equity of redemption, to the plaintiff upon trust for sale, and out of the proceeds to pay off the first mortgagees their debt of 4,300*l.*, and in the next place to pay the defendant, a second mortgagee, 350*l.*, and in the next place to repay the plaintiff the advances made to the creditors and all expenditure relating to the trusts, then a third mortgagee 100*l.*, and a fourth mortgagee 135*l.*, and, lastly, to pay the surplus to

the owners. The deed empowered the plaintiff to complete certain buildings on the land, making the moneys expended a charge on it, and also to raise by mortgage a sum not exceeding 5,000*l.* for carrying into effect the trusts of the deed, such mortgage to have priority over all the other mortgages, except the first mortgage for 4,300*l.* The defendant covenanted to execute all assurances for enabling the plaintiff to execute the trusts of the deed. The plaintiff expended 1,100*l.* in carrying out the trusts of the deed, and made arrangements for borrowing 5,000*l.*, and got the first mortgagees to agree to take 4,100*l.* in discharge of their claim. After the defendant had approved of the mortgage deed for the 5,000*l.*, he, at the last moment, refused to execute it. The result was, that the money was not advanced, and the first mortgagees sold the property, under a power of sale, for 4,510*l.*, which was exhausted in satisfaction of their debt and costs. The plaintiff brought an action against the defendant for the breach of his covenant, alleging that the plaintiff, by reason of the breach, was unable to pay off the first mortgagees, and that they sold the property for less than its value:—Held, by *Pollock, C.B.* and *Bramwell, B.*, that the plaintiff was only entitled to recover, as damages, the costs attending the preparation of the abortive mortgage; by *Martin, B.*, that the plaintiff was entitled, in addition, to recover the difference between 5,000*l.* and the value of the land as building land as contemplated by the indenture, if the 5,000*l.* had been obtained; or, at all events, that he was entitled to 900*l.*, the residue of 5,000*l.*, after paying the 4,100*l.* agreed to be taken by the first mortgagees. *Duckworth* v. *Ewart*, 33 Law J. Rep. (N.S.) Exch. 24; 2 Hurls. & C. 129.

(D) RIGHTS OF MORTGAGEE AND HIS ASSIGNS.

A obtained a mortgage of real and personal estate from B without consideration. It was afterwards deposited with C as a security, who had no notice of the circumstances under which it had been obtained:—Held, that C would stand in no better position than A, and the deed being void as against A, was equally void as against C. *Parker* v. *Clarke*, 30 Beav. 54.

The defendant, the trustee and executor, was also mortgagee of part of the estate. Upon a bill for the administration of the estate,—Held, that the defendant was not bound to produce the mortgage and title-deeds, but that he must produce all accounts in his possession relating to the mortgage. *Freeman* v. *Butler*, 33 Beav. 289.

Agreement in writing not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion within the two years, interest was not paid on the day, and the mortgagor shortly afterwards, after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs:—Held, that this was a waiver of the default; and injunction granted to restrain an ejectment brought within the two years. *Lungridge* v. *Payne*, 2 Jo. & H. 423.

B, in consideration of a sum of money lent to him by the defendants, who carried on business under the name of "The City Investment and Advance Company," assigned by deed certain goods of his to the said company to hold as their own proper goods; nevertheless, by way of mortgage for securing the repayment of the said loan, with full power to the mortgagees to sell the goods, and out of the proceeds to reimburse themselves the said loan and costs of sale, and to pay the residue, if any, to B:—Held, that the property in the goods passed by such deed to the mortgagees, and that the plaintiff, who claimed the same goods under a subsequent assignment to him from B, could not maintain an action against them for selling the goods without taking reasonable care to obtain the best prices for them. *Maughan* v. *Sharpe*, 34 Law J. Rep. (N.S.) C.P. 19; 17 Com. B. Rep. N.S. 443.

Held also, that the defendants need not be described in the deed by their christian names or surnames, and that the conveyance of the property to the company as above mentioned, operated as a conveyance to the defendants on its being ascertained that they were the persons described under the name of such company. Ibid.

(E) RIGHTS OF MORTGAGOR AND HIS ASSIGNS.

A having demised certain land to a tenant for years, mortgaged it, and then assigned his equity of redemption to the defendant. The defendant paid off the incumbrance, and before a transfer was executed distrained in the name of the mortgagee for rent in arrear:—Held, that he had the same implied authority to do so as a mortgagor in possession was held to have in *Trent* v. *Hunt*. *Snell* v. *Finch*, 32 Law J. Rep. (N.S.) C.P. 117; 13 Com. B. Rep. N.S. 651.

(F) POSSESSION; RIGHTS AND LIABILITIES OF MORTGAGEE IN RESPECT THEREOF.

A mortgagee of leaseholds may take possession, even when there is no arrear of interest due, under circumstances which may not render him liable to account with annual rests, as when he enters in order to prevent a forfeiture for non-payment of groundrent or non-assurance, &c. *Patch* v. *Wild*, 30 Beav. 99.

A B agreed to become the purchaser of some leasehold property which was subject to mortgages. He entered into possession, and, after the contract had been put an end to, he obtained a transfer of the mortgages, having all along continued in possession:—Held, that although circumstances would have justified the mortgagees in taking possession, still, that A B was not entitled to stand in the same position, and he was directed to account as mortgagee in possession with annual rests, from the date of the transfer to him of the mortgages. Ibid.

Where a mortgagee of freehold estates enters into possession, he may work mines under the estate, if the security is insufficient for the payment of his principal, interest, and costs. *Millett* v. *Davey*, 32 Law J. Rep. (N.S.) Chanc. 122; 31 Beav. 470.

A mortgagor was not allowed to surcharge a mortgagee with the value of minerals which he or his lessees had raised after entering into possession, when he knew that the mines were being worked for four years, and allowed the work to proceed without remonstrance or complaint. Ibid.

A mortgagee, who holds property in pledge, is responsible for it in its integrity; therefore, a mortgagee of lands containing underneath unopened coal-fields, who allowed the owners of adjacent coal-mines to explore and work the coal, was held responsible, on a bill filed by a mortgagor against him and such

coal owners; and, besides the common decree, the Court directed an account of all coal worked by the defendants or either of them, and of the proceeds thereof. *Hood* v. *Easton*, 2 Giff. 692.

A mortgagee in possession was not, prior to the Trustees and Mortgagees Act, in the absence of express contract, entitled to charge in account premiums on a fire policy on the mortgaged property. *Bellamy* v. *Brickenden*, 2 Jo. & H. 137.

A mortgagee in possession without express powers authorizing him to do so, incurred expenditure in insuring and improving the mortgaged estates:—Held, by *Romilly, M.R.*, that the sums expended for insurance would be allowed under the usual direction as to just allowances, and that he was entitled to have an inquiry in respect of the sums claimed for improvements. *Scholefield* v. *Lockwood*, 33 Law J. Rep. (N.S.) Chanc. 106; 32 Beav. 434, 439.

In the absence of an express contract authorizing him so to do, a mortgagee cannot (notwithstanding his mortgagor has covenanted to insure against fire and neglected so to do), as against a subsequent incumbrancer, himself insure the mortgaged premises, and add the sums so paid to his mortgage debt. *Brooke* v. *Stone*, 34 Law J. Rep. (N.S.) Chanc. 251.

### (G) Outstanding Terms.

In 1813 R O mortgaged his estate for a term of 500 years to H, who, dying in 1814, bequeathed the term to his widow, who entered into the receipt of the rents. R O died intestate in 1837, and his heir-at-law R O paid off the mortgage and possession was given by the widow of H, but no assignment was executed by her until 1843. In 1840 R O granted a lease of the property, and in 1843 he mortgaged it to J L; and the first mortgagee's widow, by R O's direction, assigned the residue of the term of 500 years to R L in trust for J L, for securing the repayment of 600*l*., and in the mean time in trust to attend the inheritance. Neither the mortgage to J L nor the assignment of the term made any mention of the lease. On ejectment by the lessee against the heir-at-law of R O,—Held, that the term was an answer, for that it was not a satisfied term within the statute 8 & 9 Vict. c. 112. *Owen* v. *Owen*, 33 Law J. Rep. (N.S.) Exch. 237; 3 Hurls. & C. 88.

### (H) Relief against Fraud.

A sum of 15,000*l*. was intrusted to the solicitors of the respondents for the purposes of investment. The solicitors appropriated 5,000*l*. to their own use, and invested 10,000*l*. on mortgage, representing to their clients that the whole of the 15,000*l*. had been duly invested. Afterwards, being pressed by the respondents for the securities, they fraudulently and without consideration procured from the appellant, for whom they were also acting as solicitors, the execution of two deeds, mortgaging his equitable interest in certain estates which they handed over to the respondents as the securities for the 5,000*l*. The solicitors soon afterwards became bankrupt, and nearly three years afterwards the appellant first discovered from the assignees in bankruptcy the particulars of the transactions between the solicitors and the respondents, whereupon he filed a bill against the latter to set aside the mortgages, and *Romilly, M.R.* made a decree in his favour which was reversed by *Campbell, L.C.*, on the ground of acquiescence and confirmation by the appellant:—Held (affirming the decision of *Romilly, M.R.*, and reversing that of *Campbell, L.C.*), that the appellant was entitled to the relief sought by his bill. *Wall* v. *Cockerell* (House of Lords), 32 Law J. Rep. (N.S.) Chanc. 276; 10 H.L. Cas. 229.

### (I) Power of Sale.

The power of sale in a mortgage provided that upon default of payment of the principal and interest as therein mentioned, and if the mortgagee, his heirs, executors, administrators or assigns, should give to the mortgagor, his heirs and assigns, "six calendar months' previous notice in writing of his or their intention to proceed to a sale, unless the principal moneys and interest should be paid at the expiration of such notice," it should be lawful for the mortgagee, his heirs, executors, administrators or assigns "immediately or at any other time after the expiration of the notice," so long as the principal and interest should remain unpaid, without the consent of the mortgagor, his heirs or assigns, to sell the mortgaged property. Default having been made in payment of the mortgage money, the devisee of the mortgagee, on the 4th of August, 1853, caused a notice in writing, dated the 15th of July, 1853, to be served on the mortgagor, requiring payment of the mortgage money "at the expiration of six calendar months from the date thereof." On the 25th of May, 1857, the mortgage money being still unpaid, the devisee of the mortgagee without any further notice to the mortgagor and without his consent, sold the mortgage property. Upon a bill by the mortgagor against the purchaser and the devisee of the mortgagee to set aside the sale, on the ground of its having been made without due notice to the mortgagor,—Held, that the notice was good, and the bill was dismissed with costs. *Metters* v. *Brown*, 33 Law J. Rep. (N.S.) Chanc. 97.

*Semble*—That even where there has been a serious irregularity in the notice to sell by a mortgagee under a power of sale, if the purchaser has entered and expended money on the property, the Court will not, in the absence of fraud, interfere to set aside the purchase. Ibid.

In May, 1849, J W deposited title-deeds as a security for 200*l*. to be advanced to him, and signed a memorandum engaging to execute a mortgage-deed when called upon to do so. In June, 1849, and before any mortgage was executed, J W sold the premises comprised in the title-deeds, and, treating the intended mortgage as in existence, conveyed the property to the purchasers, "subject to a certain mortgage to &c. for securing 200*l*. and interest, but with the benefit of the provisions for redemption, contained in the mortgage-deed." The purchasers made no inquiry of the intended mortgagees respecting the contents of the supposed mortgage, and shortly after the purchase the 200*l*. was advanced, and in July, 1849, J W executed a mortgage with a power of sale, under which the mortgagees sold the premises to the plaintiff. Upon a bill filed by the plaintiff against the purchasers from J W,—Held, that the power of sale was validly created as against the latter, and the purchasers were declared to be trustees of the legal estate for the plaintiff, and ordered to convey the same accordingly. *Leigh* v.

*Lloyd*, 34 Law J. Rep. (N.S.) Chanc. 646; 2 De Gex, J & S. 330.

The plaintiff, by deed, assigned to the defendant certain chattels as security for money lent, with a proviso for redemption on a day mentioned or at such earlier day or time as the defendant should appoint for payment, by notice in writing sent or delivered to, or left at, the last place of abode of the plaintiff. To a declaration on this deed for selling before the day mentioned and without notice, the defendant pleaded that, before seizing and before sale, to wit, on the 30th of April, 1861, the defendant, in pursuance of and under the provisions of the deed, duly gave to the plaintiff by delivering at his dwelling-house a notice in writing, appointing an earlier day than the day mentioned in the deed for payment by the plaintiff, to wit, at 2 o'clock of the said 30th of April, A.D. 1861, but the plaintiff did not pay the same:—Held, that the plea was no answer, as a reasonable notice must have been intended by the parties; and, further, as it was consistent with the plea that the seizure and sale were before default in payment. *Rogers* v. *Mutton*, 31 Law J. Rep. (N.S.) Exch. 275; 7 Hurls. & N. 733.

## (K) PRIORITY.

A first mortgagee for present and future advances is not, as against a second mortgagee, entitled to priority in respect of advances made by him after notice of the second mortgage—per *Lord Campbell*, *C.* and *Lord Chelmsford*, *dissentiente Lord Cranworth*. *Gordon* v. *Graham* overruled. *Hopkinson* v. *Rolt* (House of Lords), 34 Law J. Rep. (N.S.) Chanc. 468; 9 H.L. Cas. 514.

Upon affirmance by the House of a decree of the Lord Chancellor affirming a decree of the Master of the Rolls, the costs were given, though their Lordships differed in opinion. Ibid.

The doctrine that equity will give no relief against a *bona fide* purchaser without notice is not without exception. A declaration of priority will be made adversely to the claim of a defendant who is a purchaser or mortgagee without notice of an equitable interest. *Stackhouse* v. *the Countess of Jersey*, 30 Law J. Rep. (N.S.) Chanc. 421; 1 Jo. & H. 721.

The wife of A was entitled, for her separate use, to a share in a reversionary fund vested in A and three other trustees. A and his wife mortgaged it, first to B, who gave formal notice to A alone as trustee; secondly, to T, who gave no notice; and thirdly, to S, who gave notice to all the trustees:—Held (on that assumption), that B's mortgage was the first incumbrance, S's the second, and T's the last. But T having afterwards proved that he had given notice to the solicitor of the trustees, who said he believed he had communicated it to them,—Held (on that assumption), that the several mortgagees ranked in priority according to their respective dates. *Willes* v. *Greenhill*, 29 Beav. 387.

On a mortgage of the equitable reversionary interest in a fund to which a married woman was entitled, notice was given to the husband, who was one of the four trustees of the fund. Subsequently other mortgages of the fund were made, of which notice was given, as to one, to the solicitor of the trustees, and as to the other, to the trustees individually:—Held (affirming the decision of *Romilly*, *M.R.*), that the notice of the first mortgage was sufficient, and that the priority of the incumbrances was in the order of their date. *Willes* v. *Greenhill*, 31 Law J. Rep. (N.S.) Chanc. 1; 29 Beav. 376.

In order to affect a principal with constructive notice of facts within the knowledge of an agent, it is necessary not only that the knowledge should be derived from the same transaction, but it must be knowledge of facts which are material to that transaction and which it was the duty of the agent to communicate. Therefore, the transferee of a mortgage is not affected by the knowledge of the solicitor, acting for him in the matter of the transfer, of an incumbrance subsequent to the original mortgage, so as to prevent him from making further advances, such knowledge not being material to the business of the transfer. *Wyllie* v. *Pollen*, 32 Law J. Rep. (N.S.) Chanc. 782.

W, being about to take a transfer of a mortgage, employed P & L as his solicitors to investigate the title and conduct the negotiation; but C, who was the solicitor to the mortgagors, was employed to procure the execution by W of the deeds of transfer. C was aware of a judgment debt registered against the mortgagors, but did not communicate the fact to W. W afterwards advanced a further sum of money, and took a further charge. In a suit for foreclosure,—Held, by *Lord Westbury*, *C.* (reversing the decision of *Stuart*, *V.C.*, first, that the employment of C did not constitute him the agent of W so as to affect W with constructive notice of the judgment debt; and, secondly, that the knowledge of the judgment debt not being material to the matter of the transfer, it would not have been the duty of C to communicate it if he had been such agent; consequently W took without notice of the judgment debt, and was entitled to tack his further advance. Ibid.

The priorities of successive incumbrancers are not altered by one of them getting in the legal estate from one who is a trustee for them all. *Sharples* v. *Adams*, 32 Beav. 213.

A advanced money upon the security of dock warrants for wine which it appeared was branded fraudulently with a trade-mark. In a suit instituted by the owner of the trade-mark against the importers, A having moved to discharge an injunction, the priorities of lien upon the goods were declared to be: (1) the charges of the dock company, including their costs of suit; (2) the moneys advanced by A, the holder of the warrants, including the costs of the motion which he was ordered to pay in the first instance; (3) the plaintiff's costs of suit. *In re Uzielli*; *Ponsardin* v. *Peto*, 33 Law J. Rep. (N.S.) Chanc. 371; 33 Beav. 642.

S mortgaged to E lands in Ireland, in which the legal estate was outstanding in a prior incumbrancer. He afterwards mortgaged the same estate to a banking company of which he was chairman, and subsequently by substituting forged securities prevailed on E to release his security on the estate. S afterwards, and before the fraud was discovered, obtained the concurrence of the banking company in a mortgage of the same estate to B for 36,000*l.*, of which 1,000*l.* was retained and 35,000*l.* paid to the banking company in part discharge of the money due to them. B caused the property to be sold in the Incumbered Estates Court, and received the balance of the purchase-money after paying off the

first mortgage, and applied the same to the discharge of his own debt. E thereupon filed a bill against the banking company to set aside the release, and claiming by way of substitution for the security which he had released out of the 35,000*l.* received by them, a sum equal to the purchase-money of the estate, less the amount of the first mortgage:—Held, by *Lord Westbury, C.*, reversing the decision of *Romilly, M.R.*, that the plaintiff was not entitled to any relief. The decision in the former suit of *Eyre* v. *Burmester* (10 H.L. Cas. 90) distinguished. *Eyre* v. *Burmester*, 33 Law J. Rep. (N.S.) Chanc. 652.

J S mortgaged leaseholds to M and T to secure 1,000*l.* and interest, and by way of further security charged the principal and interest on O, a freehold estate, and deposited the O title-deeds with S & T, who acted as the solicitors for both parties. Subsequently, by representing to S & T that he was about to sell O to a railway company, J S again obtained possession of the O title-deeds under a promise to return them. Instead of returning them, he deposited them with D as security for a debt. D had no notice of the previous incumbrance, and there was no evidence that S & T had made any application to J S to return the deeds, or had inquired after them for several years after parting with them. S & T on discovering what had been done with the deeds, paid off their clients, and took an assignment of the mortgage to themselves:—Held, that S & T had been guilty of gross negligence; that they took subject to all defects in the title caused by their own act, and that D's security was entitled to priority. *Dowle* v. *Saunders*, 34 Law J. Rep. (N.S.) Chanc. 87; 2 Hem. & M. 242.

A, as a surety, joined with B in a mortgage to M of chattels and policies of assurance, both of them covenanting for payment of the mortgage money. Afterwards B mortgaged the same chattels and other policies to S. A died leaving C his executor. M sold the chattels, and commenced an action on the covenant against C, who unsuccessfully defended the action, paid off the debt, and took an assignment of the policies comprised in M's security. Subsequently C received a large amount of money on the policies:—Held, that the doctrine of marshalling applied, and that after satisfaction of the first mortgage, S was entitled to receive so much out of the balance of the policy moneys as had been realized by the sale of the chattels. *South* v. *Bloxam*, 34 Law J. Rep. (N.S.) Chanc. 369; 2 Hem. & M. 457.

Held, also, that the costs of defending the action were not properly mortgagees' costs, and could not, as against a second mortgagee, be tacked to the first mortgage. Ibid.

But (*semble*) the surety as against the original mortgagor might have tacked to his security all costs not improperly incurred as surety. Ibid.

A first mortgagee purchased the equity of redemption which was conveyed to him:—Held, under the circumstances, that the second mortgagee had not thereby obtained priority over the first. *Hayden* v. *Kirkpatrick*, 34 Beav. 645.

A and B mortgaged their estate to C. Afterwards, B conveyed all his interest in the estate to A in consideration of a second charge on the estate. A afterwards sold and conveyed the equity of redemption to C in consideration of a mortgage debt:—Held, that C's first mortgage was not thereby extinguished as against B so as to give B priority over C. Ibid.

### (L) TACKING.

A mortgage in fee, made in compliance with an agreement to charge a sum of money upon an estate, the deeds of which were deposited with the equitable mortgagee at the date of the agreement, will give him and all persons taking an assignment of his debt and the securities a right to tack to his mortgage in fee all sums advanced to the mortgagor between the date of the agreement and the conveyance in fee, if they are made *bona fide* and without notice of advances made by other persons. *Cooke* v. *Wilton*, 30 Law J. Rep. (N.S.) Chanc. 467; 29 Beav. 100.

A legal mortgage so made will relate back to the date of the equitable mortgage, and give priority over a judgment creditor to the mortgagee, who had no notice of the judgment. Ibid.

The right of a mortgagee to tack exists equally in cases of foreclosure and sale as in a redemption suit. Therefore, where a mortgagee held two securities for different debts, he was held entitled to retain the purchase-money on sale of one until payment of the other debt. *Selby* v. *Pomfret*, 30 Law J. Rep. (N.S.) Chanc. 770; 3 De Gex, F. & J. 595.

A mortgagee holding several securities from the same mortgagor has a right to consolidate as against a subsequent incumbrancer, although such mortgagee may not have the legal estate, and although such subsequent incumbrancer may originally have held the first charge, but have lost his priority by neglecting to register his security. *Neve* v. *Pennell*; *Hunt* v. *Neve*, 33 Law J. Rep. (N.S.) Chanc. 19; 2 Hem. & M. 170.

### (M) RIGHT TO REDEEM.

A testator devised his estate, charged with the payment to trustees of a sum with interest at 4*l.* per cent. The trustees were to pay the interest to certain persons for life, and after their deaths to pay the money charged to their children:—Held, upon the construction of the will, that the owner of the estate had a right in the life of the tenants for life to pay off the charge. *Marsh* v. *Keith*, 29 Beav. 625.

A mortgage of property does not alter the existing limitations affecting it, except for the purpose of the mortgage, unless an express intention be shewn to re-settle it. *Lord Hastings* v. *Astley*, 30 Beav. 261.

Explanation of the rule that a dismissal of a bill for redemption operates as a decree for foreclosure. *Ex parte Paine, in re Gleaves*, 32 Law J. Rep. (N.S.) Bankr. 65.

The plaintiff demised certain property to the defendant, to secure 4,500*l.*, and it was provided that if the plaintiff should pay the amount and interest on the 2nd of April following, in performance of the covenant therein contained, or on full payment thereof either previously or subsequently and before any execution of the trust or power of sale therein contained, the term should cease; and it was declared that the defendant should stand possessed of the property, upon trust, in case the plaintiff should not pay the amount on the

2nd of April, to sell and apply the proceeds in such payment. The mortgagor filed a bill, on the 1st of April, praying an account of all dealings between himself and the mortgagee, and that "on payment by the plaintiff to the defendant of what, upon taking such accounts, might be found due," the defendant might be ordered to reconvey the property, and for an injunction to restrain the defendant from selling. Upon general demurrer for want of equity,—Held, first, that the demurrer was not sustainable upon the ground that the bill was filed before the 2nd of April, this being a trust for sale in case of non-payment, and not a simple case of mortgage, with proviso for redemption on a fixed day; but, secondly, that the bill contained no sufficient offer to pay what might be found due; and on this technical ground, the demurrer was allowed, with leave to amend. *Harding* v. *Tingey*, 34 Law J. Rep. (N.S.) Chanc. 13.

The personal representative of a mortgagor of freehold estate has no right to file a bill against the mortgagee to redeem. *Catley* v. *Sampson*, 34 Law J. Rep. (N.S.) Chanc. 96; 33 Beav. 551.

W C, being entitled to real estate, demised the same for 1,000 years, by way of mortgage, subject to a proviso for cesser of the term on payment of the mortgage-money by W C, his heirs, executors or administrators. W C was illegitimate; and he died intestate and without issue. His wife having taken out letters of administration to her husband, filed a bill to redeem,—Held, that she could not sustain the suit. Ibid.

In a redemption suit the mortgagee cannot avail himself of an agreement by the mortgagor to sell the equity of redemption, but must file a cross-bill to enforce such agreement. *Howells* v. *Wilson*, 34 Law J. Rep. (N.S.) Chanc. 593; 34 Beav. 573.

Demurrer to a bill for redemption after a foreclosure decree, which the bill asked to open only as to one of the four parties to the decree, allowed with costs, and leave to amend refused. *Patch* v. *Ward*, 4 Giff. 96.

### (N) FORECLOSURE AND SALE.

A agreed by a written memorandum to deposit with B as an equitable security for the repayment of 500*l.* and interest, the lease of certain premises which were thereby charged with that amount. A further agreed to execute a valid legal mortgage of the premises comprised in the lease, with the usual powers and covenants when called upon so to do:—Held, that the mortgagee had a right in equity to enforce a sale, and was not compelled to take a legal mortgage. *Matthews* v. *Goodday*, 31 Law J. Rep. (N.S.) Chanc. 282.

Property was conveyed by a member of a building society to the trustees, on trust for sale to secure the moneys due to the society:—Held, that the trustees were not entitled to a foreclosure but to a decree for sale. *Scweitzer* v. *Mayhew*, 31 Beav. 37.

Under a decree of foreclosure the solicitor of the mortgagee attended at the place named for payment before the time fixed; the mortgagee did not attend until after the commencement of the time, but both remained until the time had expired; the mortgagor did not attend, and as the money remained unpaid the decree was made absolute. *Lechmere* v. *Clamp*, 32 Law J. Rep. (N.S.) Chanc. 276; 31 Beav. 578.

In a suit to foreclose a mortgage the Court has power, under the Chancery Amendment Act, to direct an immediate sale of the mortgaged estate without giving the usual six months to redeem, notwithstanding the mortgagor objects; and in a case where there were several incumbrances on some of which no interest had been paid, and all the incumbrancers pressed for a sale, it directed the sale to be made in three months. *Newman* v. *Selfe*, 33 Law J. Rep. (N.S.) Chanc. 527; 33 Beav. 522.

Where a mortgagor of leaseholds had been convicted of a felony, the Court, at the instance of an equitable mortgagee, made a decree for an account and for a sale of the mortgaged premises, and directed the purchase-money to be brought into court, with liberty to the Attorney General to apply for payment out of the balance thereof, after satisfaction of the mortgage debt and costs; but considered it had no jurisdiction to direct a conveyance by the Crown. *Hancock* v. *the Attorney General*, 33 Law J. Rep. (N.S.) Chanc. 661.

### (O) COVENANT TO PAY BY INSTALMENTS.

Where a mortgage to secure an existing debt, payable by instalments, with interest to the times of payment, contained a proviso that, in the event of the debt not being punctually paid by instalments as specified in the deed, the full amount of the debt should immediately become payable, the Lords Justices held that the proviso was not in the nature of a penalty, and refused to grant relief to the mortgagor against it. *Sterne* v. *Beck*, 32 Law J. Rep. (N.S.) Chanc. 682; 1 De Gex, J. & S. 595.

### (P) ACCOUNTS.

Bankers took a mortgage security for a fixed sum owing to them by a customer, and subsequently continued the mortgage debt as part of the general account between them, which embraced various dealings and transactions, making rests and charging compound interest. The Court directed the usual accounts to be taken of what was due in respect of the mortgage security, and a separate account of the other dealings and transactions, reserving the question as to the mode in which the latter account should be taken (and more particularly whether with rests or not) for consideration in chambers. *Mosse* v. *Salt*, 32 Law J. Rep. (N.S.) Chanc. 756; 32 Beav. 269.

A first mortgagee, executing conveyances and signing receipts for the purchase-money of lands in mortgage, was held not accountable either to the mortgagor or to the subsequent mortgagee in respect of deposits which, pursuant to the conditions of sale, the purchasers had paid to the solicitor and with which the solicitor had absconded. *Barrow* v. *White*, 2 Jo. & H. 580.

And, *semble*, under such circumstances it is immaterial whether the solicitor acted in the transaction as agent also for the first mortgagee. Ibid.

Where a mortgagor files a bill for redemption against a mortgagee in possession, who claims allowances for repairs and improvements, which the mortgagor objects to as being unnecessary and improper, such objection must be raised by the bill, otherwise the mortgagor will be only entitled to an ordinary

decree allowing the defendant "necessary repairs and lasting improvements." *Powell* v. *Trotter*, 1 Dr. & S. 388.

Demurrer to a bill by a debtor who had sold certain messuages to his creditors as a security for his debt, reserving a right of repurchase within a stipulated term, alleging that though previously requested to furnish an account the defendant failed to do so till the morning of the last day of the term, when he rendered an insufficient account—Overruled, with costs. *Ponsford* v. *Hankey*, 2 Giff. 605.

### (Q) INTEREST.

A mortgage deed recited an agreement to secure the money "with interest," but the proviso for redemption on a day certain, and the covenant to pay and the trusts of the produce of a sale were restricted to the principal only:—Held, that interest was payable. *Ashwell* v. *Staunton*, 30 Beav. 53.

If a mortgagee in a suit in court consent to the mortgaged property being sold, he at the same time accepts notice of being paid off; and if the principal and interest be paid within six months after such consent given, he will be allowed such additional interest as will make up the notice to six months from the time of such consent given. *Day* v. *Day*, 31 Law J. Rep. (N.S.) Chanc. 806; 31 Beav. 270.

Where a decree in a foreclosure and redemption suit directed an account of principal, interest, and costs, including premiums paid on a life policy which had been delivered to a trustee for the mortgagee as a further security and proceeded in the common form, "on the plaintiff paying what shall be found due for principal, interest, and costs":—Held, that the mortgagee was entitled to charge interest at 4*l.* per cent. on the premiums so paid by him or his trustees within six years before the certificate. *Bellany* v. *Brickenden*, 2 Jo. & H. 137.

### (R) RECEIVER.

A brother and sister conveyed their separate estates to a mortgagee, and the deed contained a proviso that recourse should not be had to the sister's estate so long as the brother's estate was sufficient to pay the money lent. The brother's estate, owing to prior mortgages, was insufficient, but no formal administration of his estate had been made. Upon a bill to foreclose the sister's estate,—Held, that the plaintiff, like a subsequent mortgagee, was entitled to a receiver. *Acland* v. *Gravener*, 32 Law J. Rep. (N.S.) Chanc. 474; 31 Beav. 482.

### (S) COSTS.

A decree was made in a suit for administration of a mortgagor's estate. The mortgagee afterwards filed a foreclosure bill, but subsequently obtained full payment in the administration suit:—Held, that he was entitled to stay proceedings in his own suit, and to have the costs of it. *Brooksbank* v. *Higginbottom*; *Bent* v. *Buckley*, 31 Beav. 35.

In a suit to administer a mortgagor's estate, the mortgagee, who was not a party, came in and consented to a sale. The produce formed the whole assets, and was less than the mortgage:—Held, that the mortgagee was entitled to the whole fund, after payment of the costs of sale. *Dighton* v. *Withers*, 31 Beav. 423.

An intended mortgagor agreed to pay the reasonable costs of the mortgagee's solicitor, if the matter went off:—Held, that this did not include the expenses of withdrawing the money from a banker's and of remitting it to London for payment. *In re Blakesley and Beswick*, 32 Beav. 379.

A second mortgagee presented a petition to tax the bill of costs of the first mortgagee's solicitor, which had been paid out of the produce of the sale of the mortgaged estate:—Held, that the first mortgagee must be served with the petition. *In re Jessop*, 32 Beav. 406.

A mortgagee in possession, who had neglected or refused to render an account upon the demand of the mortgagor, was refused his costs up to the hearing. *Powell* v. *Trotter*, 1 Dr. & S. 388.

Whether a solicitor mortgagee who acts for himself in a redemption suit, is entitled to costs beyond those actually out of pocket—*quære*. *Price* v. *M'Beth*, 33 Law J. Rep. (N.S.) Chanc. 460.

The proper stage of the suit at which to raise the above question is at the hearing; and a decree having been made in a redemption suit, containing no special direction as to costs, and ordering the usual account to be taken of what was due to the mortgagees for principal and interest and "for their costs of the suit to be taxed by the Taxing Master,"—Held, that the Taxing Master had properly allowed the mortgagees, who were solicitors, and had acted for themselves in the suit, their profit costs. Ibid.

A mortgagor, seeking to tax the bill of the mortgagee's solicitor, as against the solicitor, stands in the position of the mortgagee himself, and, if the mortgagee cannot tax it, neither can the mortgagor; but the mortgagor may tax it as against the mortgagee for the purpose of diminishing the amount of his claim. *In re Baker*, 32 Beav. 526.

By an order made, with the consent of the mortgagee, for the sale of mortgaged property, the money to arise from the sale was directed to be applied, *in the first place*, in payment of the mortgagee:—Held, that it was not competent for the Court, by an order made on subsequent further consideration, to direct the payment of the costs of the sale in priority to the mortgage debt. *In re Mackinlay*; *Ward* v. *Mackinlay*, 34 Law J. Rep. (N.S.) Chanc. 52; 2 De Gex, J. & S. 358.

*Semble*—The payment of the costs of sale of a mortgaged estate ought not to be ordered out of the proceeds in priority to the debt of a consenting mortgagee, whether or not a party to the cause. Ibid.

A mortgagee who, upon tender of the amount due, refuses to accept the same must pay the costs of the redemption suit rendered necessary by his refusal. And a direction ordering him to pay costs, contingently upon its turning out that less was due than the amount tendered, may properly be inserted in the decree made at the hearing. *Hosken* v. *Sincock*, 34 Law J. Rep. (N.S.) Chanc. 435.

### (T) PRACTICE.

Upon the hearing of a foreclosure suit it appeared that two only out of three tenants in common beneficially entitled to the equity of redemption were before the Court:—Held, that the Court could neither decree a sale nor a partial foreclosure. *Caddick* v. *Cook*, 32 Law J. Rep. (N.S.) Chanc. 769; 32 Beav. 70.

The plaintiff was ordered to pay the costs of the day to the defendants who appeared. Ibid.

## MORTMAIN.

[The law relating to the conveyance of land for charitable uses amended by 24 Vict. c. 9.—The time for making enrolments under 24 & 25 Vict. c. 9. extended, and the said act explained, by 25 Vict. c. 17.—The law relating to the conveyance of land for charitable uses further amended by 26 & 27 Vict. c. 106.—The time for making enrolments under 24 & 25 Vict. c. 9. further extended by 27 Vict. c. 13.]

A executed a deed, by which, reciting that he was desirous of founding certain charities, he covenanted with certain persons therein named, in his lifetime and within twelve calendar months, to invest 60,000*l.* in the name of the covenantees, or that his executors should, without prejudice to his debts and the legacies to be given by his will, do so within twelve months after his death. The deed then declared the charitable trusts. A executed another deed of similar import. On the same day he made his will. He never communicated to anybody the existence of these deeds, but kept them till the day of his death in his own bureau. When he believed himself to be dying, he said where a paper parcel was to be found which contained his will. The parcel was found: it contained the two deeds and the will, together with a memorandum explaining the true object of the deeds, and directing two individuals specially named to be placed on the funds of the charity. His property almost entirely consisted of chattels real:—Held, that the indenture was a deed, and not a testamentary disposition; but that it was a deed affecting his assets, and that as these assets were chattels real, it could not be carried into effect, being void under the Mortmain Act. The costs of all parties were ordered to be paid out of the estate. *Jeffries* v. *Alexander* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 9; 8 H.L. Cas. 594.

A piece of land was conveyed to trustees upon trust to permit a church and schools to be built thereon. The deed of conveyance was sought to be set aside, on the ground that there was an antecedent agreement between the donor and the trustees that the donor should have a life interest in the land, and it appeared that part of the produce of the land had been applied for her benefit, but the existence of any such agreement was denied by the trustees:—Held, that in the absence of clear evidence of an agreement that the deed should not take effect in possession, but that the beneficial interest should be retained by the donor, the deed was valid. *Fisher* v. *Brierley*, (House of Lords), 32 Law J. Rep. (N.S.) Chanc. 281; 10 H.L. Cas. 159.

In such a gift the conveyance to the trustee creates a right on the part of the charity to have the intermediate profits applied to the purposes of the charity, and there is no resulting trust in favour of the donor. Ibid.

A devised a leasehold to his widow for life, and after her death to trustees to sell and divide the produce amongst B and others. B died in the lifetime of the widow, having bequeathed his residue to charities. Whether the bequest of B's interest in the leasehold was void under the Statute of Mortmain—*quære.* But the certificate having found it to be pure personalty,—Held, that it was too late in the absence of a motion to vary the certificate to raise the objection. *Aspinall* v. *Bourne*, 29 Beav. 462.

The interest which a testator has in the proceeds of the sale of land directed by a former testator to be sold for the purposes of distribution, is not an interest in land within the 3rd section of the 9 Geo. 2. c. 36. *Marsh* v. *the Attorney General*, 30 Law J. Rep. (N.S.) Chanc. 233; 2 Jo. & H. 61.

A gift by will of "200*l.* to aid of deaf and dumb to found a chapel for them in London as a bequest," is void under the Statute of Mortmain, 9 Geo. 2. c. 36. *Hopkins* v. *Philipps*, 30 Law J. Rep. (N.S.) Chanc. 671; 3 Giff. 182.

Arrears of interest on a mortgage of real estate are within the Statute of Mortmain, and cannot be bequeathed to a charity. *Alexander* v. *Brame* (No. 2), 30 Beav. 153.

Debts due on bond, accompanied with a deposit of title-deeds of real estate, and an agreement to execute a legal mortgage when required, are within the Statute of Mortmain. Ibid.

A debenture of the Commissioners of a dock made under an act of parliament, and in the form of an assignment of the duties arising by virtue of the act, is within the Mortmain Act. Ibid.

Bequests of 6,000*l.* and 2,000*l.* were made to be applied, the one "in, about or towards establishing, endowing, maintaining or supporting of almshouses"; and the other, "in, about or towards establishing, endowing, maintaining, continuing and keeping up a day-school," "or otherwise for school purposes for children or infants":—Held, that the gift of the 2,000*l.* was for a purpose valid in itself; but that if doubts had arisen, the words "or otherwise" would have enabled the trustees to apply the fund for valid purposes. *Dent* v. *Allcroft*, 31 Law J. Rep. (N.S.) Chanc. 211; 30 Beav. 335.

Held also, that the gift of the 6,000*l.* was valid, as the will indicated a clear intention that it should not be laid out in the purchase of land or any interest therein; and that the interest, dividends and income of the legacy might be applied for the objects of the charity independent of any interest in land. Ibid.

A direction to invest residuary personal estate on real securities, with a power to vary such investment, and to pay one-third for the benefit of certain charities, will not bring the gift within the meaning of the 9 Geo. 2. c. 36. *Graham* v. *Paternoster*, 31 Law J. Rep. (N.S.) Chanc. 444; 31 Beav. 30.

A bequest made to print, publish and propagate the works of a particular author is within the 43 Eliz. c. 4; but so far as it is derived from real estate, it is void under the Statute of Mortmain. *Thornton* v. *Howe*, 31 Law J. Rep. (N.S.) Chanc. 767; 31 Beav. 14.

If, however, the bequest consists of personalty only, it is valid, and the purpose will be supported if the writings are not immoral or irreligious. Ibid.

Trustees had a discretionary power of investing a residue either on government or "real securities," and to alter or vary the investment. A B who, subject to a prior life estate, was absolutely entitled, gave the fund to charity, both by deed not enrolled

and by her will, and she died in the life of the tenant for life. The fund had always been invested in the public funds:—Held, that notwithstanding the Mortmain Act the gift to the charities was valid. *In re Beaumont's Trusts*, 32 Beav. 191.

A legacy for the enlargement of a parish church surrounded by its own churchyard is good, as it does not involve the bringing of additional land into mortmain. *In re Hawkins*, 34 Law J. Rep. (N.S.) Chanc. 80; 33 Beav. 570.

In construing a charitable bequest it is the duty of the Court to ascertain the intention of the testator from the words of the will, without adverting to the existence of the Statute of Mortmain; and if that intention be contrary to the provisions of the statute, the Court ought not to adopt any secondary interpretation for the purpose of escaping from the operation of the statute. *Tatham* v. *Drummond*, 34 Law J. Rep. (N.S.) Chanc. 1; 2 Hem. & M. 262.

A testatrix bequeathed 10,000*l.* to the Society for the Prevention of Cruelty to Animals, and stated it to be her express wish that this sum and the dividends thereof should be applied by the committee of the Society in such manner as they should think best "towards the establishment in the neighbourhood of London and Westminster of slaughter-houses away from the densely-populated places in which they were then situated, and for the relief of and protection from cruelty to the animals taken to be slaughtered":—Held, by *Lord Westbury, C.*, reversing the decision of *Wood, V.C.*, that the bequest was void by the operation of 9 Geo. 2. c. 36. Ibid.

## MUNICIPAL CORPORATION.

[The Municipal Corporations Act, 5 & 6 Will. 4. c. 76, amended by 24 & 25 Vict. c. 74.

(A) Rights and Privileges of the Mayor.
(B) Qualifications and Rights of the Burgesses.
(C) Election of Aldermen and Town Councillors.
(D) Property of.
(E) Expenses of Litigation.

### (A) Rights and Privileges of the Mayor.

The Municipal Corporation Act (5 & 6 Will. 4. c. 76), s. 57, which enacts, "that the mayor of a borough shall be a Justice of the Peace for the borough during his year of office and the year after, and that such mayor shall, during the time of his mayoralty, have precedence in all places within the borough," does not confer on the mayor the right to preside and act as chairman at petty sessions and other meetings of the borough Justices. *Ex parte the Mayor of Birmingham*, 30 Law J. Rep. (N.S.) Q.B. 2; 3 E. & E. 222.

### (B) Qualifications and Rights of the Burgesses.

By 5 & 6 Will. 4. c. 76. s. 9, "every male person of full age who, on the last day of August in any year, shall have occupied any house, warehouse, counting-house, or shop within any borough..... shall, if duly enrolled.....be a burgess," &c.:—Held, that a person who, as a member of a firm of attorneys, occupied premises as a place of business within the borough, might be a burgess under this section, although neither he nor any of his firm, nor their servants, slept on the premises. *In re Creek*, 32 Law J. Rep. (N.S.) Q.B. 89; 3 Best & S. 459.

Burgesses created by the Municipal Corporation Act, 5 & 6 Will. 4. c. 76. are not entitled to participate in common lands and public stock held and applied before the act for the particular benefit of burgesses of the borough. *Hulls* v. *Estcourt*, 32 Law J. Rep. (N.S.) Exch. 193; 2 Hurls. & C. 47.

### (C) Election of Aldermen and Town Councillors.

By section 14. of 7 Will. 4. & 1 Vict. c. 78. aldermen are to be elected by the council by personally delivering to the mayor or chairman of the meeting voting-papers containing the christian name and surname of the persons for whom the votes are given, with their respective places of abode and descriptions:—Held, that it is not necessary that the christian name should be written at full length; but if such a contraction is written as is ordinarily used for the christian name, and would be intended to designate such, it is sufficient. *R.* v. *Bradley*, 30 Law J. Rep. (N.S.) Q.B. 180; 3 E. & E. 634.

At an election of town councillors, the offence of "personation," under the 9th section of the Municipal Corporations Act, 1859 (22 Vict. c. 35), is complete when a person, not the voter, hands in a nomination paper to the polling officer; and it is immaterial that he does not persist, but answers "No," when questioned whether he is the voter. *R.* v. *Hague*, 33 Law J. Rep. (N.S.) M.C. 81; 4 Best & S. 715.

A conviction, under the above section, that the defendant "induced J F to personate" a voter, is good without setting out the means of inducement. Ibid.

It is not necessary that the conviction should shew that the election was duly held. Ibid.

### (D) Property of.

A burgess filed a bill against a corporation, not within the Municipal Corporation Act (5 & 6 Will. 4. c. 76), and their solicitor, alleging that they were trustees of divers estates for themselves, the town and the inhabitants, and that he, as a senior burgess, was individually entitled to rights in the lands, most of which had been sold, and praying that the corporation might be restrained from selling what remained of the corporation estates, and for a discovery relating to the mortgaged estates and for accounts. Upon demurrer for want of equity,—Held, (allowing the demurrer and refusing leave to amend the bill) that if the plaintiff had any right, he was entitled to it in his corporate, and not in his individual capacity. *Evan* v. *the Portreeve, Aldermen and Burgesses of Avon*, 30 Law J. Rep. (N.S.) Chanc. 165; 29 Beav. 144.

If an oath be taken by the members of a corporation, not to consent to or join in any alienation of the estates, prejudicial to the corporation or town, they are the judges of what is beneficial to the corporation. Ibid.

If a burgess claim an individual right of pasturage

in a part of the corporate estates, it must be considered as made in his corporate, and not in his individual capacity, and where the particular lands had been sold no distinct claim could be made by him individually for compensation out of the unsold property of the corporation. Ibid.

The portreeve, &c. of Aberavon were a corporation from time immemorial, owning freehold estates and a town hall, and were not made subject to the provisions of the Municipal Corporations Act. By the Aberavon Market Act, 1848, the portreeve, &c. were empowered to construct a market, market-place, &c., and to levy and receive rents and tolls, which were to be applied, first, in defraying the costs of obtaining the act; secondly, in making and maintaining the buildings and in paying off borrowed moneys; and, thirdly, to such objects as the portreeve, &c. should think fit. In 1860, pending an application by the inhabitants for a charter of incorporation, the portreeve, &c. sold all their property, except the town hall and the market, &c. constructed under the above-mentioned act; and early in 1861, after an intimation that the Lord President would recommend the Queen to grant the charter, they sold the town hall, and agreed to let the rents and tolls of the market to J J for fifty years, at an annual rent of 5*l.*, in consideration of a fine of 600*l.* On the 15th of March, 1861, the original information was filed, praying a declaration that the portreeve, &c. were not authorized so to demise or lease the rents and tolls, and that any such demise or lease would be a breach of trust; and praying an injunction accordingly. On the 2nd of July, 1861, a new charter was granted to the inhabitants under the Municipal Corporations Amendment Act, and on the 6th of February, 1862, the information was amended by making the mayor, aldermen and burgesses under the new charter defendants, and praying a declaration that the markets, market-place, &c., and the lands belonging thereto, and all rights to levy rents and tolls, and all other the property and rights of the portreeve, &c. had become vested in the mayor, &c., under the Municipal Corporations Act, &c.; that the portreeve, &c. might be decreed to deliver up possession thereof, and that inquiries and accounts might be directed to ascertain what property belonged to the portreeve, &c. at the date of the new charter. The portreeve, &c. insisted that there was no trust for the benefit of the inhabitants, and their Lordships having come to the conclusion that this was so, except as to the property under the Aberavon Market Act, 1848,—Held, by the *Lords Justices*, that a decree of *Romilly, M.R.*, in conformity with the prayer of the amended information, must be discharged; that no relief to enforce rights arising under the new charter could be given upon an information filed before the grant of that charter; and that the only decree that could be made upon the information was to restrain leases of the market property upon fine. *The Attorney General* v. *the Portreeve, &c of Avon*, 33 Law J. Rep. (N.S.) Chanc. 172; 33 Beav. 67.

(E) EXPENSES OF LITIGATION.

At a Court held in October, 1856, before the mayor and assessors of the city of Rochester, for the revision of the burgess list, the names of several burgesses were expunged, and they obtained rules calling upon the succeeding mayor and assessors to shew cause why writs of mandamus should not issue, commanding them to hold fresh Courts of Revision. The corporation, under their common seal, retained the plaintiff, an attorney, to shew cause and otherwise defend these rules, and he accordingly did so, and the Court having made the rules absolute, he appealed to a Court of error, who affirmed the judgment. The plaintiff having sued the corporation for his costs,—Held, that he was entitled to judgment; and, there being nothing to shew that the litigation on the part of the corporation was not justifiable, that the expenses were payable out of the borough fund. *Lewis* v. *the Mayor of Rochester*, 30 Law J. Rep. (N.S.) C.P. 169; 9 Com. B. Rep. N.S. 401.

## MURDER.

[See SHOOTING WITH INTENT TO DO GRIEVOUS BODILY HARM.]

*On the High Seas.*

The prisoner was one of the crew of a ship which was built in Holstein, from whence she sailed to London. All the officers and crew were foreigners. R, the registered sole owner, was an alien born, but described in the register as "of London, merchant." The ship sailed from London, and under the British flag. While on the voyage, the prisoner killed the master on board the vessel when several thousand miles from England and 200 miles from any land. On the trial of the prisoner for murder, these facts were proved, and no evidence was given that R had been naturalized or had obtained letters of denization:—Held, that there was no evidence that the ship was a British ship, and that consequently the prisoner could not be convicted in England for this offence. *R.* v. *Bjornsen*, 34 Law J. Rep. (N.S.) M.C. 180; 1 L. & C. 545.

## MUSIC AND DANCING.

A local act, in similar terms to the 25 Geo. 2. c. 36. s. 2, enacted, that no house, room, or other place, within the borough should be kept or used for public dancing, or other public entertainment of the like kind, without a licence:—Held, that the dancing need not be by the public; but that in order to bring an entertainment within the act the music and dancing must not be merely subsidiary, but must form a substantial part of the entertainment. *Guaglieni* v. *Matthews*, 34 Law J. Rep. (N.S.) M.C. 116.

## NATIONAL DEBT.

[Further provision made for the investment of the moneys received by the Commissioners for the Reduction of the National Debt from the trustees of savings banks, by 26 Vict. c. 25.]

## NAVIGATION.

*Abstraction of Water from Navigable River.*

By the 13 Geo. 2. c. 26. s. 2. the plaintiffs were constituted a corporation and empowered to do all things necessary to make the river Medway navigable, and the river so to be made navigable, and all lands, &c. to be by them made use of for the benefit of the said navigation, were thereby vested in the plaintiffs, their successors, heirs and assigns for ever:—Held, that the act conferred upon the plaintiffs such an interest in all the water of the river for the purposes of the navigation as was interfered with by the abstraction of any part thereof by the defendants, who were not riparian proprietors, and that it was not necessary that there should be an actual damage to the navigation to entitle the plaintiffs to sue for such abstraction. *The Medway Navigation Co.* v. *the Earl of Romney*, 30 Law J. Rep. (N.S.) C.P. 236; 9 Com. B. Rep. N.S. 575.

*Right to Tolls.*

By act of parliament the plaintiffs were authorized to execute certain works for the purpose of making the river Tamar navigable for the distance of thirty miles, and it was enacted that in consideration of the great charge and expense which the said company of proprietors must incur and suffer in making and maintaining the works thereby authorized to be made and maintained, it should and might be lawful to and for the said company of proprietors from time to time, and at all times thereafter, to ask, demand, take and recover the several rates therein mentioned for the tonnage and wharfage of all minerals, &c. which should be carried upon the said navigation, canal, and collateral cut, or any of them. The plaintiffs only completed the navigation to the extent of about three miles:—Held nevertheless, that they were entitled to recover rates in respect of the conveyance of goods of the defendant along the navigation so completed by them. *The Tamar Navigation Co.* v. *Wagstaff*, 32 Law J. Rep. (N.S.) Q.B. 295.

## NAVY.

[See SHIP AND SHIPPING.]

[Her Majesty enabled to accept the services of officers of the Merchant Service as officers of reserve to the Royal Navy by 24 & 25 Vict. c. 129.—The law relating to the Royal Navy Coast Volunteers amended by 26 Vict. c. 5.—Certain enactments relating to naval prize of war, and matters connected with the management of the Navy, repealed by 27 & 28 Vict. c. 23.]

## NEGLIGENCE.

[The act 9 & 10 Vict. c. 93, for compensating the families of persons killed by accident, amended by 27 & 28 Vict. c. 95.]



### (A) WHAT AMOUNTS TO ACTIONABLE NEGLIGENCE.

(*a*) *Generally.*

The defendants had a wharf by the side of the Thames, for the more convenient use of which wharf the previous occupier had deepened the bed of the river opposite to it, and had erected a campshed,—a structure consisting of piles and planking for preventing the soil from filling up the part which had been so deepened,—which was completely hidden at high water. It was however improperly constructed, and instead of being carried out from the wharf to low-water mark and sloping off to a point, it extended only some few feet and then terminated abruptly. The plaintiffs sent a barge to be loaded with marble, which formed the portion of the cargo of a schooner then unloading at the wharf, and for the convenience of the schooner the barge, with the sanction of the defendants' foreman, was brought alongside the wharf and loaded therefrom with the marble instead of direct from the schooner. In the course of loading, the barge, as the tide ebbed, fell and canted over on the campshed (of the existence of which the plaintiffs' bargeman had no previous knowledge) and was injured:—Held, that it was the duty of the defendants either to have had the campshed properly constructed, or to have given notice of its existence to all who used the wharf in the ordinary course of the wharfage business, and that the plaintiffs were sufficiently using the wharf in the course of such business to entitle them to sue the defendants for the injury occasioned by a neglect of such duty. *White* v. *Phillips*, 33 Law J. Rep. (N.S.) C.P. 33; 15 Com. B. Rep. N.S. 245.

*Semble*—That the campshed being in a navigable river imposed a duty on the defendants to guard against its causing injury to those navigating the river. Ibid.

In an action brought against the owners of a ship for injury to a telegraphic cable on the high seas, the first count of the declaration stated that the plaintiffs were possessed of the cable, which was lawfully and with the consent of Her Majesty lying at the bottom of the sea, within three marine miles of the shore and coast of Kent, and that the defendants so negligently navigated their ship that an anchor belonging to it struck against and injured the plaintiffs' cable. The second count was to the same effect, but stated that the cable, at the time of the injury to it, was lying within eight marine miles of, and more than three marine miles from, the seashore:—Held on demurrer, that these counts, though omitting to allege notice on the part of the defendants of the existence and situation of the cable, were good. *The Submarine Tele-*

*graph Co.* v. *Dickson*, 33 Law J. Rep. (N.S.) C.P. 139; 15 Com. B. Rep. N.S. 759.

The defendants, in answer to the above-mentioned counts, pleaded that the cable, at the time of the alleged injury to it, was lying at a place beyond the jurisdiction of Her Majesty, and that the defendants were aliens, subject to the laws of the kingdom of Sweden, and not to those of England. The plea went on to state that the injury to the cable was caused by a lawful use of their anchor by the defendants in the ordinary course of navigation:—Held, that the introductory part of the plea, setting up that the defendants were foreigners, and not subject to the laws of this country, alleged facts which, by themselves, afforded no legal answer to the action, and were only matters to be taken into account by the jury in deciding whether the defendants had or had not been guilty of negligence, but that the whole plea was good. Ibid.

The defendants contracted with the Lords of the Admiralty for the erection of docks and works in Plymouth harbour, and for that purpose sunk piles in the navigable part of the channel. After the completion of the works, and after a reasonable time for the removal of the piles, the defendants sold the piles to J, who undertook to remove them by a certain date, or sooner if required by the Lords of the Admiralty. The Admiralty subsequently required J not to draw the piles, and J, acting under those orders, cut the piles off on a level with the bed of the channel. The soil was subsequently washed from around the stumps, and the plaintiff's vessel struck against them and was injured. In the position in which the piles existed at the time the defendants delivered them up to J, the damage could not have been done without the plaintiff's gross negligence:—Held, that there was no cause of action against the defendants. *Bartlett* v. *Baker*, 34 Law J. Rep. (N.S.) Exch. 8; 3 Hurls. & C. 153.

The plaintiff was driving a waggon with three horses along a highway walking in the usual way at the head of the leading horse, on his proper side of the road. The defendant and his groom were riding by at a foot pace (meeting the waggon on the wrong side), when, just as he passed the plaintiff, the groom touched his horse with a spur, and the horse kicked out and struck the plaintiff:—Held, that the act of using the spur when so near to plaintiff justified the jury in finding negligence. *North* v. *Smith*, 10 Com. B. Rep. N.S. 572.

The plaintiff's vessel, whilst being towed into a harbour by a steam-tug, got aground, and the defendants' vessel, which was being towed in at the same time by the same tug, astern of the plaintiff's vessel, without any active default on the defendants' part, struck and damaged the plaintiff's vessel:—Held, no evidence to go to a jury of negligence for which the defendants were liable. *Harris* v. *Anderson*, 14 Com. B. Rep. N.S. 499.

### (b) *Inference of Negligence from Fact of Accident or Damage.*

The mere happening of an accident is not sufficient evidence of negligence to be left to the jury; but the plaintiff must give some affirmative evidence of negligence on the part of the defendant. *Hammack* v. *White*, 31 Law J. Rep. (N.S.) C.P. 129; 11 Com. B. Rep. N.S. 588.

Where, therefore, it was shewn that the defendant was riding a horse at a walk, when the animal became restive, and, rushing on to the pavement, knocked down and killed the husband of the plaintiff; but the witnesses for the plaintiff also proved that the defendant was doing his best to prevent the accident,—Held, that this was no evidence of negligence; that taking the evidence of the witnesses for the plaintiff altogether, it was clear that the defendant was carried on to the pavement against his will, and that there was therefore nothing to turn the scale of evidence against the defendant, and to shew that he was responsible for the consequences of the accident. Ibid.

*Quære*—Whether, on an indictment for manslaughter, the same presumption would be made in favour of a prisoner as for the defendant in an action for death caused by negligence. Ibid.

Accidents may be of such a nature that negligence may be presumed from the mere fact of the accident; the presumption depending on the nature of the accident. *Byrne* v. *Boadle*, 33 Law J. Rep. (N.S.) Exch. 13; 2 Hurls. & C. 722.

The plaintiff, while walking in a street in front of the house of a flour-dealer, was injured by a barrel of flour falling upon him from an upper window:—Held, that the mere fact of the accident, without any proof of the circumstances under which it occurred, was evidence of negligence to go to the jury in an action against the flour-dealer, the declaration alleging that the plaintiff was injured by the negligence of the defendant's servants. Ibid.

The plaintiff, a custom-house officer, while on the defendants' premises in the execution of his duty, was injured by some bags of sugar falling on him from a crane fixed over a doorway, under which he was passing:—Held, by the majority of the Court, *Crompton, J., Byles, J., Blackburn, J.* and *Keating, J.*, that as the accident was such as did not in the ordinary course of things happen to those who have the management of machinery, and use proper care, it afforded reasonable evidence of negligence in the absence of any explanation by the defendants *(dissentientibus Erle, C.J.* and *Mellor, J.)* *Scott* v. *the London Dock Co.* (Ex. Ch.), 34 Law J. Rep. (N.S.) Exch. 220; 3 Hurls. & C. 596—affirming the judgment below, 34 Law J. Rep. (N.S.) Exch. 17.

### (B) ACTION BY PARENT FOR INJURY TO CHILD.

An illegitimate child is not within the statute 9 & 10 Vict. c. 93, giving a right of action for the benefit of the wife, husband, parent, or child of a person whose death has been caused by wrongful act, neglect or default. *Dickinson* v. *the North-Eastern Rail. Co.*, 33 Law J. Rep. (N.S.) Exch. 91; 2 Hurls. & C. 735.

### (C) IN THE CARE AND KEEPING OF VICIOUS ANIMALS; SCIENTER.

If a horse strays on to a highway, and there kicks a child, the owner is not liable unless he knew the horse was of a vicious temper. *Cox* v. *Burbidge*, 32 Law J. Rep. (N.S.) C.P. 89; 13 Com. B. Rep. N.S. 830.

For the vicious acts of an animal of an ordinarily quiet nature, the owner is, generally speaking, not liable; for such acts as are in accordance with its ordinary nature he is liable; and he is also liable for his vicious acts, if he knew that the animal was

accustomed or was likely to commit any such acts. For the acts of an animal ordinarily vicious the owner is liable. Ibid.

The plaintiff, innocently and without negligence, went on the premises of the defendants, a corporation, where he was bitten by a dog which was chained in a place in which he could not be seen by the plaintiff. The dog had previously bitten a person, as was known to some of the servants of the defendants, but those servants had no control over the affairs of the corporation, or over the dog:—Held that, assuming that the defendants knew the dog was a mischievous one, and accustomed to bite, they would be liable in an action brought by the plaintiff; but that there was no evidence to shew that the defendants had such knowledge. *Stiles* v. *the Cardiff Steam Navigation Co.*, 33 Law J. Rep. (N.S.) Q.B. 310.

The declaration stated that the defendant knowing that certain of his dogs were accustomed to hunt for and pursue game, and also knowing that the plaintiff preserved game in a certain wood, so negligently controlled and restrained his said dogs near to the said wood that they entered it, and hunted and destroyed the game therein. It was proved at the trial that the defendant had a dog of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, and that that vice was known to the defendant, who, notwithstanding, allowed the dog to be at large in the neighbourhood of the plaintiff's wood, and that the dog consequently entered, and did the damage complained of:—Held, that the declaration was proved in an actionable sense, and was also good after the verdict. *Read* v. *Edwards*, 34 Law J. Rep. (N.S.) C.P. 31; 17 Com. B. Rep. N.S. 245.

*Quære*—Whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another. Ibid.

(D) In not fencing and keeping up Fences.

The workmen employed in a government dockyard were permitted by the government to cross certain land within the dockyard premises, to go to the water-closets erected for their accommodation. A government contractor, by permission of the government, had erected machinery in the aforesaid yard. A revolving shaft, a portion of this machinery, was so placed as to cross the shortest and most convenient way to these water-closets. The shaft was partially covered, but not concealed, by planks, and was found by the jury to be "insufficiently covered." There were other, though not shorter or more convenient ways, to these water-closets. The plaintiff, a workman employed in the dockyard, but not by the contractor who had erected the machinery, in going to the water-closet, accidentally fell near the shaft, which caught his arm and severely injured him. In an action against the contractor to recover damages for the injury,—Held, that the plaintiff's right to cross the yard was only the right not to be treated as a trespasser for so doing, and that the defendant was under no obligation to fence the machinery at all, and therefore not liable for insufficiently fencing it, and that the action was not maintainable. *Bolch* v. *Smith*, 31 Law J. Rep. (N.S.) Exch. 201; 7 Hurls. & N. 736.

*Semble*—That if the fencing to the machinery had been only apparently sufficient, or the machinery had been concealed from view, or there had been anything in the nature of a "trap," as explained in *Corby* v. *Hill*, the defendant would have been liable. Ibid.

The appellants were in occupation of the minerals under a field which was in the occupation of the respondent, and had sunk a shaft in that field for the purpose of getting the minerals beneath it. When they had ceased to work the shaft, they covered it over in such a manner as not to afford a proper and effectual protection for horses in the field. The respondent turned out a mare to feed in the field, and she fell down the shaft and was killed, without any negligence on the part of the respondent:—Held, that the appellants were liable to an action in respect of the injury caused by the want of fencing. *Groucott* v. *Williams*, 32 Law J. Rep. (N.S.) Q.B. 237; 4 Best & S. 149.

The defendants were possessed of a canal and the land between it and a sluice; an ancient public footpath passed through the land close to the sluice; there was a towing path, nine feet wide, by the side of the canal, and an intervening space of twelve feet of grass between the towing path and the footpath. By the permission of the defendants the intervening space had been lately used for carting, and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land had been obliterated. A person using the path at night, missed his way, and fell into the canal and was drowned:—Held, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the defendants the duty of fencing the canal off; and that the other facts did not render the defendants liable for the accident. *Binks* v. *the South Yorkshire Railway and River Dun Co.*, 32 Law J. Rep. (N.S.) Q.B. 26; 3 Best & S. 244.

Through the defect of a gate which the defendant was bound to repair, the defendant's horse got out of the defendant's farm into an occupation road, and strayed into the plaintiff's field, where it kicked the plaintiff's horse:—Held, that the defendant was liable for the trespass by his horse, and that it was not necessary for the maintenance of the action to prove that the defendant's horse was vicious and that the defendant was aware thereof. Held also, that the damage the plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of the defendant's neglect to be recoverable in such action. *Lee* v. *Riley*, 34 Law J. Rep. (N.S.) C.P. 212; 18 Com. B. Rep. N.S. 722.

(E) Of Contractors and others.

The defendants, a railway company, were empowered by act of parliament, to construct an opening bridge over a navigable river, and were forbidden to detain any vessel navigating the river for a longer space of time than would be sufficient to allow trains ready to traverse the bridge to pass, and for opening the bridge; and in case the company, or any one acting under them, should detain any such vessel for more than ten minutes, the company were to be liable to a penalty, in addition to any claim for damages sustained by reason of such detention. The defendants employed a contractor to build the bridge in conformity with the require-

ments of the act. While the bridge was unfinished and in the hands of the contractor, from some defect in the machinery it could not be opened, and the plaintiff's vessels were thereby prevented from navigating the river:—Held, that the defendants were liable. Per *Pollock, C.B.*—Where the mischief arises directly from the act ordered to be done, there the person giving the order is responsible; but where it arises from something collateral and incidental to the act ordered to be done, he is not responsible. Where a person employs another to do an act which the employer has a right to do, it is the duty of the employer to see that the act is properly done; and he will therefore be responsible for any mischief arising from the improper performance of the act by the person employed. Per *Martin, B.*—By the act of parliament authorizing the construction of the bridge, a duty was cast upon the defendants that neither they nor any person acting under them should detain a vessel beyond a certain space of time; the plaintiff's vessel having been detained beyond that time, he had a right of action against the defendants, to which it was no answer that the defendants had covenanted with the contractor that such delay should not occur. Per *Wilde, B.*—Where, by reason of the negligence of a servant of a contractor, an injury is caused to a third person, the question of liability depends on the relation of master and servant; but where the thing contracted to be done causes the mischief—in other words, where the injury arises from the imperfectly doing the thing ordered to be done—the person giving the order is responsible. *Hole* v. *the Sittingbourne and Sheerness Rail. Co.*, 30 Law J. Rep. (N.S.) Exch. 81; 6 Hurls. & N. 488.

A person who employs another to do a lawful act is presumed, in the absence of evidence to the contrary, to employ him to do it in a lawful and reasonable manner; and therefore, unless the parties stand in the position of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the act is done. *Butler* v. *Hunter*, 31 Law J. Rep. (N.S.) Exch. 214; 7 Hurls. & N. 826.

In an action for negligently pulling down a wall of the defendant's house adjoining the plaintiff's, evidence was given that the wall was taken down by a builder at an estimated cost in pursuance of directions given to him by an architect employed by the defendant, and who had the general superintendence of the work at the defendant's house. In consequence of the removal of a beam from the wall, the front of the plaintiff's house fell down. It appeared that the plaintiff's house ought, as a reasonable precaution, to have been shored up before the defendant's wall was removed:—Held, that on these facts there was no evidence to go to the jury of the defendant's liability. Ibid.

A company undertaking for their own profit to maintain a channel for carrying off water, and neglecting to do so effectually, are responsible for damage done to the adjoining land by reason of the banks giving way after an unusual rainfall, although other persons, who were bound to keep the outlet of the channel of certain dimensions, had failed to perform that duty, and had thereby occasioned an increase of water in the channel, without which its banks would not have given way. *Harrison* v. *the Great Northern Rail. Co.*, 33 Law J. Rep. (N.S.) Exch. 266; 3 Hurls. & C. 231.

The defendants employed a competent engineer and contractor to select a site for, and to construct a reservoir on their land. During the construction, the contractor's people met with some old vertical shafts (of the existence of which the defendants were ignorant), and they failed to exercise reasonable skill and care, with reference to these shafts, to provide for the pressure the reservoir was intended to bear. The water from the reservoir escaped down the shafts, through certain old coal workings, under the defendants' land, and under land between the defendants' land and land of the plaintiff, into the plaintiff's colliery, which was thereby flooded:—Held, by *Pollock, C.B.* and *Martin, B.*, that, this damage not being the immediate result of the defendants' act, there must be negligence to render them legally responsible to the plaintiff; and that the defendants, being ignorant of the existence of the circumstances requiring the exercise of unusual care on their part, were not guilty of negligence. Held, by *Bramwell, B.*, that, the plaintiff having the right to be free from water sent to him through any artificial course by the defendants—whether directly or indirectly—this action was maintainable on that right being infringed; and that the defendants' knowledge or ignorance of the damage likely to result from their act was immaterial. *Fletcher* v. *Rylands*, 34 Law J. Rep. (N.S.) Exch. 177; 3 Hurls. & C. 774.

The defendant, the owner of a house in the metropolis, employed a contractor to make a drain from his house to the main sewer, under the powers given by the Metropolis Local Management Act (19 & 20 Vict. c. 120). The contractor made the drain, but filled up the ground so negligently where it crossed a public footway, that it subsided and left a hole, into which the plaintiff fell, and was injured:—Held, by the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench (32 Law J. Rep. (N.S.) Q.B. 169), that the defendant was liable for the injury; that the statutable power given, by ss. 77. and 110. of the act, for making the drain also imposed on the defendant the duty of filling up the cutting across the footway properly, and that he was not excused by reason of his having employed to perform the work a contractor who omitted to do his duty. *Gray* v. *Pullen* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 265; 5 Best & S. 970, 981.

### (F) Of Servants.

The defendant bought some boards from the plaintiff, a timber merchant, and at the defendant's request the plaintiff gave him permission to use his shed for the purpose of making a sign-board. The defendant employed D, a carpenter, to make the sign-board at a fixed price, and D used the shed for that purpose, with the plaintiff's knowledge. D, while so working, lighted a pipe from a match with a shaving, which he accidentally dropped, and the shed was burnt down:—Held, that the defendant was not liable, for there was no contract between the plaintiff and the defendant, but a mere revocable licence to use the shed, and the act of D was not a negligent act within the scope of his employment. *Williams* v. *Jones*, 33 Law J. Rep. (N.S.) Exch. 297; 3 Hurls. & C. 256.

Some bales of cotton, sent by the defendant to a warehouse and packed there carelessly by his servants under the direction of the warehouse-keeper, afterwards fell on the plaintiff, a servant of the owner of the warehouse, who was passing by in the course of his duty:—Held, that the defendant was not responsible. *Randelson* v. *Murray* impugned. *Murphy* v. *Caralli*, 34 Law J. Rep. (N.S.) Exch. 14; 3 Hurls. & C. 462.

### (G) Of gratuitous Lender.

A gratuitous lender of a chattel is not liable for a personal injury sustained by the person to whom it is lent, or by any other person with his permission, arising from the defective construction of the article, the lender not having notice of the defect, although guilty of negligence in its construction. In such a case it is immaterial that the person using the chattel was carrying out a contract entered into by the borrower with the lender. *Mac. Carthy* v. *Young*, 30 Law J. Rep. (N.S.) Exch. 227; 6 Hurls. & N. 329.

The defendant, a builder, having erected a scaffold for the purpose of pulling down and rebuilding his own house, subsequently agreed that A should pull down and remove a wall, and lent A the scaffold to assist in performing his contract. A employed the plaintiff to take down the wall at so much a load, and the plaintiff used the scaffold for that purpose. The scaffold fell and injured the plaintiff who was upon it. The jury found that the accident arose from the defective construction of the scaffold, and that the defendant was guilty of negligence. There was no proof that the defendant had notice of the defect:—Held, that the defendant was not responsible for the injury. Ibid.

### (H) Contributory Negligence.

The plaintiff, a carman, being sent by his employer to the defendants for some goods, was directed by a servant of the defendants to go to the counting-house. In proceeding along a dark passage of the defendants, in the direction pointed out, the plaintiff fell down a staircase, and was injured:—Held, that the defendants were not guilty of any negligence: for if the passage was so dark that the plaintiff could not see his way, he ought not to have proceeded; and if, on the other hand, there was sufficient light, he ought to have avoided the danger. *Wilkinson* v. *Fairrie*, 32 Law J. Rep. (N.S.) Exch. 73; 1 Hurls. & C. 633.

Contributory negligence by an infant has the same effect in disentitling him to maintain an action as in the case of an adult. *Abbott* v. *Macfie; Hughes* v. *the same*. 33 Law J. Rep. (N.S.) Exch. 177; 2 Hurls. & C. 744.

The defendants placed the shutter of their cellar against the wall of a public street. The dress of a child, who was playing in the street and jumping off the shutter, caught the corner of the shutter, which fell upon and injured him:—Held, that the defendants were not liable to an action. Ibid.

Held also, that the defendants' liability for an injury to another child, present on the same occasion, depended on whether the children were playing together, so as to be joint actors. Ibid.

No action will lie for the consequences of a negligent act, where the party complaining has by his own want of due care and caution been in any degree contributory to the misfortune. A swing-bridge over a canal, crossing a public highway, when turned back for the passage of a barge along the canal, left a gap on the side of the road without any fence towards the water. A, being upon the bridge whilst it was in this state, and the spot being dark, incautiously stepped back and fell into the water, and was drowned. In an action by his widow and administratrix against the canal company (under Lord Campbell's Act, 9 & 10 Vict. c. 93.), the jury were told that, if they thought there had been any negligence on the part of the company, and no want of proper care and caution on the part of the deceased, the plaintiff was entitled to a verdict; but that, if they thought that the deceased had by his own negligence contributed to the accident, they must find for the defendants:—Held, a proper direction, and that, upon the facts, the jury were warranted in finding for the defendants, although they were of opinion that the bridge was not secured as it should have been. *Witherley* v. *the Regent's Canal Co.*, 12 Com. B. Rep. N.S. 2.

### (I) Of Public Bodies in the Construction, Care and Management of their Works, Premises, and Machinery.

By a local act a waterworks company was bound, at the request of Town Improvement Commissioners, to fix fire-plugs into their mains, and to repair and keep them in proper order, at the cost of the Improvement Commissioners, in whom the property in the plugs was vested by virtue of their Improvement Act. In consequence of the cap of one of the fire-plugs provided under the act being broken, a horse placed his foot in the plughole and was lamed:—Held, that the waterworks company, and not the Commissioners, were liable for the injury. *Bayley* v. *the Wolverhampton Waterworks Co.*, 30 Law J. Rep. (N.S.) Exch. 57; 6 Hurls. & N. 241.

The corporation of a town caused a washhouse to be erected, with a wringing-machine, under the Baths and Washhouses Act (9 & 10 Vict. c. 74), which vests such houses, &c. in the corporation, the actual management being in the council, the members of which are not to be personally liable. The wringing machine was originally intended not to be worked by hand, and being worked by steam, a projecting handle was needlessly retained, which went round with great rapidity, and had no protection. Those who used the washhouse, &c. paid for the use of it; and the female plaintiff using the machine, without negligence on her part, was caught by the handle when thus revolving, and was injured:—Held, that the corporation were liable to an action. *Cowley* v. *the Mayor, &c. of Sunderland*, 30 Law J. Rep. (N.S.) Exch. 127; 6 Hurls. & N. 565.

The defendants, the proprietors of certain docks, for the use of which they were entiled to tolls, opened them for public use to all vessels of a certain size before the low-water basin was completed, and while a bar of earth remained across a large part of it, dangerous to navigation, not visible at high tide, not in any manner marked by buoys, and which, by the exercise of reasonable care on the part of the defendants, might have been removed before. The plaintiffs' vessel, which was under the size limited, and had entered the docks and loaded her cargo, on coming out into the basin, was driven upon

the bar and wrecked, without any negligence or mismanagement on the part of the plaintiffs or of the crew, or of the pilot who had been engaged to take the vessel out. The pilot knew of the bar, but the plaintiffs did not:—Held, that the defendants were liable for the injury to the ship, as they were guilty of negligence in not having taken reasonable care, while they kept the basin open for the public use, that those who chose to navigate it might do so without danger. *Thompson* v. *the North-Eastern Rail. Co.* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 194; 2 Best & S. 119—affirming the judgment below, 30 Law J. Rep. (N.S.) Q.B. 67; 2 Best & S. 106.

Held further, assuming the knowledge of the pilot to be the knowledge of the plaintiffs, that knowledge of the existence of the bar did not disentitle the plaintiffs to recover, as it was not found by the jury that it was an act of imprudence on their part, if they had such knowledge, to attempt to take the vessel over the bar. Ibid.

On the trial of an action against a railway company for an injury to the plaintiff's property, caused by the emission of sparks from one of the company's locomotive engines, owing to the negligence of the company, the Judge, after telling the jury that the evidence for the company was extremely powerful to shew that the engine was of the best known construction, but that the evidence of the plaintiff's witnesses was that, in their opinion, the risk of causing mischief by sparks from the engine in question was not improbable, and that the engine was so constructed as to be dangerous without a precaution of some kind, left it to the jury to decide whether they believed either the plaintiff's or the defendants' witnesses on this point; and he also left it to the jury to consider whether each set of witnesses might not have been mistaken in the degree of excellence or of defect imputed to the engine; and if so, that it was still for the jury to decide, either for the company, if no further precautions could with reason be required, or for the plaintiff, if they were in reason requisite:—Held, that this direction was right, notwithstanding the case of *Vaughan* v. *the Taff Vale Rail. Co.*, there being a conflict of testimony upon a question of degree, which was necessarily for the jury. *Fremantle* v. *the London and North-Western Rail. Co.*, 31 Law J. Rep. (N.S.) C.P. 12; 10 Com. B. Rep. N.S. 89.

The Mersey Docks and Harbour Board, incorporated by statute for the purpose of maintaining and managing the docks in the Mersey, were empowered for the purposes of their acts to levy tolls on ships using the docks. Neither the members of the board, who acted gratuitously in performance of a public duty, nor the board as a corporation, derived any benefit from the corporation funds. In one of the docks a bank of mud had accumulated, which rendered the dock dangerous for shipping. It was nevertheless kept open to the public, and the plaintiffs' vessel entering struck on the bank and was injured:—Held, that though the defendants did not know of the state of the dock, yet, if they had the means of knowing it, and were negligently ignorant, the defendants were responsible to the plaintiffs. *Penhallow* v. *the Mersey Docks and Harbour Board* (Ex. Ch.), 30 Law J. Rep. (N.S.) Exch. 329; *nom. The Mersey Docks and Harbour Board* v. *Penhallow*, 7 Hurls. & N. 329 — affirmed in the House of Lords, *Mersey Docks' Trustees* v. *Gibbs*, and *Same* v. *Penhallow*, 35 Law J. Rep. (N.S.) Exch. 225; 11 H.L. Cas. 686.

If in the execution of works authorized by act of parliament damage be sustained, and the act provides a special mode in which compensation for such damage may be recovered, no action will lie for it. But this only relates to works carefully and skilfully executed, and if there be a want of proper care and skill on the part of those executing the works an action for the negligence to recover damages for the injury thereby sustained will lie. Therefore, where works were executed by the Metropolitan Board of Works, acting under the powers conferred by the 18 & 19 Vict. c. 120. s. 135, whereby the plaintiff's premises were injured, and the jury found that by proper care and skill the injury could have been avoided,—Held, that to recover compensation for this injury an action would lie, and that the plaintiff was not precluded from maintaining this action by the provisions of s. 225. *Clothier* v. *Webster*, 31 Law J. Rep. (N.S.) C.P. 316; 12 Com. B. Rep. N.S. 790.

The defendants' railway crossed a carriage-road on a level; there were locked carriage gates and swing gates for foot passengers; the trains were frequent, the crossing was on a curve, and a bridge near to it over the line obstructed the view in that direction. Two trains passed about the same time, and whilst the plaintiff's attention was directed to one the other knocked him down:—Held that, although there might be no statutory provisions for the safety of such a foot passenger, yet under the circumstances there was evidence of negligence to go to the jury, and the Judge was not bound to nonsuit. *Bilbee* v. *the London and Brighton Rail. Co.*, 34 Law J. Rep. (N.S.) C.P. 182; 18 Com. B. Rep. N.S. 584.

The level crossing between the platforms at a railway station, which formed part of the "way out" for passengers arriving at the south platform, was blocked for more than ten minutes by the train in which the plaintiff arrived there. Under such circumstances, it was usual for the arriving passengers—and the railway company did not object to the practice—to walk alongside and round the end of the train in order to cross the line. The plaintiff so doing in the dark, stumbled over a hamper which had been taken out of the train, and placed at the side of the line, some distance from the platform:—Held, that there was evidence of negligence on the part of the railway company. *Nicholson* v. *the Lancashire and Yorkshire Rail. Co.*, 34 Law J. Rep. (N.S.) Exch. 84; 3 Hurls. & C. 534.

A railway company, for the more convenient access for passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous:—Held, that the company were liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used. *Longmore* v. *the Great Western Rail. Co.*, 19 Com. B. Rep. N.S. 183.

On the arrival of a train at the railway terminus, there not being room for all the carriages to be drawn up to the platform, some of the passengers were required to alight upon the line beyond it, the depth from the carriage to the ground being about three

feet. In so alighting, a lady, instead of availing herself of the two steps, with the assistance of a gentleman, jumped from the first step to the ground, and sustained a spinal injury from the concussion. The jury having found that the company were guilty of negligence in not providing reasonable means of alighting, and that the lady had not by any misconduct on her part contributed to the injury, and having awarded her 500*l.*,—The Court held that there was evidence to warrant their finding, and declined to interfere with the amount of damages. *Foy* v. *the Brighton Rail. Co.*, 18 Com. B. Rep. N.S. 225.

Where a railway has running powers over the line of another company,—*Quære*, whether it is not the duty of the former to see that its engines and carriages are reasonably adapted for safe travelling thereon? *Graham* v. *the North-Eastern Rail. Co.*, 18 Com. B. Rep. N.S. 229.

In an action by the guard of a railway exercising such powers for an injury sustained by him through his head coming in contact with a post on the servient railway, while looking out in the reasonable performance of his duty,—the jury having found that the position of the post was such as to be dangerous to a guard who is to keep a look out reasonable for the safety of the train,—Held, that the servient railway company were liable. Ibid.

Where a railway crosses a highway on a level at a place where there is considerable traffic, the fact of the engine-driver blowing off the steam at that spot, so as to frighten horses waiting to pass over the line, is sufficient to warrant the conclusion that the company had been guilty of actionable negligence. *The Manchester Rail. Co.* v. *Fullarton*, 14 Com. B. Rep. N.S. 54.

(K) Of Owners and Occupiers of Premises.

Refreshment-rooms and a coal-cellar at a railway station were let by the company to one S, the opening for putting coals into the cellar being on the arrival platform. A train coming in whilst the servants of a coal-merchant were shooting coals into the cellar for S,—the plaintiff, a passenger, whilst passing (as the jury found) in the usual way out of the station, without any fault of his own, fell into the cellar opening, which the coal-merchant's servants had negligently left unsufficiently guarded:—Held, that S, the occupier of the refreshment-rooms and cellar, was responsible for this negligence,—And, *semble*, per *Williams, J.*, that the railway company also would be liable, but not the coal-merchant. *Pickard* v. *Smith*, 10 Com. B. Rep. N.S. 470.

## NEWSPAPER.

Pending a suit and after the time had expired for the defendants to file affidavits, an article appeared in a local newspaper commenting upon the persons who had made affidavits on behalf of the defendants, attributing to them falsehood, ignorance and self-interest, and holding them up to public contempt and ignominy:—Held, that the article was a contempt of Court, and the publisher of the newspaper was committed to prison. *Felkin* v. *Herbert*, 33 Law J. Rep. (N.S.) Chanc. 294.

The publisher having made an affidavit, in which he expressed his regret and contrition for having unintentionally committed a contempt of Court, and having undergone ten days' confinement, he was discharged on payment of costs and fees, although he had made no apology to the deponents for the imputations cast on them. Ibid.

## NUISANCE.

[See Injunction.]

[The Nuisances Removal Act for England, 1855, amended with respect to the seizure of diseased and unwholesome meat by 26 & 27 Vict. c. 117.—The law relating to certain nuisances on turnpike-roads amended, and certain Turnpike Acts continued, by 27 & 28 Vict. c. 75.—An Act for the more effectual Condensation of Muriatic Acid Gas in Alkali Works, 26 & 27 Vict. c. 124.]

(A) When restrained in Equity.
(B) Action for.
  (*a*) *Injury to Property.*
  (*b*) *Personal Discomfort.*
(C) Abatement of, under the Nuisances Removal Act.
  (*a*) *Order to abate; Enforcing.*
  (*b*) *Expenses.*
(D) Indictment and Information.
  (*a*) *Nuisance indictable at Common Law.*
  (*b*) *Under the Public Health Act.*

(A) When restrained in Equity.

Where the comfort and enjoyment of a mansion were injured, and the trees planted for ornament and to exclude the view of unsightly objects were in some cases destroyed, and in many cases injured by brick-burning, the Court granted an injunction to restrain the brick-buroing,—it appearing that, although the defendant carried on the brick-burning in order to execute a contract for the construction of the fortifications near Portsmouth, it might have been carried on elsewhere on the land in the defendant's occupation without any inconvenience to the plaintiff, or without that degree of injury which would entitle the plaintiff to complain. *Beardmore* v. *Tredwell*, 31 Law J. Rep. (N.S.) Chanc. 892; 3 Giff. 683.

The Court will not as a general rule grant an injunction against a nuisance which is temporary and occasional only. *Swaine* v. *the Great Northern Rail. Co.*, 33 Law J. Rep. (N.S.) Chanc. 399.

The Court, though refusing an injunction, may, under Sir Hugh Cairns's Act, direct an inquiry as to damages; but it is not bound to do so by Mr. Rolt's Act; and if the Court think the case will be more effectually disposed of at law, it will dismiss the bill without prejudice to the plaintiff's right to an action.—The rule as laid down in *Johnson* v. *Wyatt* (33 Law J. Rep. (N.S.) Chanc. 398) adhered to. Ibid.

S possessed a house and premises within about 80 feet of a station of the Great Northern Railway Company. Previous to 1859 there had been but one siding at the place, and it was on the opposite side of the line from the property of S. In 1859 the company constructed a second siding, on the side of the line nearest to the property of S, and used it for carrying manure from London, of an

offensive description. S remonstrated from time to time, but in 1862, finding the nuisance greatly increased, in the month of May he made a formal complaint. Obtaining no redress, he, after a demand by his solicitors, filed, in January, 1863, his bill for an injunction and for an inquiry as to damages. *Wood, V.C.*, considered that the plaintiff having had ample time to establish his right at law, and having failed to do so, was not entitled to file a bill for an injunction, and dismissed the bill with costs. On appeal, *Knight Bruce, L.J.*, and *Turner, L.J.*, held, that there had not been a nuisance so continuous and systematic as to justify the grant of the injunction, and they agreed to the dismissal of the bill, but without prejudice to the plaintiff's right to an action, and without costs, and gave no costs of the appeal. Ibid.

The vestry of St. George, Hanover Square, assuming to act under the powers conferred upon them by the Act for the better Local Management of the Metropolis (19 & 20 Vict. c. 120), passed a resolution to erect a urinal in Grosvenor Place adjacent to the wall of Buckingham Palace. *Stuart, V.C.*, being of opinion that the erection of a urinal at that spot would be a serious injury to the property in the neighbourhood, upon bill filed by a resident nearly opposite to the site of the proposed urinal, granted an injunction until the hearing of the cause, restraining the vestry from proceeding to make the erection complained of. Upon appeal, *Knight Bruce, L.J.*, and *Turner, L.J.*, being of opinion that the evidence did not shew that the proposed urinal would be in point of law a nuisance, or that the vestry were exceeding their statutory powers in what they proposed to do, or that they were influenced by improper motives, did not think the case one for an interlocutory injunction, and discharged the order for the injunction granted. *Biddulph* v. *the Vestry of St. George, Hanover Square*, 33 Law J. Rep. (N.S.) Chanc. 411.

An information was instituted, at the relation of the Conservators of the River Thames, to restrain the corporation of Kingston-on-Thames from altering their drains so as to discharge a greatly increased quantity of sewage into the river. The Court, considering upon the evidence that neither present nuisance, nor probability of immediate prospective nuisance, had been proved, dismissed the information without prejudice to future proceedings in the event of nuisance being subsequently occasioned. *The Attorney General* v. *the Mayor, Aldermen and Burgesses of the Borough of Kingston-on-Thames*, 34 Law J. Rep. (N.S.) Chanc. 481.

The defendant allowed a noxious and offensive refuse water to flow from his manufactory into an old pit on his own land, but which percolated underground into the plaintiff's colliery. The defendant was restrained by perpetual injunction. *Turner* v. *Mirfield*, 34 Beav. 390.

On a bill to restrain a nuisance, a delay in six months in filing the bill, though important on an interlocutory application, held no bar to relief by injunction at hearing of the cause. Ibid.

### (B) ACTION FOR.

#### (*a*) *Injury to Property.*

The defendant, who was the owner of a building and a stack of chimneys, near to a building of the plaintiff, demised them when the chimneys were known by him to be ruinous and in danger of falling upon the building of the plaintiff, and kept and maintained them in such ruinous state until they afterwards fell upon the plaintiff's building, which they did during the occupation of the tenant under such demise, from no default of such tenant, but by the laws of nature:—Held, that an action for the injury the plaintiff had sustained from the fall of the chimneys would lie against the defendant, though he was not the occupier at the time of the fall. *Todd* v. *Flight*, 30 Law J. Rep. (N.S.) C.P. 21; 9 Com. B. Rep. N.S. 377.

There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter, a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him; as to the former, the same rule would not apply. *St. Helen's Smelting Co.* v. *Tipping*, 11 H.L. Cas. 642; 35 Law J. Rep. (N.S.) Q.B. 66—affirming the decision of the Ex. Ch. and Queen's Bench, *Tipping* v. *St. Helen's Smelting Co.*, 4 Best & S. 608.

Where no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is one generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages, in respect of injury created by it to property in the neighbourhood. Ibid.

A place where the works of one person are carried on which occasion an actionable injury to the property of another, is not within the meaning of the law, "a convenient" place. Ibid.

A bought an estate in a neighbourhood where many manufacturing works were carried on. Among others there were the works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapours from these works when they were in operation were proved to be injurious to the trees on A's estate. At the trial the Judge told the jury that (unless by a prescriptive right) every man must so use his own property as not to injure that of his neighbour; but that the law did not regard trifling inconveniences; everything must be looked at from a reasonable point of view, and therefore in the case of an alleged injury to property, as from noxious vapours from a manufactory, the injury to be actionable must be such as visibly to diminish the value of the property; that locality, and all other circumstances must be taken into consideration, and that in counties where great works have been and were carried on, parties must not stand on extreme rights:—Held, that the direction was right. Ibid.

To a declaration alleging that the defendant, with intent to frighten away grouse from the plaintiff's land, fired and exploded rockets and fireworks so as to be a nuisance, the defendant pleaded that he committed the supposed grievance in order to prevent the plaintiff from shooting and killing grouse which had been enticed by the plaintiff from land of the defendant, and also in order to prevent the plaintiff from enticing other grouse which might be enticed by him from the defendant's land:—Held,

that the plea was no answer to the action. *Ibbotson* v. *Peat*, 34 Law J. Rep. (N.S.) Exch. 118; 3 Hurls. & C. 644.

### (*b*) *Personal Discomfort.*

The carrying on a lawful trade in the usual manner is not necessarily the carrying it on in a reasonable and proper manner. Where to an action for carrying on a trade in such a manner as to cause injury to the plaintiff, the defendant relies for a defence upon the fact of the trade being carried on in a reasonable and proper manner, the onus of proving that it is so carried on is on the defendant, and not on the plaintiff of shewing that it is not so carried on. *The Stockport Waterworks Co.* v. *Potter*, 31 Law J. Rep. (N.S.) Exch. 9; 7 Hurls. & N. 160.

To an action for damages for fouling, polluting and corrupting the water of a river from which the plaintiffs had been accustomed, and were entitled to take a supply of pure water for their reservoirs from which for their own profit they supplied the town of S with good and pure water,—the defendants pleaded, *inter alia*, that they carried on the business of calico-printers, bleachers and dyers, at premises situated on a stream falling into the river at a spot above that from which the plaintiffs' reservoirs were supplied, and had lawfully carried on the said business for twenty years without interruption, and for the purposes of their business had taken water from the stream, and let it off from their works back into the stream after it had been used, and by reason of the use necessarily containing small quantities of poisonous, deleterious and impure substances necessary to be used for carrying on the said business, whereby the said water necessarily became a little foul, corrupt and dirty, and that the grievances complained of were necessarily and unavoidably caused by the defendants in the use and exercise of their rights as such occupiers, and whilst carrying on in their said premises such businesses, and as necessary thereto. At the trial, it appeared from the plaintiffs' witnesses, that various noxious substances, causing the pollution, were found in the water below the defendants' premises, and that these substances were used by the defendants in their trade, and that on the same stream there were other premises of other persons who carried on the same trade as the defendants. No witnesses were called by the defendants to give evidence as to the manner in which their business was conducted. The jury, in answer to questions left to them by the learned Judge, found, that the plaintiffs had the right they claimed; that the water was polluted by the defendants; that it caused damage to the plaintiffs, and was done without their leave and licence; that they (the jury) knew of no means by which the pollution could be avoided by the defendants, and that "*the defendants' trade was a lawful trade, carried on for purposes necessary and useful to the community, and carried on in a reasonable and proper manner and in a proper place.*" A verdict having been entered for the plaintiffs with 40*s.* damages, the Court discharging a rule obtained to set that verdict aside,—Held, that there was no evidence to go to the jury that the defendants' trade was carried on in a reasonable and proper manner and in a proper place, and that even if there had been any such evidence the finding of the jury in accordance with it would have no legal effect on the rights of the parties.—Held, also, that the case did not come within the principle enunciated in *Hole* v. *Barlow*. Ibid.

Where a man, by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement as to amount *prima facie* to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land. *Bamford* v. *Turnley* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 286; 3 Best & S. 62; Ex. Ch. 66. The fitness of the locality does not prevent the carrying on of an offensive, though lawful, trade from being an actionable nuisance; but whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance, an action will lie whatever the locality may be. *Hole* v. *Barlow* overruled. Ibid.

In an action for a nuisance caused by the defendant burning bricks on his own land near the house and land of the plaintiff, it is no misdirection for the Judge to refuse to leave to the jury the question whether the bricks had been burnt in a convenient place for that purpose: such form of question having been decided by the Court of Exchequer Chamber, in *Bamford* v. *Turnley*, to be a misdirection. But, *semble*, per *Erle, C.J.*, it would be a misdirection if the Judge told the jury to consider solely the evidence adduced to shew discomfort to the plaintiff, and not to take into their consideration any evidence shewing that the act complained of was one of ownership on the part of the defendant, which was clearly lawful if it did not cause actionable discomfort to a neighbour, and that it was done with full intention to prevent discomfort in respect of time and place and manner and degree. *Cavey* v. *Ledbetter*, 32 Law J. Rep. (N.S.) C.P. 104; 13 Com. B. Rep. N.S. 470.

## (C) ABATEMENT OF, UNDER THE NUISANCES' REMOVAL ACT.

### (*a*) *Order to abate; Enforcing.*

The owner of a market allowed sheep to be penned there, and he found the hurdles for the pens, and derived a profit in addition to the toll on the sheep. The sheep droppings created a nuisance on the part where they were penned:—Held, that the owner of the market was liable to an order for the removal of the nuisance, under s. 12. of the Nuisances' Removal Act (18 & 19 Vict. c. 121), as being the person within the meaning of that section "by whose act, default, permission, or sufferance," the nuisance arose. *Draper* v. *Sperring*, 30 Law J. Rep. (N.S.) M.C. 225; 10 Com. B. Rep. N.S. 113.

Penalties imposed, under s. 14. of the Nuisances' Removal Act, 1855, for disobeying an order to abate a nuisance under s. 13, cannot be enforced without previously summoning the offender under s. 20. *R.* v. *Jenkins*, 32 Law J. Rep. (N.S.) Q.B. 50; 3 Best & S. 116.

### (*b*) *Expenses.*

Where sewers and works have been made by the local authority, under the powers given them by s. 22. of the 18 & 19 Vict. c. 121, they are bound to assess the houses, buildings, &c. using such sewers or works, before they can resort to the high-

way-rates, in the manner pointed out by s. 7, in order to defray the expenses incurred. *R.* v. *Gosse*, 30 Law J. Rep. (N.S.) M.C. 41.

In the parish of H four districts (M, M S, H and C) were formed for the purpose of drainage under the Nuisances Removal Act, 1855. In the year 1855 sewers were made for draining the M S district, and the house of B was assessed in respect of the expenses of making the sewers. B compounded, and paid the sum at which he was charged. In the year 1856 the M district was drained, and the result of the two works made in the two districts was to increase a nuisance which before existed in the H district. Accordingly, in 1859, it became necessary to make new sewers in that district, and it was resolved by the local authority that the drainage of the four districts should be considered as one system. The works were made, and the house of B was again assessed in respect of the expense of making the new works:—Held, that the local authority had power to charge B, as his house might be said to use the sewer into which its refuse flowed, within the meaning of s. 22. of 18 & 19 Vict. c. 121. *R.* v. *Bodkin*, 30 Law J. Rep. (N.S.) M.C. 38; 3 E. & E. 271.

In June an order of Justices was made, under the Nuisances' Removal Act, 1855 (18 & 19 Vict. c. 121), "on the owner" of certain premises to remove a nuisance, and in default the local board themselves commenced the necessary works for abating the nuisance; which were completed on the 7th of September, and the expenses were then paid. The real owner of the premises was abroad, and on the 21st of May he executed a power of attorney to the defendant to receive the rents for him. This reached the defendant on the 22nd of July, and the rent being payable yearly at Michaelmas, he received the past year's rent at the Michaelmas following. By the 2nd section of the act, "owner" includes the person receiving the rents for himself or as agent; and s. 19. enacts that expenses incurred in carrying out an order of Justices shall be money paid at the request of the person on whom the order is made; and in case of a nuisance caused by the default of the owner, the premises shall continue chargeable with such expenses:—Held, that the defendant was not liable under the 19th section to an action for money paid. *The Guardians of Blything* v. *Warton*, 32 Law J. Rep. (N.S.) M.C. 132; 3 Best & S. 352.

(D) INDICTMENT AND INFORMATION.

(*a*) *Nuisance indictable at Common Law.*

A canal company were empowered by an act of parliament to take the water of certain brooks and use it for the purposes of their canal; the water in one of the brooks at the time the act passed was pure, but it afterwards became polluted by drains, &c. before it reached the canal, and it was then penned back in the canal, and became a public nuisance:—Held, that the company were liable to be indicted for the nuisance, as there was nothing in the act compelling them to take the water, or authorizing them to use it so as to create a nuisance. *R.* v. *Pease* distinguished. *R.* v. *Bradford Navigation*, 34 Law J. Rep. (N.S.) Q.B. 191; 6 Best & S. 631.

Negligently blasting stone in a quarry, and thereby projecting large pieces of stone so as to endanger the safety of persons in houses and on the highways adjoining the quarry, is a misdemeanor indictable at common law. *R.* v. *Mutters*, 34 Law J. Rep. (N.S.) M.C. 22; 1 L. & C. 491.

A person is indictable for a common nuisance by indecently exposing his person in a public place, though the exposure be made in a place not open to the public, if the act be done where a great number of persons may be offended by it, and several see it. *R.* v. *Mallam*, 33 Law J. Rep. (N.S.) M.C. 58.

(*b*) *Under the Public Health Act.*

Brick-making is not necessarily such a "noxious or offensive business, trade or manufacture" as is contemplated by s. 64. of the Public Health Act (11 & 12 Vict. c. 63). *Wanstead Local Board* v. *Hill*, 32 Law J. Rep. (N.S.) M.C. 135; 13 Com. B. Rep. N.S. 479.

## NUN.

A professed nun is not *civiliter mortua*, nor by law disqualified from taking or holding property; neither is she prevented from dealing with it as she may think fit. *In re Metcalfe's Will*, 33 Law J. Rep. (N.S.) Chanc. 308; 2 De Gex, J. & S. 122.

## OUTLAWRY.

The outlawry of a plaintiff on civil process is the subject of a plea in abatement only, and the Court will not after verdict set aside the judgment or stay the proceedings for a defendant who has not pleaded the outlawry, although the fact of the outlawry did not come to the defendant's knowledge in time to plead it in due course. *Sowerby* v. *Wadsworth*, 33 Law J. Rep. (N.S.) Exch. 57; 2 Hurls. & C. 701.

## PARENT AND CHILD.

*Gift by Child to Parent.*

Gift by a daughter of a large part of her property to her father set aside with costs,—it appearing to have been made shortly after attaining twenty-one and while the father was acting as her guardian and was regarded with implicit confidence as her sole relative capable of managing her affairs. *Davies* v. *Davies*, 4 Giff. 417.

Where a gift is impeached on the ground of undue influence, in order to sustain the gift, the Court requires the clearest and most unequivocal evidence that the transaction was fully understood by and was the voluntary and deliberate act of the donor. Ibid.

*Gift by Parent to Child.*

A conveyance of property by a father to his son to give him a qualification to vote,—Held, not invalid, but a bounty. *May* v. *May*, 33 Beav. 81.

*Custody of Children.*

Up to the age of sixteen, a female child has no right to withdraw herself from the custody of her father against his will; and if she do so, this Court will order her to return to, or be restored to, her father, where there is no reason to suppose that he will not exercise proper parental control. *R.* v. *Howes*, 30 Law J. Rep. (N.S.) M.C. 47; 3 E. & E. 332.

## PARK.

As to evidence upon which deer in a park will be considered tame, see *Ford* v. *Tynte*, 31 Law J. Rep. (N.S.) Chanc. 177.

## PARLIAMENT.

[Provision made by 24 & 25 Vict. c. 53. for recording votes at elections for the Universities by means of voting papers.—The law regarding the registration of county voters in Scotland amended by 24 & 25 Vict. c. 83.—The Corrupt Practices Prevention Act (1854) continued by 24 & 25 Vict. c. 122. and 25 & 26 Vict. c. 109.—The law relating to corrupt practices at elections amended and continued by 26 Vict. c. 29.—The time for proceeding to election during the recess limited and defined by 26 Vict. c. 20.—The law relating to seats in the House of Commons of persons holding certain public offices amended by 27 & 28 Vict. c. 34.—The Election Petitions Act, 1848, amended in certain particulars by 28 Vict. c. 8.—Costs awarded in certain cases of private bills by 28 Vict. c. 27.—The law relating to county registration and to revising barristers amended in certain cases by 28 Vict. c. 36.]

### *1.—ELECTION OF MEMBERS.*

BRIBERY AND CORRUPT PRACTICES AT ELECTIONS.

### *2.—REGISTRATION OF VOTERS.*

(A) QUALIFICATION.
  (*a*) *For County Vote.*
  (*b*) *For Borough Vote.*
(B) DISQUALIFICATION.
(C) CLAIM TO BE RATED.
(D) NOTICE OF OBJECTION.
(E) PUBLICATION BY CLERK OF THE PEACE OF THE REGISTER.
(F) POWER AND DUTY OF REVISING BARRISTER.
(G) PRACTICE ON APPEALS.

### *1.—ELECTION OF MEMBERS.*

BRIBERY AND CORRUPT PRACTICES AT ELECTIONS.

[*Reed* v. *Lamb*, 29 Law J. Rep. (N.S.) Exch. 452; 8 Law J. Dig. 449; s.c. 6 Hurls. & N. 75.]

In an action, under the 17 & 18 Vict. c. 102, for bribery at an election of members of parliament, the plaintiff did not declare for eleven months after the issuing of the writ: — Held, that this was a wilful delay within s. 14. of the above act, which enacts, that such suit "shall be proceeded with and carried on without any wilful delay"; and that it was no answer to say that he declared within the time allowed by law, and that he could not sooner acquire the evidence and information necessary to allege the specific charges in the declaration. *Taylor* v. *Vergette*, 30 Law J. Rep. (N.S.) Exch. 400; 7 Hurls. & N. 143.

The 15 & 16 Vict. c. 57 (the Corrupt Practices at Elections Act), s. 8, after making it compulsory on all persons summoned by the Commissioners under that act to attend and answer all questions and produce all documents required, provides that no "statement" made by any person in answer to any question shall, except in an indictment for perjury in such answers, be admissible in evidence in any proceeding, civil or criminal:—Held, that a person, who had been examined before the Commissioners, and had, when under examination, referred to a document previously written by him, was not protected by the above section from having the document afterwards produced in evidence against him. *R.* v. *Leatham*, 30 Law J. Rep. (N.S.) Q.B. 205; 3 E. & E. 658.

### *2.—REGISTRATION OF VOTERS.*

#### (A) QUALIFICATION.

##### (*a*) *For County Vote.*

The members of a corporation seised of real property have individually no legal or equitable seisin in any of the property of the corporation, and are therefore not entitled to the franchise in respect of any freehold interest in such property; the right of the individual members being confined to a share in the profits, and not extending to any legal or equitable interest in the land itself. *Acland* v. *Lewis*, 30 Law J. Rep. (N.S.) C.P. 29; 9 Com. B. Rep. N.S. 32.

An inmate of the Shrewsbury Hospital at Sheffield, who is appointed for life, and who lives in separate apartments within the hospital, is not entitled to a vote for the county, for he is a mere inmate of an eleemosynary institution, and has no interest, either legal or equitable, in that portion of the hospital which is assigned to his use. The case therefore falls within the decision of *Heartley* v. *Banks*. *Freeman* v. *Gainsford*, 31 Law J. Rep. (N.S.) C.P. 33; 11 Com. B. Rep. N.S. 68.

Shareholders in a company, incorporated under the Joint-Stock Companies Acts, 1856, 1857, can have as such shareholders no freehold estate, legal or equitable, in any lands held by the corporation, their rights being confined to a proportionate share in the profits of the company. They are therefore not entitled to the franchise in respect of any freehold interest in lands held by the company. *Baxter* v. *Brown* distinguished. *Bulmer* v. *Norris*, 30 Law J. Rep. (N.S.) C.P. 25; 9 Com. B. Rep. N.S. 19.

The resolution of a committee of the House of Commons cannot deprive any one of a right of voting conferred by statute. Ibid.

The appellant, a parish clerk, was duly licensed by the bishop of the diocese; he also, by an ancient custom, received a fee at the opening of every grave in the parish, and the fees thus received amounted to 40*s.* a year. The duties incident to the opening of the graves were entirely performed by a sexton, who received similar fees:—Held, that the appellant was not entitled to a vote either as holding a freehold office or as having a freehold interest in land to the amount of 40*s.* a year. *Bushell* v. *Eastes*, 31 Law J. Rep. (N.S.) C.P. 44; 11 Com. B. Rep. N.S. 106.

The respondent was one of the six preachers of the cathedral church of Canterbury, to which office a stipend was attached of 32*l.* a year, paid according to the directions of the statutes of the cathedral by the treasurer of the dean and chapter, at the audit-room in the cathedral, out of the chapter revenues:—Held, that the respondent had no interest in land which entitled him to a vote. *Hall*

v. *Lewis*, 31 Law J. Rep. (N.S.) C.P. 45; 11 Com. B. Rep. N.S. 114.

The minister of a dissenting congregation occupied premises which were vested in trustees upon trust, *inter alia*, to permit the same to be occupied by the minister of the said congregation for the time being as his place of residence. The evidence before the revising barrister of the mode by which the minister was appointed was, that he undertook the duties of such minister for a probationary period of three months, in accordance with a request to that effect contained in a letter from deacons of the congregation; and that at the expiration of that time he received verbally a call in general terms to become the minister of the congregation, which he accordingly did, and in that capacity had ever since occupied the premises. The proof of the appointment for life consisted of the minister's own statement, that he so considered it, and of the evidence of one of the deacons that the appointment was made in the usual mode, and, in his opinion, was for life. The revising barrister having decided that these facts did not, in law, amount to an appointment for life, the Court affirmed his decision, as the facts did not necessarily prove that such general appointment operated as an appointment for life. *Collier* v. *King*, 31 Law J. Rep. (N.S.) C.P. 80; 11 Com. B. Rep. N.S. 14, 478.

The appointment of a parish clerk need not be by a deed. A parish clerk by virtue of his appointment was entitled to a twelfth share of 26 acres of freehold land in the parish (of sufficient value to confer a vote for the county) so long as he continued clerk, and his predecessors in the office had always enjoyed the same:—Held, that the clerk had a freehold interest in his share, in respect of which he was entitled to be registered. *Roberts* v. *Drewitt*, 18 Com. B. Rep. N.S. 48.

Whether or not a shareholder in a joint-stock company, unincorporated, has any direct interest in the property and income of the company, or only a right to a share of the profits, depends on the deed of association. In ordinary cases he has no such interest, either legal or equitable, and is not entitled to the franchise as a freeholder in respect of his shares in a company which is possessed of real estate. *Bennett* v. *Blain*, 33 Law J. Rep. (N.S.) C.P. 63; 15 Com. B. Rep. N.S. 518.

A member of a building society purchased freehold land of the society, in which he held one share. The society advanced the purchase-money of the land, the member mortgaging the land as a security. The member was bound to make certain monthly payments to the society, which amounted annually to 4*l.*, and upon his failure to do so the society might re-enter and take possession of the land. The land would have been clear of all payments when the member had paid instalments to the amount of 73*l.*, of which he had paid 71*l.* on the 31st of January, 1863. The annual value of the property unincumbered was 3*l.*:—Held, that the member had an interest of the clear yearly value of 40*s.*, and was entitled to vote as a freeholder. *Robinson* v. *Dunkley*, 33 Law J. Rep. (N.S.) C.P. 57; 15 Com. B. Rep. N.S. 478.

The houses of a village, in the manor of S, were occupied by certain persons who paid a small nominal rent to the lord of the manor. An alphabetical list of their names was inserted upon the court roll. One instance only had been known of a notice to quit having been served by the lord of the manor on one of these tenants, and then the tenant did not quit. No action of ejectment had ever been brought against any one of them. Applications to be admitted as tenants were made to the steward in the manorial court; and if the applicant claimed as purchaser from the outgoing tenant, he was almost always admitted; but if he claimed under a devise from the said tenant, his application was sometimes refused. Upon being admitted, his name was inserted in the list on the roll in place of that of the outgoing tenant. He then took the oath of fealty, but paid no fine to the lord of the manor. Changes of ownership also took place between the holdings of courts, by sale or pledge, no deed or document of any kind being used, nor any copy of the court-roll being furnished. Permission to sell was in such cases obtained from the land agent of the lord of the manor, and an undertaking in some cases given to pay over part of the purchase-money, to meet arrears of rent due from the outgoing tenant:—Held, without deciding under what description of tenure the tenants held, that as the tenure was a permanent interest, they were entitled to the franchise, under the 2 Will. 4. c. 45. s. 19, in respect of "lands or tenements of copyhold or any other tenure not freehold." *Garbutt* v. *Trevor*, 33 Law J. Rep. (N.S.) C.P. 73; 15 Com. B. Rep. N.S. 550.

An hospital was founded, and lands were devised to trustees upon trust to permit the rectors of two parishes to make certain fixed payments out of the profits to the inmates of the hospital. The inmates had each a separate room, and were removable for misbehaviour. There was a surplus income after making the specified payments not disposed of by the deed which created the trust:—Held, that the inmates of the hospital were not entitled to the surplus, and had not any equitable freehold interest in the lands of the charity, and were, therefore, not entitled to a county vote. *Steele* v. *Bosworth*, 34 Law J. Rep. (N.S.) C.P. 57; 18 Com. B. Rep. N.S. 22.

By an act of Geo. 1. Commissioners were appointed for building a bridge across the Thames from Fulham to Putney, after compensating the proprietors of the then existing ferries; and a pontage or toll was granted and vested in the Commissioners, to be applied as directed by the act; and by a subsequent act of Geo. 2, for more effectually enabling the Commissioners to complete such work, they were empowered to convey in perpetuity the tolls and income of the said bridge or ferries to such persons as would undertake to erect and maintain the bridge. The Commissioners accordingly contracted with certain persons, who subscribed the necessary funds, and became the shareholders of the bridge, to build and maintain the bridge and compensate the proprietors of the said ferries; and afterwards, the bridge having been built, the Commissioners, by a deed which recited the above acts of Geo. 1. and Geo. 2. and their powers thereunder, conveyed the said bridge and tolls and all such ground adjacent and belonging to the said ferries and every other matter which they were empowered to convey, by virtue of the said acts, to certain trustees in fee, in trust to permit the said shareholders

to receive the said tolls and income, and have the sole management thereof:—Held, that the Commissioners had no power to convey the land belonging to the bridge, which had become vested in them by virtue of the said acts, and that the said shareholders having knowledge of the Commissioners' title under the said acts, acquired nothing more under the said deed than the Commissioners could lawfully convey, namely, the tolls and income; and, consequently, that none of the shareholders had, as such, any freehold estate which could qualify him for a county vote. *Tepper* v. *Nichols*, 34 Law J. Rep. (N.S.) C.P. 61; 18 Com. B. Rep. N.S. 121.

An hospital was founded for certain bedesmen who are appointed for life, and who inhabit separate rooms into which the hospital is divided, and each of which is of the annual value of 4*l*. The hospital was founded before statute 29 Eliz. c. 5, which enables hospitals for the poor to be incorporated, and it is governed by rules made before that act, which refer to feoffees and their heirs, but none are known, and the warden and bedesmen manage the property without anybody interfering with them, and when a portion of it was lately sold for a railway, they signed the conveyance and received the proceeds, which they expended in erecting buildings on the land for their own benefit. The rules give power to remove a bedesman for certain offences, but no instance has ever occurred of a bedesman having been removed during his life:—Held, that each bedesman had an equitable freehold estate in his room, which entitled him to be registered as a freeholder. *Simpson* v. *Wilkinson* affirmed, and the case distinguished from those of *Heartley* v. *Banks* and *Freeman* v. *Gainsford*. *Roberts* v. *Percival*, 34 Law J. Rep. (N.S.) C.P. 84; 18 Com. B. Rep. N.S. 36.

Though the grantee of a rentcharge under a grant at common law is not entitled to be registered before he has been in the actual receipt of the rent (since until then he has only a possession in law, and not the actual possession required by 2 Will. 4. c. 45. s. 26), it is otherwise where the rentcharge is by a conveyance operating under the Statute of Uses; for then the person, to whose use the rentcharge is limited, is by virtue of the Statute of Uses at once in actual possession; and he may be entitled to be registered if the rent be of sufficient value, though he has not received any part of it. *Heelis* v. *Blain*, 34 Law J. Rep. (N.S.) C.P. 88; 18 Com. B. Rep. N.S. 90.

A person who occupies, as sole tenant, land for which he is liable to a yearly rent of less than 50*l*., and also, as tenant jointly with another, land at a yearly rent of less than 50*l*. for each joint tenant, is not, under 2 Will. 4. c. 45. s. 20. or 6 & 7 Vict. c. 18. s. 73, entitled to a county vote, though both tenancies are under the same landlord, and the share of the rent under the joint tenancy added to that under the sole tenancy exceeds 50*l*. a year. *Smith* v. *Foreman*, 34 Law J. Rep. (N.S.) C.P. 93; 18 Com. B. Rep. N.S. 144.

Shareholders of a freehold music hall, who were thereby qualified to be on the register of county voters, vested the fee of the hall by deed in trustees, who were to manage the hall and pay to the shareholders proportionate sums out of the profits:—Held, on the authority of *Bennett* v. *Blain*, that the shareholders had, after the execution of such deed, no direct interest in the land, but only a right to a share of the profits, and were therefore not entitled to vote as freeholders. *Freeman* v. *Gainsford*, 34 Law J. Rep. (N.S.) C.P. 95; 18 Com. B. Rep. N.S. 185.

*(b) For Borough Vote.*

A lay clerk, who occupied one of a certain number of houses, the freehold of which was in the dean and canons of Windsor, claimed to be entitled to a borough vote in respect of such occupation. The evidence was that there were more lay clerks than houses, and that the juniors received 20*l*. a year more salary till a house became vacant, when the salary was reduced by the 20*l*. The lay clerk might then take the house, but was not obliged to reside, as he could perform all his duties without residing in the house, but could not let it without the permission of the dean and canons. The claimant stated that he believed that he held his office for life, or so long as he did his duties; that he had never seen the statutes of the dean and canons, though he had no doubt of the existence of such statutes, but that he had no right of access to them, and he had made no attempt to see them, or procure any evidence from them, and that he knew no book relating to his office but the cheque-book, in which his name was entered, and which he saw once a month:—Held, that the revising barrister was right in deciding that the above facts did not shew a sufficient occupation, either as owner or tenant, within the meaning of the Reform Act, 2 Will. 4. c. 45. s. 27. *Bridgewater* v. *Durant*, 31 Law J. Rep. (N.S.) C.P. 46; 11 Com. B. Rep. N.S. 7.

Part of a house which has not become by actual severance an entire house will not confer a qualification on the occupier within the requirements of 2 Will. 4. c. 45. s. 27. *Wilson* v. *Roberts*, 31 Law J. Rep. (N.S.) C.P. 78; 11 Com. B. Rep. N.S. 50.

A, on the list of voters for the city of L in respect of "offices," had been in the exclusive occupation as tenant of the whole of the first-floor of a house, and resided elsewhere (within required limits). His landlord occupied the shop on the ground-floor and resided with his family on the upper floor. There were two outer doors to the house, one opening from the front street into the shop, and the other opening from the front street into a passage communicating with a staircase leading up to the first and upper floors. Both A and his landlord had a key of the latter, and locked and unlocked and passed through it when and as they pleased, and A had never been controlled by his landlord in the use of this door, which was the only mode of access A had to the first-floor, and into the passage communicating with the common staircase. There was also an inner door leading from the shop into the passage, and this was used exclusively by the landlord and his family:—Held, that the first floor, occupied by A, was part of a house, and had not become by actual severance an entire house in any sense, and was not sufficient to confer a vote for the city within the statute 2 Will. 4. c. 45. s. 27. Ibid.

Part of a house used for residence does not confer a qualification for a borough vote as being included under the words "house, warehouse, counting-house, shop, or other building," of 2 Will. 4. c. 45. s. 27. In order that part of a house may be a "house" within the meaning of 2 Will. 4. c. 45.

s. 27. there must be actual severance of the part from the rest of the house. *Cook* v. *Humber*, 31 Law J. Rep. (N.S.) C.P. 73; 11 Com. B. Rep. N.S. 33.

The dictum in *Toms* v. *Luckett*, that part of a house was a sufficient tenement within the words "other building" was not a part of the judgment in that case, and was not a question there submitted by the revising barrister for the decision of the Court. Ibid.

An occupier of part of a house may be qualified by reason of his occupation, although he may not have a key of the outer door, or may not have uncontrolled access to the tenement, or be free from any servitude or rights of entry reserved by the landlord, which affect only the value of the tenement,—if from other circumstances it appear that the party claiming the qualification is substantially tenant of a separate dwelling, and not merely of apartments in the house of another; the true question being, not what is the nature of the occupation, but what is the nature of that which is occupied. Ibid.

Where A rented and resided in one side of a house, the side consisting of rooms on the ground-floor having doors into the house, passage or hall, which was shut off from the street by an outer door, kept closed night and day; and also of rooms on the upper floor, approached by a staircase used exclusively by him, between which and the room on the other side of the passage (occupied by his landlord, the owner of the whole house, who resided on the premises with his family) there was no communication. A had a lock and key to each of his rooms, and both he and his landlord had keys of the street-door:—Held, that A's residence was not a house, but part of a house, without any actual severance from the rest; and that he was therefore not qualified in respect of the subject of occupation to be registered as a borough voter, under 2 Will. 4. c. 45. s. 27. Ibid.

The claimant was tenant of the whole of the upper floor of a building; his holding consisted of two rooms, opening on to the common staircase. The staircase was approached from the street by a passage at the end of which, next to the street, was a door, which could be closed, but had no lock or fastening of any kind. The other floors were occupied by other tenants in a similar way. The claimant had exclusive control of the door leading to his own two rooms, which were completely severed from the rest of the building:—Held, that he was tenant of a *house* within the meaning of the 2 Will. 4. c. 45. s. 27; and therefore entitled to the borough franchise. *Henrette* v. *Booth*, 33 Law J. Rep. (N.S.) C.P. 61; 15 Com. B. Rep. N.S. 500.

A person is not disqualified by 2 Will. 4. c. 45. s. 27. from being on a borough register of voters because he has not paid some arrear of a poor-rate in respect of which he was not rated and which had never been demanded of him, but which had been made on the qualifying premises prior to his occupation, and which the 17 Geo. 2. c. 38. s. 12. makes the incoming tenant liable to pay in proportion to the time he occupied—So held by *Erle, C.J.*, *Willes, J.* and *Keating, J. (Willes, J. dissentiente)*. *Flatcher* v. *Boodle*, 34 Law J. Rep. (N.S.) C.P. 77; 18 Com. B. Rep. N.S. 152.

In a borough in which freemen by birth were entitled to vote before the passing of the Reform Act, the right is preserved, by s. 32, not only to those whose fathers were entitled to their freedom previously to the 31st of March, 1831, but to the lineal descendants of all persons entitled to their freedom before that day. *Gaydon* v. *Pencraft*, 34 Law J. Rep. (N.S.) C.P. 53; 18 Com. B. Rep. N.S. 11.

A poor-rate allowed by two magistrates was made by the majority of the parish officers, but such majority was obtained by an assistant overseer joining in making the rate. This assistant overseer had been appointed by the vestry to perform all the duties incident to the office of overseer, except the collection of rates:—Held, that this rate was so far presumably valid that its non-payment by a party claiming a borough franchise was a disqualification to his being on the register of voters. *Baker* v. *Locke*, 34 Law J. Rep. (N.S.) C.P. 49; 18 Com. B. Rep. N.S. 52.

A, a market-gardener, who claimed to vote for the borough of K, occupied as tenant land of the yearly value of 20*l.* within the borough. When he first took the land there was no building upon it, but he erected a wooden structure with boarded sides, and a thatched roof supported by wooden posts let into the ground; there was a door to the structure fastened by a padlock, and it was used for storing potatoes. The revising barrister found that this structure was a "building" within the meaning of the 2 & 3 Will. 4. c. 45. s. 27, and that A occupied it as tenant, and was entitled to be registered as a voter:—Held, upon the principle laid down in *Watson* v. *Cotton*, that there was nothing in the description as given by the barrister to warrant the Court in disturbing his decision. *Powell* v. *Farmer*, 34 Law J. Rep. (N.S.) C.P. 71; 18 Com. B. Rep. 168.

*Quære*—Whether a pig-sty is a "building" within the meaning of the Reform Act. Ibid.

G, who claimed to have his name retained upon the register of voters for the borough of K, had been imprisoned for six months in a gaol more than seven miles from the borough, for an assault, without the option of paying a fine. The six months expired on the 25th of August in the year for which he claimed to be entitled to be so registered:—Held, that as G by his own criminal act had debarred himself of the power of residing within the borough, he had not the necessary qualification. *Powell* v. *Guest*, 34 Law J. Rep. (N.S.) C.P. 69; 18 Com. B. Rep. N.S. 72.

If a claimant for a borough vote has occupied the premises for which he claims for twelve months previous to the last day of July in the year in which he claims, and is of full age previous to the day of registration, it is sufficient, though he was not of full age during the whole year of occupation. *Powell* v. *Bradley*, 34 Law J. Rep. (N.S.) C.P. 67; 18 Com. B. Rep. N.S. 65.

A was possessed of three houses (one of which he himself occupied), each being under the value of 10*l.* Under a local act he compounded for the rates upon all the premises for one year. At the expiration of the year no new composition was entered into, but the overseers continued to assess the premises as before, though A had improved those in his own occupation so as to increase their yearly value to upwards of 10*l.* He then claimed to be

rated to the full rate in respect of the premises in his own occupation, but he did not at that time pay or tender the arrears of rates then due. No alteration was made in the rating. A afterwards, and before the 20th of July paid to the overseers a sum which was more than sufficient to satisfy all rates due in respect of the last-mentioned premises to the 5th of January, but made no specific appropriation of the money at the time of the payment; and the overseers placed the amount against all the rates due. The revising barrister having found that A was sufficiently rated, and that he had paid his rates so as to entitle him to be registered, the Court refused to interfere with his decision. *Powell* v. *Jones*, 18 Com. B. Rep. N.S. 83.

The claimant for a vote in the borough of K occupied, as tenant, land of the yearly value of more than 10*l*. within the borough. When he first took the land there was no building upon it. In 1862 an electioneering agent, having no interest of any sort in the land, caused to be erected a shed made of boards nailed to posts, and the claimant had used the shed, by keeping therein some of his agricultural implements. There was no evidence that the landlord had any knowledge of the shed having been placed on the land:—Held first, that though, as a fact, the revising barrister had found otherwise, this shed was not a "building" within the meaning of the 2 & 3 Will. 4. c. 45. s. 27, not being used either for residentiary or for commercial purposes. And secondly, that the claimant did not occupy it in the capacity of tenant; for there was nothing to shew that it had become parcel of the freehold so as to vest in the landlord subject to the interest of the tenant during the term. *Powell* v. *Boraston*, 34 Law J. Rep. (N.S.) C.P. 73; 18 Com. B. Rep. N.S. 175.

(B) DISQUALIFICATION.

A borough voter who, under an agreement with the guardians of the union, and without any order of Justices, has contributed 1*s*. 6*d*. weekly towards the maintenance of his father, the union defraying the residue of the expense of such maintenance, during the twelve months preceding the 31st of July, is not thereby disqualified from being registered for such year by the 36th section of the Reform Act, as having during such twelve months received parochial relief. *Trotter* v. *Trevor*, 32 Law J. Rep. (N.S.) C.P. 59; 13 Com. B. Rep. N.S. 48.

*Quære*—Whether obtaining medical attendance and medicine "on loan" from the guardians of a union, under the 58th section of the Poor Law Amendment Act (4 & 5 Will. 4. c. 76.) is a receiving of parochial relief within the 36th section of the Reform Act. *Devenish* v. *Digby*, 13 Com. B. Rep. N.S. 28.

In the borough of S there were certain freemen who were brethren of the hospital of St. B, there situate. The hospital was a corporation, and the brethren were each entitled, as such, to a house for his own occupation, and to a share in the profits of the hospital. The whole of the profits of the hospital were divided amongst the brethren. In order to be qualified to be elected as a brother, it was necessary that the person should either be above the age of fifty-six years, or lame, blind, or impotent, and unfit for husbandry:—Held, that the brethren were not recipients of alms so as to be disqualified, by the 2 Will. 4. c. 45. s. 36, from voting as freemen. *Smith* v. *Hall*, 33 Law J. Rep. (N.S.) C.P. 59; 15 Com. B. Rep. N.S. 485.

(C) CLAIM TO BE RATED.

An assistant overseer having been nominated by a resolution of vestry at a salary of 15*l*. a year, he was duly appointed to the office by two Justices, in accordance with the 59 Geo. 3. c. 12. s. 7. Subsequently a resolution to increase the salary to 25*l*. a year was passed by the vestry, but there was no re-appointment by the Justices, and the assistant overseer continued without intermission to perform the duties of his office:—Held, that the first appointment was good and subsisting, and that a claim to be rated, under the 2 Will. 4. c. 45. s. 30. and 14 & 15 Vict. c. 14. s. 1, might be well made to this assistant overseer. *Caunter* v. *Addams*, 33 Law J. Rep. (N.S.) C.P. 68; 15 Com. B. Rep. N.S. 512.

(D) NOTICE OF OBJECTION.

The production of the duplicate notice of objection stamped by the postmaster, pursuant to the 6 & 7 Vict. c. 18. s. 100, and duly signed by the objector, is evidence that the notice of objection retained by the postmaster to be sent to the voter, was signed by the objector, as required by s. 7. *Lewis* v. *Roberts*, 31 Law J. Rep. (N.S.) C.P. 51; 11 Com. B. Rep. N.S. 23.

An objector to a voter for the city of W inclosed the notice of objection required by s. 17. of 6 Vict. c. 18. to be given to the overseers of the parish, in a cover with other notices to other voters on the list for the same parish, and addressed the cover "to the overseers of the parish of A, in the city of W," and sent the parcel thus made up by post. The parcel reached the overseers in due time, and the notices it contained were by them included in their published list of objections; but no duplicate notice, stamped by the postmaster according to the provision of the 100th section, was produced before the revising barrister in proof of the service of any of the notices:—Held, that the statutable mode of proof of service, by the production of the postmaster's stamped duplicate, was unnecessary. *Smith* v. *Huggett*; *Smith* v. *James*, 31 Law J. Rep. (N.S.) C.P. 38, 41; 11 Com. B. Rep. N.S. 55, 62.

So also, where the objections were to county votes under section 7, and the cover inclosing them addressed "To the Overseers of the Parish of A. in the County of M." Ibid.

A person may have two places of abode, and may state either in the notice of objection delivered pursuant to 6 Vict. c. 18. s. 7. *Courtis* v. *Blight*, 31 Law J. Rep. (N.S.) C.P. 48; 11 Com. B. Rep. N.S. 95.

Whether or no, a house occupied by the objector, and which he uses occasionally, is or is not his place of abode, within the meaning of that section, is rather a questinn of fact than of law. Ibid.

Where the objector lived and carried on his business in F Street, but so far retained a former residence in C Street, of which he was tenant at will to his mother, as to keep some furniture there, and occasionally to sleep there, probably with the intention of again returning to it,—Held, that these circumstances would not warrant the Court in saying that the revising barrister was wrong in deciding that

F Street, and not C Street, was the objector's true place of abode. Ibid.

A notice of objection to a borough vote described the objector as being on the list of voters for the parish of P. The objector was on the 10*l.* household qualification list for such parish:—Held, that the notice was sufficient, although there was made out for such parish the reserved right list in addition to the 10*l.* household qualification list, and the notice omitted to state on which of such lists the objector's name was. *Samuel* v. *Hitchmough*, 32 Law J. Rep. (N.S.) C.P. 55; 13 Com. B. Rep. N.S. 3.

A notice of objection by an objector who was on the register of county voters as "Sedgwick, Leonard, M.A.—Fencote Hall—Freehold house and land—The Hall," was signed by him in his usual mode of signing; but though the christian name was legible, the surname and the word "Fencote," in "Fencote Hall," the objector's place of abode, were so illegible that a person, unacquainted with the objector's handwriting could not by ordinary diligence, without referring to the register or other extraneous assistance, have deciphered them, but he might have done so by such reference to the register:—Held, that the notice of objection was sufficient: inasmuch as it was the objector's ordinary signature, and there did not appear to have been any fraud, or want of due care on his part to give by his signature due information to the party objected to. *Trotter* v. *Walker (Hallam's case)*; *Trotter* v. *Walker (Aylam's case)*; *Sedgwick* v. *Trevor*, 32 Law J. Rep. (N.S.) C.P. 60; 13 Com. B. Rep. N.S. 30, 40, 42.

*Quære*—Whether the notice would have been sufficient if the objector's signature had been wholly illegible. Ibid.

B sent to the overseers of the borough of Kidderminster a notice of objection, signed thus: "G B of Wharf Hill, on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied in the parish of Kidderminster." The ancient parish of Kidderminster consists of the borough of Kidderminster, the foreign of Kidderminster, and the hamlet of Lower Mitton, for each of which separate and distinct overseers, churchwardens, highway surveyors, and other officers, are appointed. Separate and distinct rates are also made for each. There are two lists of persons entitled to vote for the parliamentary borough of Kidderminster, one of which is headed, "List of persons entitled to vote in the election of a member for the borough of Kidderminster, county of Worcester, in respect of property occupied within the borough of Kidderminster," and the other headed, "List of persons entitled to vote in the election of a member for the borough of Kidderminster, in the county of Worcester, in respect of property occupied within the foreign of the parish of Kidderminster." The name of G B was on the first-mentioned list:—Held, that G B had not sufficiently pointed out by his notice on which list his name would be found, and that therefore the notice was invalid. *Crowther* v. *Bradney*, 33 Law J. Rep. (N.S.) C.P. 70; 15 Com. B. Rep. N.S. 536.

F sent to one Sidney Rice Force a notice of objection as follows: "To Sidney Rice Force. I hereby give you notice that I object to the name of *Force Sidney Rice* being retained on the list of persons entitled to vote as occupiers in the election of members for the city of E." The form of notice No. II, in Schedule B, to the 6 Vict. c. 18, and directed to be used by s. 17, is as follows: "To Mr. —, I hereby give you notice that I object to *your* name being retained on the list of persons entitled to vote in the election of members (or a member) for the city or borough of ——":—Held, that the notice of objection was not rendered invalid by reason of the above-mentioned departure from the form in Schedule B, the inaccuracy being cured by s. 101, which provides that no notice shall be vitiated by any misnomer, provided that the person shall be described so as to be commonly understood. *Semble* also, that the notice would have been held good independently of that section. *Force* v. *Floud*, 33 Law J. Rep. (N.S.) C.P. 71; 15 Com. B. Rep. N.S. 543.

Service of notice of objection, addressed to a borough voter, and sent by the post, pursuant to s. 100. of the 6 & 7 Vict. c. 18, is proved by producing a duly stamped notice signed by the objector, although it be headed with the word "copy"; such heading not vitiating the document as a duplicate if in all other respects it corresponds with the notice left with the postmaster. *Bencsh* v. *Booth*, 34 Law J. Rep. (N.S.) C.P. 99; 18 Com. B. Rep. N.S. 111.

In the borough of D there were two parishes or townships, S and E, and there was a separate list of voters for each parish or township. The notice of objection described the objector as "on the list of voters for the borough of D and township of E":—Held, that the notice sufficiently indicated on which of the two lists the voter's name was to be found. *Oram* v. *Cole*, 34 Law J. Rep. (N.S.) C.P. 52; 18 Com. B. Rep. N.S. 1.

### (E) Publication by Clerk of the Peace of the Register.

The lists of county voters, transmitted by the revising barrister to the clerk of the peace, do not become the register for the ensuing year until signed and delivered by the clerk of the peace to the sheriff of the county. *Brumfitt* v. *Bremner*, 30 Law J. Rep. (N.S.) C.P. 33; 9 Com. B. Rep. N.S. 1.

Although by s. 47. the delivery by the clerk of the peace to the sheriff is required to be before the last day of November, a failure in this respect does not invalidate the register. Ibid.

Per *Byles, J.*—The signature by the clerk of the peace should be a manual signature. Ibid.

A revising barrister, while revising a list of county voters, in October, 1859, by inadvertence partially erased the name of W B, the appellant. He attempted to obliterate the erasure, and intending the name to remain on the list, he did not prefix his initials, but signed the page of the lists, and returned it to the clerk of the peace, who, misled by the partial erasure, erroneously omitted the name of the appellant in printing the revised lists for the purpose of forming the new register for the ensuing year. Being applied to, on the 12th of December, by a voter, for copies of the new register, the clerk of the peace, on the 29th of December (the printing having been delayed by unavoidable causes), sold two copies, neither of which contained the name of the appellant, to the voter. Similar copies were sold to other applicants, and amongst them to the appellant himself. These copies

had the names "B and W, deputy clerks of the peace," printed on the last sheets thereof respectively. The appellant having called attention to the erroneous omission of his name, the clerk of the peace, on the 13th of January, communicated with the purchaser of the incorrect copies, requesting their return, at the same time forwarding copies in which the name of the appellant was inserted in its proper place in alphabetical order, as 5638a, immediately after 5638, and before 5639. At this time, although the lists had been printed and bound up, they had not been signed by the clerk of the peace nor delivered to the sheriff. The name of the appellant was therefore interlined in print, as above mentioned, and the sheet with such interlineation was substituted for the original sheet in all the printed copies and in the bound copy of the lists, which bound copy was then signed by the clerk of the peace, and delivered to the sheriff on the 13th of January, 1860. At the revision, by another revising barrister, of this register, in October, 1860, the appellant proved the service, on the 18th of August, of a notice of objection, in his own name, on the respondent:—Held, overruling the decision of the revising barrister, that the sale, on the 29th of December, by the clerk of the peace, of the copies of the register from which the appellant's name had been omitted under the above circumstances, was not to be taken as the publication of the register, nor as an adoption by the clerk of the peace of the printed signatures to those copies, and that he was not only not precluded from making the alteration by inserting the omitted name, but was bound to correct the mistake according to the list signed by the barrister, and to insert, as he did, the appellant's name; and that the name being thus legally on the register, the appellant was entitled to object, and the revising barrister ought to have received the notice of objection. Ibid.

(F) Power and Duty of Revising Barrister.

A voter's qualification was described, in the third column of the list of voters for a county, as "tenant":—Held, a sufficient description of an occupying tenant at 50*l.* rent, under the 2 Will. 4. c. 45. s. 20; and that for the purpose of more clearly and accurately defining the qualification, the revising barrister ought to amend, under 6 & 7 Vict. c. 18. s. 40, by changing "tenant" into "farm as occupying tenant." *Birks* v. *Allison*, 32 Law J. Rep. (N.S.) C.P. 51; 13 Com. B. Rep. N.S. 12.

A and B were appointed to revise the list of voters for the county of L. At a Court held by A the name of a voter was duly objected to, and the voter not being present his name was struck off. The Court was adjourned, and on the following day the voter came before B, who was then presiding, and explained the cause of his absence, and prayed for a re-hearing. B consented to re-hear the case, and eventually restored the voter's name to the list. Upon an appeal to this Court, the case not stating whether on the second day the objector was present or not,—Held, that in the absence of this statement the decision of the revising barrister could not be supported. *Blain* v. *the Overseers of Pilkington*, 34 Law J. Rep. (N.S.) C.P. 55; 18 Com. B. Rep. N.S. 6.

The decision of this Court on appeal, though made final by 6 & 7 Vict. c. 18. s. 66, does not prevent the revising barrister from entering into a case in all respects similar to the one so decided, but affecting a different register and a different voter. *Roberts* v. *Percival*, 34 Law J. Rep. (N.S.) C.P. 84; 18 Com. B. Rep. N.S. 36.

(G) Practice on Appeals.

Though the appellant has given notice of his appeal to the respondent at the time he lodged his case with the Master, in compliance with the 6 & 7 Vict. c. 18. s. 62, the Court will not, under s. 64. of this act, postpone the hearing because there are not ten clear days, as required by the act, between the time when the notice was given and the day appointed for the hearing of appeals, if there was sufficient time after the decision of the revising barrister to have given the necessary notice. *Luckett* v. *Voller*, 31 Law J. Rep. (N.S.) C.P. 43; 11 Com. B. Rep. N.S. 1.

At an adjourned Court held by the revising barrister for a borough, on the 28th of October, he decided in favour of one of several objections taken to certain votes, and expunged the voters' names from the list; but, on application by such voters for a case, he consented to grant one if a point of law could be raised, provided the case were shewn to the objector's attorney, in order that he might raise in it the points which had been decided against the objector. The directions in ss. 42, 43, 44. of 6 & 7 Vict. c. 18, as to giving notice in writing of appeal, reading statement in writing in open court, signing the same then and there by the barrister, and appointing respondent to consolidated appeal, were not complied with, but both parties agreed at such court to waive all objections in point of form, and that the objector should appear as respondent, and the appeals be consolidated. There was no further adjournment of the Court, but the barrister directed the parties to come to him at his chambers, which were out of the borough. A case was afterwards prepared, and given to the objector on the 4th of November, but as he was then unable to shew it to his attorney, he refused to sign it, and returned it unsigned on the 5th of November; the barrister signed it at his chambers, making the objector respondent, and it was transmitted on the same day to the Masters of the Court, that being the last day for doing so; a copy of the case and notice of appeal were served on the same day on the objector, who refused to be bound thereby:—Held, that there was not a completed appeal, and the Court therefore made absolute a rule to strike the case out of the list of appeals. *Scott* v. *Durant*, 34 Law J. Rep. (N.S.) C.P. 81; 18 Com. B. Rep. N.S. 205.

## PAROCHIAL ASSESSMENT.

[See Rate.]

## PARTIES TO ACTIONS.

[See Action.]

By the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125. s. 56), the costs, charges, and expenses of and incident to the passing of that act, and preliminary thereto are to be paid by the Metropolitan

Board of Works:—Held, that the parliamentary agent who had been employed by certain persons to obtain that act could not sue such Board for his costs attending the passing of that act, as the persons whom the statute meant to be reimbursed by the Board were the persons who had employed such agent, and who, but for the statute, would have been ultimately liable for such costs. *Wyatt* v. *the Metropolitan Board of Works*, 31 Law J. Rep. (N.S.) C.P. 217; 11 Com. B. Rep. N.S. 744.

Covenant on a joint lease of certain land by two tenants in common, whereby they demised the land according to their several estates to the lessees, who covenanted with them and their respective heirs and assigns to repair. It then deduced a title to the plaintiffs as the assignees of one only of the undivided shares, traced the lease to the defendant's testator, and assigned a breach by him of the covenant to repair in the time of the plaintiffs:—Held, on demurrer, that both the tenants in common of the reversion at the time of the breach ought to have joined as plaintiffs in the action. *Thompson* v. *Hakewill*, 19 Com. B. Rep. N.S. 713.

## PARTIES TO SUITS.

(A) Necessary or Proper Parties.
(B) Joinder of.

### (A) Necessary or Proper Parties.

The plaintiff having in common with another person the right to use a particular trade-mark, sued alone for an injunction to restrain the defendants from using it, and for an account of profits, and payment to the plaintiff of what it should appear he was entitled to. Demurrer for want of parties overruled. *Dent* v. *Turpin; Tucker* v. *Turpin*, 30 Law J. Rep. (N.S.) Chanc. 495; 2 Jo. & H. 139.

If other parties are necessary for any part of the relief prayed, that is sufficient to sustain a demurrer for want of parties, and it is no answer to such demurrer to say that that part of the relief may be waived at the hearing. Ibid.

The 51st section of the 15 & 16 Vict. c. 86. held applicable to special cases. A B, who was out of the jurisdiction, was interested in a question arising on a special case. There being other parties having an interest identical with that of A B, the Court authorized the omission of A B's name in the special case. *In re Brown*, 29 Beav. 401.

The plaintiffs sold and conveyed some land to a building society, retaining an equitable mortgage on it for the purchase-money. The land was divided, and sold in lots to the members:—Held, that the plaintiffs could not maintain a suit against the purchasers of some of the lots to recover this debt, in the absence of the purchasers of the other lots. *Peto* v. *Hammond*, 29 Beav. 91.

A suit against a corporation to enforce public trusts must be filed by the Attorney General, and not by an individual member, though he alleges himself entitled to a separate benefit. *Evan* v. *the Portreeve, &c. of Avon*, 30 Law J. Rep. (N.S.) Chanc. 165; 29 Beav. 144.

Where a contract between several public companies had been acted upon for four years, it was held, that all the parties to the contract were necessary parties to a suit by a shareholder in one of the companies, to set it aside as *ultra vires*. *Hare* v. *the London and North-Western Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 280; 1 Jo. & H. 252.

Next-of-kin claimed restitution of trust funds from a trustee:—Held, that he was entitled to insist that the personal representatives of the tenants for life who received and applied the fund should be made parties to the suit. *Williams* v. *Allen*, 30 Law J. Rep. (N.S.) Chanc. 810; 29 Beav. 292.

An annuity charged on lands of Lord K was purchased by his solicitor T, in Lord K's lifetime. After his death the executor of Lord K filed a bill against T, praying a declaration that the purchase was made for the benefit of Lord K, and out of his money. T put in a plea for want of parties to the bill, on the ground that the judgment creditors of Lord K were not before the Court:—Held, affirming a decision of *Romilly, M.R.*, that the plea must be overruled, with costs. *Ford* v. *Tennant*, 30 Law J. Rep. (N.S.) Chanc. 631; 29 Beav. 452.

An administrator *ad litem* is sufficient representative for the purpose of a suit in equity, and a general administrator held not to be necessary. *Williams* v. *Allen*, 31 Law J. Rep. (N.S.) Chanc. 550.

A bill was filed, by the mortgagee of a term of years, against the trustee and executor of the mortgagor, who was also tenant for life of the mortgaged property, for a foreclosure or sale:—Held, that the persons entitled in remainder were not necessary parties. *Marriott* v. *Kirkham*, 31 Law J. Rep. (N.S.) Chanc. 312; 3 Giff. 536.

A defendant against whom an account was prayed died after bill filed, and the bill was thereupon amended by striking out his name and alleging that he died insolvent and had no personal representative. Upon its being objected, *ore tenus*, at the hearing, that the suit was defective for want of parties,—Held, that the bare allegation of "insolvency" was not sufficient, and the cause was directed to stand over, with leave to add parties by amendment or supplemental bill. *Cox* v. *Stephens*, 33 Law J. Rep. (N.S.) Chanc. 62.

Held also, that, the objection not having been made by affidavit or answer, no costs of the day could be given. Ibid.

A tenant for life, with power to appoint new trustees, parted with the whole of his interest in the settled property. He afterwards appointed two improper persons to be trustees. Upon a bill to remove such trustees, and also to administer the trusts and to make the tenant for life pay the costs,—Held, on demurrer by the tenant for life, that he had properly been made a party. *Raikes* v. *Raikes*, 32 Beav. 403.

A bankrupt who, by fraud committed before his bankruptcy, has acquired property which has passed to his assignees, cannot properly be made a defendant to a suit for setting aside the fraudulent transaction, either for the purpose of fixing him with costs or otherwise. *Gilbert* v. *Lewis*, 32 Law J. Rep. (N.S.) Chanc. 347; 1 De Gex, J. & S. 38; 2 Jo. & H. 452.

An information claiming payment of a rentcharge, instituted on behalf of a charity against the owners of some of the lands charged, may be sustained with-

out making the owners of the residue of the lands defendants, though the rule is otherwise in the case of a bill filed for the same purpose by a private person. *The Attorney General* v. *Naylor*, 33 Law J. Rep. (N.S.) Chanc. 151; 1 Hem. & M. 809.

Persons claiming a title purely adverse to a trust cannot be made parties to a suit for the execution of the trust, and *Talbot* v. *Earl of Radnor* (3 Myl. & K. 252), in which a contrary view was acted upon, will not be followed—per *Turner, L.J. The Attorney General* v. *the Portreeve, &c. of Avon*, 33 Law J. Rep. (N.S.) Chanc. 172; 33 Beav. 67.

Though the solicitor or agent of a trustee is not generally a proper party to a suit to recover the trust funds, yet the case is different where he has intermeddled with the performance of the trust. *Hardy* v. *Caley*, 33 Beav. 365.

A agreed to grant B a lease, but before he had done so he mortgaged the property to C with notice, who in no way contested A's right to the lease:—Held, that C was not a proper party to a suit for specific performance. *Long* v. *Bowring*, 33 Beav. 585.

A company held, under the circumstances, not to be a necessary party to a suit to impeach acts of its directors. *Gregory* v. *Patchett*, 33 Beav. 595.

To a bill for a general account against trustees, all the trustees or their representatives must in general be parties, and Consolidated Order VII. Rule 2. applies only where the sole question is, whether there has been a breach of trust or not, and where, if the breach of trust be established, there is a right to a decree against all the trustees. *Coppard* v. *Allen*, 33 Law J. Rep. (N.S.) Chanc. 475; 2 De Gex, J. & S. 173.

But whether there are not cases in which one only of several trustees may be sued in respect of joint receipts, *quære*. Ibid.

By a deed of inspectorship dated in August, 1851, containing the provisions usual in such deeds, and made between A, a debtor, of the first part, X, Y and Z, inspectors, of the second part, and A's creditors of the third part, a year was granted to A in order to wind up his affairs under the inspection of X, Y and Z, which term the inspectors had the power of extending to two years. Out of the moneys realized from the real estate of A, large sums were paid to his mortgagees, but no dividend having ever been declared among his unsecured creditors, B, who was one of such creditors, filed a bill in November, 1862, against Z (X having died about a year before the filing of the bill, and Y having been out of the jurisdiction of the Court since 1854), alleging improper retainer of balances and wilful default, and praying—that the trusts of the deed might be carried into execution; for an account of A's estate realized by Z alone or jointly with any other person or persons, or which but for his wilful default might have been so realized; and that Z might be charged with interest on the balances from time to time received and unapplied, with yearly rests. Z, by his answer, submitted to the Court that the personal representatives of X and Y were necessary parties to the suit. It appeared at the hearing that Z had had 151*l.* in his hands belonging to A's estate since 1856, applicable to the payment of a dividend to A's general creditors. It was decided, by *Stuart, V.C.*, that the personal representatives of X and Y were not necessary parties; that A's property was bound by a trust for the benefit of his creditors, and that Z had so acted as to make himself accountable to them as trustee, and an account was directed against Z with yearly rests at *5l.* per cent. per annum on the balances. On appeal by Z against the order, except so much thereof as directed the account against him of the moneys he had himself received, *Knight Bruce, L.J.* and *Turner, L.J.* discharged the decree so far as appealed against, with liberty to the plaintiff to amend within one month by adding parties, and ordered the deposit to be returned and the costs to be costs in the cause. Ibid.

Although a person claiming land by title paramount is not a proper party to a suit for specific performance, a person who, by virtue of an antecedent agreement with the vendor, claims to be interested in the purchase-money is a proper party to a suit by the purchaser to have the right to the purchase-money ascertained and for specific performance against the vendor. *The West Midland Rail. Co.* v. *Nixon*, 1 Hem. & M. 176.

(B) JOINDER OF.

If a father, on the marriage of his daughter, makes the intended husband a promise for her benefit, she alone cannot file a bill to enforce it. The husband and wife must be co-plaintiffs. *Laver* v. *Fielder*, 32 Law J. Rep. (N.S.) Chanc. 365; 32 Beav. 1.

A bill to redeem a mortgage on the real estate of a married woman should not be filed by husband and wife merely, but by the wife by her next friend, making her husband a co-plaintiff; and this is the right course, even where the husband is a bankrupt. *Smith* v. *Etches*, 1 Hem. & M. 558.

## PARTITION.

[See COSTS, IN EQUITY.]

An infant being entitled to one-ninth of a real estate, and it being for her benefit, the Court, instead of directing a partition, declared the costs a charge on the infant's share and ordered a sale of the whole estate. *Davis* v. *Turvey*, 32 Beav. 554.

As to the circumstances under which a sale will be ordered, instead of a partition of real estate, and for the form of order when one of the defendants is an infant and another is out of the jurisdiction,—see *Hubbard* v. *Hubbard*, 2 Hem. & M. 38.

A sale was directed in a partition suit of a freehold estate in which a married woman was interested for her separate use without power of anticipation; the Court having first made her costs a charge on her share, directed them to be raised by a sale. *Fleming* v. *Armstrong*, 34 Beav. 109.

## PARTNERS.

[See EXECUTORS—INSOLVENT (A).]

[The law of partnership amended by 28 & 29 Vict. c. 86.]

(A) PARTNERSHIP.

(*a*) *Constitution and Effect of.*

(*b*) *Dissolution.*

(1) *Time of Dissolution.*

(2) *Cause of Dissolution.*

(3) *Effect of Dissolution.*
(4) *Return of Premium.*
(5) *Accounts.*
(c) *Deed.*
(d) *Goodwill and Trade-Mark.*
(e) *Payment of Debts; Joint and Separate Estates.*
(B) LIABILITIES OF.

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## (A) PARTNERSHIP.

### (a) *Constitution and Effect of.*

A, an ironmonger, having supplied goods to the amount of 189*l.* to B & C, builders, agreed to join them in the purchase of some land for building, on the conditions that B & C should build the houses, A supplying the ironmongery required, and that on the completion and sale of the houses A should be paid the 189*l.* and the price of the ironmongery and no more, and that if no profit was realized A should be a loser; an agreement was accordingly entered into by all three with the landowner for the purchase of a piece of land, and the three bound themselves to complete buildings upon it according to certain plans, the vendor agreeing to make advances to the three to enable them to complete the building, and the three being jointly bound to pay the purchase-money, and the conveyance when all was paid to be to the three, or as they should direct. B & C having ordered timber of the plaintiff, it was supplied on their credit (the plaintiff being ignorant of A's having any interest in the building), and it was used on the building:—Held *(Wightman, J. dissentiente)*, that A was not jointly interested with B & C in such a way as to make him a partner and liable for the timber. *Kilshaw* v. *Jukes*, 32 Law J. Rep. (N.S.) Q.B. 217; 3 Best & S. 847.

In the absence of any evidence, the presumption is, that partners are equally entitled to the profits and equally liable to bear the losses of the business. *Collins* v. *Jackson; Jackson* v. *Collins*, 31 Beav. 645.

The law of partnership is a branch of the law of agency, and the test of partnership is not simply whether the alleged partner was to receive a share of profits, but whether he constituted his alleged co-partners his agents for carrying on business. The receipt of profits is only important as a consequence of such agency and a ground for inferring it in certain cases. *In re English and Irish Church and University Assur. Soc.*, 1 Hem. & M. 85.

The plaintiff and defendant were partners; they were joint-owners with B of some ships, as to which B acted as ship's husband, but the duties were principally performed for him by the defendant. There being no agreement on the subject between the parties, it was held that B was entitled to the profits derived as ship's husband, and that the plaintiff was not as partner entitled to participate in any share of those received by the defendant by arrangement with B. *Miller* v. *Mackay* (No. 2), 34 Beav. 295.

A, carrying on business by himself, joined with B and C, carrying on business under the style of "B & C" in an adventure of a wholly different description from the usual business of "B & C":—Held, by *Stuart, V.C.*, that the existence of the partnership between B and C did not in itself afford any ground for inferring that the profits of the adventure were to be shared otherwise than if B and C had been separate traders; and that, in the absence of evidence of agreement to any other effect, the profits must be divided in equal third parts between A, B, and C. *Warner* v. *Smith*, 32 Law J. Rep. (N.S.) Chanc. 573; 1 De Gex, J. & S. 337.

The adventure in question was for the supply of small-arms to a foreign government; and the arrangement to tender for the supply was verbally come to without any distinct agreement respecting the division of the profits. In the contracts for supply subsequently entered into with the representative of the foreign government, A signed separately, and B and C were made parties by the name of their firm, and signed in that character:—Held, by *Knight Bruce, L.J.* and *Turner, L.J.*, that the proper inference from the form and mode of execution of the contracts was that the adventure was undertaken by B & C as a firm, *i.e.*, as one person, conjointly with A as another person, and consequently that the profits ought to be divided in moieties, one to A and the other to B & C, and they decreed accordingly. Ibid.

When articles of partnership are clear and distinct, then partners are bound by them; when they are ambiguous or silent, the course of dealing between the partners regulates the mode by which this Court must deal with them, and in some cases the Court has allowed the constant usage of partners to supersede the articles. *Coventry* v. *Barclay*, 33 Beav. I.

By a partnership deed, annual rests were to be made and entered in a book and signed, and which were to be binding and conclusive on the partners; and in case of the death of a partner, the survivors had a right to take his share at the valuation appearing by the last annual rest. The rest was made in July, 1860, in the absence of H B (one of the partners), in which, according to the usual custom, the plant, &c. was taken at an arbitrary sum, without any distinct valuation. A copy was furnished to H B, who expressed no disapprobation. The book was signed by all the partners except H B, and he died two months afterwards:—Held, that the rest was binding on him and his executors, and that the latter could not require an actual valuation to be made of the partnership property. Ibid.

As to the right of a part-owner or partner in ships who acts as ship's husband to charge the usual commission,—*Semble*, that, in the absence of any agreement express or implied, he is not entitled. In a case in which no express agreement appeared, and books shewing the usual course of dealing were not produced at the hearing, an inquiry was directed. *Miller* v. *Mackay*, 31 Beav. 77.

A partnership between father and son, though admitted to exist as regards the world, was held, under certain circumstances, not to exist as between themselves. *Radcliffe* v. *Rushworth*, 33 Beav. 484.

From 1849 J R resided with his father and assisted him in his business. The sign-board, the invoices and the banking account were in the name of "R & Son." They drew and accepted bills under the same title, and executed a deed which described them as co-partners:—Held, nevertheless, after the death of the son in 1862, upon the evidence, that they were not partners *inter se*. The circumstances relied on were: the absence of any division of profits in the books which were kept by the son; the absence of proof of the son having any capital

or being entitled to receive any share of the profits; the fact of his having, when he ceased to reside with his father, made no request for an account of the profits, but accepted 1*l.* a week as a remuneration until his death (six months afterwards); and the testimony of the members of the family. Ibid.

A father took his two sons into partnership under articles by which it was agreed that the business should be carried on with the father's capital, which should remain his; that yearly stock-takings should be made; that the partners should share profit and loss in thirds; that each of the sons, besides his own share, should have 150*l.* a year out of the father's share; that repairs, &c., should be made out of profits; that before division of profits the father should have interest at 4*l.* per cent. on his capital; and that, in estimating profits, a certain discount should be taken off the mill and machinery. The partnership existed for ten years, during which time the valuation of the mill and machinery remained unaltered, no discount being taken. The 150*l.* a year to each son was charged against the business and not the father's share; each partner was credited with interest on the capital standing to his credit at the beginning of the year; and the profit was divided in thirds, each share being carried to the credit of the partners respectively:—Held, that this mode of dealing evidenced a new agreement, and that the accounts must be taken on that footing, and not upon the footing of the articles; and that the mill and machinery, whether they were, according to the articles, the property of the father or the partnership, must be treated as the property of the partnership. *Pilling* v. *Pilling*, 3 De Gex, J. & S. 162.

The bill made no reference to the accounts having been made in a mode inconsistent with the articles, and the decree directed an account of all dealings between the partners "as under the articles dated the 30th of December, 1850":—Held, that this was not a direction to take the accounts according to the articles, and that they ought to be taken according to the books. Ibid.

The partners being entitled to interest on their capital,—Held, that such interest must run until the principal was paid, although the partnership had been dissolved for several years. Ibid.

Statements by one of two persons that another is his partner, he not being so in fact, will not be evidence to render the other liable as an ostensible partner, the statements not having been made to the person who seeks to render the other liable, and not having come to his knowledge as a matter of notoriety, and it not being shewn that he has acted on the faith of such statements. *Edmundson* v. *Thompson*, 31 Law J. Rep. (N.S.) Exch. 207.

T and B negotiated for a partnership, and pending the negotiations T wrote to E that he had got a partner. The negotiations ultimately ended in an agreement for a future partnership between T and B; B in the mean time attending at T's place of business, and acting apparently as partner, representing himself to other persons as partner, and T introducing him to old customers as a partner. There was no evidence (except that of the letter written by T to E) that these representations ever came to E's knowledge, or that he was induced to supply goods on the faith of the representations that a partnership existed. In an action by E against T and B for goods sold and delivered, T having suffered judgment by default,—Held, that the statements made by T were no evidence against B. Ibid.

### (b) *Dissolution.*

#### (1) *Time of Dissolution.*

When partners carry on business under a deed of partnership, if they continue it after the period fixed for its duration, they will, in the absence of any other agreement, be held to continue it upon the terms of the original deed, and in the event of dispute the business will be wound up under its provisions. *Parsons* v. *Hayward*, 31 Law J. Rep. (N.S.) Chanc. 666; 31 Beav. 199.

If a partnership is carried on beyond the term fixed for its duration, it can only be dissolved by special notice, and in its absence no notice to dissolve will be implied. Ibid.

If a partnership entered into by articles for a term of years be continued without special agreement after the expiration of the term, the new partnership is a partnership at will only, and those provisions only of the articles which are applicable to a partnership at will are to be considered as binding on the new partnership. *Clark* v. *Leach*, 32 Law J. Rep. (N.S.) Chanc. 290; 1 De Gex, J. & S. 409; 32 Beav. 14.

Articles of partnership for a term of years contained a clause authorizing either partner in case of the negligence of his co-partner to dissolve the partnership by notice, and thereupon the negligent partner was to be considered as quitting the business for the benefit of the partner giving notice. The term expired, and the partnership was continued without special agreement:—Held, that the clause referred to could not be considered as imported into the new partnership contract. Ibid.

A partnership at will held dissolved as from the date of the filing of a bill which prayed for its dissolution. *Shepherd* v. *Allen*, 33 Beav. 577.

#### (2) *Cause of Dissolution.*

Partnership dissolved on the ground that the ill-feeling between the partners rendered it impossible that the business could be successfully or beneficially conducted. *Watney* v. *Wells*, 30 Beav. 56.

A partnership for ten years dissolved by decree of the Court at the end of three years, the relation between the partners being such that it could not be continued with advantage to either party. *Leary* v. *Shout*, 33 Beav. 582.

A firm was established to work a mine; each partner, after notice, was to be at liberty to sell his share, which the continuing partners were at liberty to purchase. The first partner gave notice to sell his share. The second partner afterwards became a confirmed lunatic; and the third partner then purchased the share of the first, and filed his bill for a dissolution of the partnership. The committee of the lunatic then filed a cross-bill, and insisted upon the clause of pre-emption, and a right to participate in the purchase:—Held, that the partners ought not to be compelled to carry on business with a lunatic or his committees; that the partnership must be dissolved; that notice of sale by one partner to the other before his lunacy was sufficient to bind his committees, and determine any right of pre-emption; but that the real value of the undertaking could only be ascer-

tained by a sale of the whole as a going concern. *Rowlands* v. *Evans; Williams* v. *Rowlands*, 31 Law J. Rep. (N.S.) Chanc. 265 ; 30 Beav. 302.

Determination of an agreement of the nature of a partnership at will held to result from the animus of the parties towards each other. *Pearce* v. *Lindsay*, 3 De Gex, J. & S. 139.

(3) *Effect of Dissolution.*

Where, on the dissolution of a partnership, one of the partners is entitled to a return of a proportion of the premium on the ground of failure of the consideration, the Court, in determining the proportion, will not always fix it by reference exclusively to the whole period for which it was agreed that the partnership should last, but will have regard to the conduct of the partners and the amount of benefit already obtained. *Bullock* v. *Crockett*, 3 Giff. 507.

Where two partners, carrying on the partnership in separate districts, agreed to dissolve, and that the partnership premises, stock and goodwill should be sold, and until sold should vest in receivers, the Court restrained one partner who had made use of the partnership property from carrying on the business on his own account in one district, and directed him to account for the profits. *Turner* v. *Major*, 3 Giff. 442.

Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract, and although, after notice of the retirement, the retiring partner is in a sense a surety (on the principle of *Oakeley* v. *Pasheller*) that authority will not be extended so far as to discharge him from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract. *Oakford* v. *European and American Steam Shipping Co.*, 1 Hem. & M. 182.

Continuing partners under such a contract (which *inter alia* gave the firm the power of appointing an arbitrator in case of dispute) entered into an agreement by which they waived a very doubtful point of construction on the original contract, and referred differences to arbitrators, one of whom was selected by themselves instead of by the firm as constituted at the date of the contract:—Held, that this was not such a variation of the original contract as to discharge the retired partner. Ibid.

(4) *Return of Premium.*

A partnership for fourteen years was dissolved before the end of two years. This Court, under the circumstances, refused to direct the repayment of any portion of the premium paid for a share in the business. *Airey* v. *Borham*, 29 Beav. 620.

A partnership between two solicitors was dissolved by mutual consent unconditionally; a bill was subsequently filed for a return of premium:—Held, that there was no foundation for such a claim. *Lee* v. *Page*, 30 Law J. Rep. (N.S.) Chanc. 857.

The plaintiff and defendant became partners for ten years, the plaintiff paying the defendant a premium of 1,000*l.* A quarrel occurred at the end of eight years, in which both parties were held to be in the wrong, and a dissolution took place:—Held, that the plaintiff was entitled to a return of 200*l.* of the premium. *Pease* v. *Hewitt*, 31 Beav. 22.

(5) *Accounts.*

As to the proper mode, in the absence of any agreement, expressed or implied, of taking the partnership accounts of bankers as between a surviving partner and the estate of the deceased partner —see *Bate* v. *Robins*, 32 Beav. 73.

A firm of two bankers were accustomed to keep the accounts, both of the customers and of the partners, at compound interest. One partner died: —Held that, in the absence of any special agreement, it was not proper to continue the accounts as between the surviving partner and the estate of the deceased partner at compound interest. Ibid.

Where each of two partners, upon entering into partnership, agreed to advance an equal sum of money in respect of capital, but did not make any stipulation as to interest on such sum, and it appeared that one of the partners advanced his share of capital, but that the other did not, the former was allowed, in taking the partnership accounts, interest at 5*l.* per cent. per annum during the period of the partnership upon the amount brought into the partnership by him, in addition to his share of the profits. So held by *Stuart, V.C.*, but afterwards overruled by *Lord Westbury, C.*, for want of evidence. *Hill* v. *King*, 32 Law J. Rep. (N.S.) Chanc. 79: 33 Law J. Rep. (N.S.) Chanc. 136.

If a partnership is dissolved by decree, and accounts are directed, it means they are to be taken according to any existing articles of partnership, or system on which the accounts have been taken up to the time of the dissolution,—no settled accounts being disturbed. *Watney* v. *Wells*, 32 Law J. Rep. (N.S.) Chanc. 194.

A decree dissolving a partnership terminates any existing articles, and if thenceforward the business is carried on for the purpose of winding up the affairs, the accounts must be taken in the ordinary form, allowing simple interest on the capital. Ibid.

A partner who overdraws his share of profits contrary to the provisions of the deed of partnership, cannot, in the absence of an express provision, be charged with interest upon the sums overdrawn. *Meymott* v. *Meymott*, 32 Law J. Rep. (N.S.) Chanc. 218 ; 31 Beav. 445.

A being entitled prior to 1845 to a lease, which expired on the 31st of December, 1848, of coal-mines called respectively the upper and lower seams, took B into partnership in 1845, for the purpose of working the upper seam. In 1849 a renewed lease of the mines comprised in the former lease was granted, not to A and B, but to A, for twenty-five years from the expiration of the former lease, and the partnership between A and B for working the upper seam was continued. A concurred in a large expenditure in the erection of works for winning the upper seam. There were no articles of partnership. In 1858 A filed a bill for a dissolution of the partnership:—Held, by *Stuart, V.C.*, first, that in the absence of express stipulation or of conduct which would bind both parties as completely as an express stipulation, the upper seam did not form part of the partnership property; secondly, that as A sought to dissolve the partnership a fair allowance ought to be made to B in taking the partnership accounts in respect of the above expenditure, if it should turn out on inquiry that that expenditure was made under such circumstances as that B if he

had known them would not have concurred in it. *Knight Bruce, L.J.* and *Turner, L.J.* affirmed this decision, holding that as the defendant had not succeeded in establishing the agreement which he had set up, the plaintiff was entitled to a decree for dissolution of the partnership. They however made some alterations in the accounts directed by the decree. *Burdon* v. *Barkus*, 31 Law J. Rep. (N.S.) Chanc. 521; 3 Giff. 412.

Partners having stipulated to devote their whole time to the business, and one having discontinued his services, an inquiry was, upon a dissolution, directed as to what was proper to be allowed to the other partner in respect of the business having been exclusively conducted by him. *Airey* v. *Borham*, 29 Beav. 620.

If a partner neglects a business which he covenanted to manage for a salary of 200*l.* a year out of the profits, and a suit is instituted for a dissolution of the partnership, a decree will be made, and the Court will not compel him to pay the costs up to the hearing, but any neglect or breach of covenant by such partner may be considered in taking the accounts. *Hawkins* v. *Parsons*, 31 Law J. Rep. (N.S.) Chanc. 479.

(c) *Deed.*

In 1856 an agreement was entered into between J H and R F D, under which the former was to carry on business during twenty-one years for the benefit of himself and of any person whom the latter might name within eight years. R F D was to make advances, and to become surety to a bank for J H's drafts, and the profits were to be applied, first, in payment of a salary and allowances to J H, then in repayment of the advances made by R F D with interest, and subject thereto were to belong as to one-third to J H, and as to two-thirds to the nominee of R F D. R F D died in 1861 without exercising his right of nomination, and in 1863 J H became bankrupt. On application by the executors of R F D to prove under the bankruptcy for the amount due to his estate under the arrangement,—Held, that the agreement did not constitute a partnership between J H and R F D, and that the executors of the latter were entitled to prove. *Ex parte Davis, in re Harris*, 32 Law J. Rep. (N.S.) Bankr. 68.

By a partnership deed, interest at 5*l.* per cent. was payable on the partners' capital, and it was provided, that, on death or retirement of a partner, the clear balance ascertained at the last stock-taking should be repaid with interest at 5*l.* per cent. by certain instalments. But upon the death of a partner the last stock-taking was to be conclusive "as to the share and amount of interest of the deceased partner in the business, and should be the sum to be paid to his executors," with interest from the last stock-taking in lieu of profits from that time:—Held, that the estate of a deceased partner was entitled not only to 5*l.* per cent. for interest, but also to 5*l.* per cent. for profits. *Browning* v. *Browning*, 31 Beav. 316.

By partnership articles, "the clear balance, as ascertained from the last stock-taking, of a deceased partner together with an additional capital (if any) was to be paid to his executors by instalments, and the last stock-taking was to be conclusive as to the share or amount of interest of the deceased partner in the business, and was to be the sum to be paid to his executors":—Held, that as additional capital was to be taken into account, so, impliedly, capital drawn out in the interval between the last stock-taking and the death of a partner must be deducted. Ibid.

The arbitration clauses commonly inserted in partnership articles apply only to questions arising upon the construction of the articles and to matters of internal dispute thereunder, and not to a case where it is charged that the partnership articles have been wholly broken through, and where a dissolution is sought on that ground. *Cook* v. *Catchpole*, 34 Law J. Rep. (N.S.) Chanc. 60.

Articles of partnership contained a clause providing for the reference to arbitration of all disputes and questions respecting the construction of the articles, the accounts and transactions of the partnership, and all matters relating to the partnership. A bill was filed by one of the partners against his co-partners, charging misconduct amounting to fraud, and praying for a dissolution of the partnership, an injunction and a receiver. On a motion to stay the proceedings in a suit, under the provisions of the articles and s. 11. of the Common Law Procedure Act, 1854,—Held, that assuming the charges in the bill to be true, the matter in dispute was not within the provisions of the arbitration clause, and that the motion must be refused, with costs. Ibid.

*Semble*—That the onus of proof that an arbitrator could not give effectual relief, lies on the person proceeding otherwise than by arbitration. Ibid.

A and B entered into partnership, and during the partnership were entitled to the capital stock in equal moieties. The partnership deed provided, that, if B died first his estate was to receive from A his one-half share in the business, but it made no corresponding provision for the event (which happened) of A's dying first:—Held, nevertheless, that the representatives of A (who died first) were entitled to half the capital stock. *Nelson* v. *Bealby*, 30 Beav. 472.

A father took his sons into partnership under articles providing that the capital then used by him in the business should be kept in it without allowing interest, and should remain the property of the father, the sons having during the partnership a share of the profits. The debts due to the business were estimated at 20 per cent. below their nominal value, but very nearly the full amount was realized. The father drew out of the business large sums, which appeared to be wholly applied in payment of debts due when the partnership was formed. One of the sons brought fresh capital into the business:—Held, that, in the absence of contract, the sons could not claim to treat the difference between the estimated and realized value of the debts as profits, but that the whole amount realized was to be treated as part of the father's capital. *Cooke* v. *Benbow*, 3 De Gex, J. & S. 1.

Held also, that the contract was not that the father should keep in the business the moneys employed there when the partnership was formed, and pay *aliunde* the debts then owing, but that the business should be carried on as it then stood for the benefit of the partners, and that therefore the payment of the old debts was not an improper withdrawal of capital. Ibid.

Held, that if the father had withdrawn capital for unauthorized purposes, he could not have been charged with interest, unless such withdrawal had been fraudulent or grossly excessive. Ibid.

Held also, in the absence of contract, that the son could not claim interest upon the capital brought in by him. Ibid.

*(d) Goodwill and Trade-Mark.*

Partnership stock includes the goodwill of the business and the right to use the trade-mark; and on the purchase, by a surviving partner from the executors of a deceased partner, of the partnership stock at a valuation, the value of the goodwill and the trade-mark must be taken into account. *Hall* v. *Barrows*, 33 Law J. Rep. (N.S.) Chanc. 204.

By articles of partnership it was provided, that if either of the partners should die before the expiration of the co-partnership, the surviving partner should have the option of taking to himself all the stock belonging thereto on paying to the executors of the party dying the value of his share. The firm were in the habit of using as a trade-mark the initial letters of the names of the original manufacturers of the articles sold; but the mark had ceased to be a representation that the articles on which it was impressed were the manufacture of the persons whose initials it bore, and had come to be a mere brand, denoting the quality of the articles. In taking the value of the partnership stock for the purpose of purchase by a surviving partner,—Held, reversing the decision of *Romilly, M.R.*, that the exclusive right to the trade-mark belonged to the partnership as part of its property, and must be included in the valuation. Ibid.

On the purchase by a surviving partner of the goodwill of the business, the goodwill should be valued on the footing that such surviving partner is entitled to set up the same description of business without purchasing. Ibid.

A & B carried on the business of chemists upon leasehold premises belonging to A. By the partnership articles, upon A's retirement, B was to have the right of purchasing the premises at a valuation:—Held, that the premises were to be valued irrespective of the advantages to be derived from the fact, that the business of chemist had been carried on there for thirty years. *Burfield* v. *Rouch*, 31 Beav. 241.

When a partnership is dissolved, each partner is entitled, in the absence of express agreement, to carry on business in the name of the old firm. *Banks* v. *Gibson*, 34 Law J. Rep. (N.S.) Chanc. 591; 34 Beav. 566.

The advertisement on the sale of a business as a going concern, with its goodwill, ought to state that the sale is without prejudice to the right of a surviving partner to carry on the same description of business. *Johnson* v. *Helleley*, 34 Law J. Rep. (N.S.) Chanc. 179; 2 De Gex, J. & S. 446; 34 Beav. 63.

The assignees in bankruptcy of A being about to sell A's stock in trade, B, at the request of A and of A's son C, agreed to purchase the same and to enter into partnership with C upon the understanding that A should be engaged as manager of the concern and give a bond not to carry on the same kind of business within a limited distance. The bond was given, and an undertaking to employ A as manager, though not for any definite time, was signed by B and C, and handed to him; and he was taken into employment accordingly:—Held, that there was a good consideration for the bond, and that notwithstanding the absence of complete mutuality, A must be restrained from carrying on business contrary to the terms of the bond. *Clarkson* v. *Edge*, 33 Law J. Rep. (N.S.) Chanc. 443; 33 Beav. 227.

*(e) Payment of Debts; Joint and Separate Estate.*

Soon after the commencement of a partnership between H & W it was discovered that H had drawn a large sum from the account of the partnership at the bankers' and applied the money to his own purposes. Thereupon the partnership was dissolved, and H assigned his share of the assets to W, in order that the money misappropriated might in the first place be restored, and the assets realized for the benefit of the two according to their respective interests. After the dissolution both W and H became bankrupt, and it was decided by the Commissioner that the whole assets were subject to a trust for the payment of the joint debts of W & H; but, the Lords Justices held, that the assignment by H converted his former joint estate into the separate estate of W. *Ex parte Walker, in re Walker; and ex parte Walker, in re Hardy*, 13 Law J. Rep. (N.S.) Bankr. 71.

The firm of L & M had an account with the C Bank, and M, one of the partners, had a separate account with the same bank. Upon the discounting by the bank of a promissory note of M he deposited with them certain shares as security for the same or for any sum or sums of money in which he might then be or might thereafter become indebted to them. The shares afterwards became the property of the partnership firm. L & M became bankrupt, being indebted in a large amount to the bank:—Held (reversing the decision of *Commissioner Holroyd*), that the bank was not entitled to hold the shares as a security for the joint debt, but for the separate debt only of M. *Ex parte M'Kenna, in re Laurence*, 30 Law J. Rep. (N.S.) Bankr. 20; 3 De Gex, F. & J. 629.

The partnership firm of W & G being in insolvent circumstances, a deed of dissolution was executed, whereby G assigned to W all his interest in the partnership assets, and W covenanted to pay the partnership debts and indemnify G from the liabilities of the partnership. Fourteen days afterwards W & G were adjudicated bankrupts:—Held, reversing the decision of one of the Commissioners, that the deed of dissolution was fraudulent and void as against the joint creditors, and that the whole of the partnership property, as it existed at the date of the deed, still continued to be joint property. *Ex parte Mayou, in re Edwards-Wood and Greenwood*, 34 Law J. Rep. (N.S.) Bankr. 25.

Where one of two partners has died, and after his death the surviving partner has become bankrupt, and the joint creditors have received a dividend under the bankruptcy out of the joint estate, but have not been paid in full, they will, in the administration in Chancery of the estate of the deceased partner, be entitled to come against so much only of his estate as may remain after payment of his separate creditors. *Lodge* v. *Prichard*, 32 Law J. Rep. (N.S.) Chanc. 775; 1 De Gex, J. & S. 610.

A ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bankrupt:—Held, that the firm had no interest in the ship, or any lien on it, for the amount of the purchase-money. *Walton* v. *Butler*, 29 Beav. 428.

Trust money was sent to A B (one of a firm of solicitors who was himself one of two trustees) for investment on mortgage. The money was paid into the bankers' to the account of the firm, and was afterwards drawn out by A B, and never invested:—Held, that the other member of the firm was liable. *Eager* v. *Barnes*, 31 Beav. 579.

(B) Liabilities of.

A & S were joint-owners of a ship. A worked the ship, defraying all the expenses and taking the entire management of her, and he took two-thirds of the gross earnings; S did nothing, and took the remaining one-third of the gross earnings:—Held, that the result of these facts was, that A hired the share of S in the ship, and that he was not the partner or agent of S so as to render S liable in an action for damages caused by the negligence of A. *Quære*, per *Byles, J.*, whether the same rule would hold in an action *ex contractu*. *Burnard* v. *Aaron*, 32 Law J. Rep. (N.S.) C.P. 334.

A, B, and C agreed that each should furnish 3,000*l.* worth of goods, to be shipped on a joint adventure, the profits to be divided according to the amount of their several shipments:—Held, that this did not constitute a partnership between the three, so as to make B and C responsible for goods bought by A, to furnish his quota of the cargo. *Heap* v. *Dobson*, 15 Com. B. Rep. N.S. 460.

## PATENT.



(A) What may be the Subject of a Patent.

Hoops of whalebone, cane and other substances, suspended from the waist and forming a petticoat, had long since been used by ladies. The plaintiffs took out a patent for using, for the same purpose, hoops made of steel watch-springs:—Held, that this was not an invention which could properly be made the subject of a patent. *Thompson* v. *James*, 32 Beav. 570.

Whether the application in the construction of a known machine of a material never before used for that purpose, for instance, *iron* instead of *timber* in the construction of floating-docks, can properly be the subject of a patent—*quære*. *Mackelcan* v. *Rennie*, 13 Com. B. Rep. N.S. 52.

(B) When Valid or Void.

(*a*) *Novelty generally.*

A patent is bad if the discovery or invention has been described or explained in a book written by a foreigner and exposed for sale, and published openly in England before the grant of the patent. *Lang* v. *Gisborne*, 31 Law J. Rep. (N.S.) Chanc. 769; 31 Beav. 133.

Inventions in mechanics are as totally different from inventions in economical chemistry, as the laws and operations of mechanical powers differ from laws of chemical affinities, and the results of analysis in the comparatively infant science of chemistry with its boundless field of undiscovered laws and substances. Where, therefore, prior to the date of an inventor's patent, something necessary for the useful application of a chemical discovery for manufacturing purposes remained to be discovered, which the plaintiff's invention supplied,—Held, that the manufacture with the materials and process in the specification was a new manufacture not in use at the date of the patent. *Young* v. *Fernie*, 4 Giff. 577.

The law recognizes the right of an inventor who finds out and supplies for commercial purposes an article known previously only as a chemical curiosity. Ibid.

This Court looks with distrust on experiments conducted with a view to litigation. Ibid.

The plaintiff took out a provisional patent for "certain improvements in the doors and sashes of carriages." The second part of the invention comprised in such patent related to a mode of applying certain metal fittings to sashes. The metal fittings themselves were old, but the mode of applying them was new. In the specification the plaintiff said, "I claim the metal fittings and the mode of applying the same, described herein as the second part of my invention." There was no description of metal fittings in the specification, which was not inseparably interwoven with the mode of applying. The specification contained words indicating that the invention might be applied to other doors and windows than those belonging to carriages, but not indicating that the patentee intended to claim such possible application to be comprised in his patent:—Held, that the metal fittings were not claimed separately, and therefore the patent was not void for want of novelty. Held also, that the claim should be construed with reference to the title, and confined accordingly to the doors and windows of carriages. *Oxley* v. *Holden*, 30 Law J. Rep. (N.S.) C.P. 68; 8 Com. B. Rep. N.S. 666.

Where a provisional specification was filed on the 17th of March, and afterwards abandoned by the inventor, who delivered another specification for the same invention on the 10th of April, in respect of which a patent was granted to him on the 12th of October, but dated as of the 10th of April, it was held, that there had not been a dedication of the

invention to the public by the abandonment of the first provisional specification, but that the patent was valid by 15 & 16 Vict. c. 83. s. 24. Ibid.

*(b) Application of known Article or Process to analogous Purpose.*

Letters patent were granted to W for an alleged invention of fishes and fish-joints for connecting the ends of rails used on railways. The fishes were made of iron, with a groove on the outer surface, for the purpose of preventing the square heads of the bolts passing through them and the rail from turning round, and also for the purpose of procuring greater strength with an equal weight of metal than could have been obtained from a fish of the same thickness throughout. Before these letters patent had been granted grooved iron plates, with bolts let into the groove, had been used for the purpose of fastening timbers placed vertically upon one another, or placed horizontally side by side. In one case of a bridge, a channelled plate with bolts had been used for the purpose of fishing a scarf joint where the ends of two timbers met together:—Held, in the Exchequer Chamber, reversing the judgment below, that the patent was bad, as even without reference to the case of the bridge, the use of grooves in pieces of iron for holding materials together by means of bolts and nuts had been given to the world, together with all its advantages, before the date of the patent in question; and that the supposed invention was a mere application of that old contrivance in an old way to an analogous subject, without any novelty or invention in the mode of applying that old contrivance to the new purpose. *Harwood* v. *the Great Northern Railway Co.* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 198; 2 Best & S. 194; in Ex. Ch. 222—affirmed by the House of Lords, 11 H.L. Cas. 654.

The plaintiff claimed as an invention the application of a double angle iron to the construction of hydraulic joints of telescopic gasholders. Before the plaintiff's invention similar hydraulic joints had been made by means of two pieces of single angle iron attached to a sheet of iron so as to form a trough. The jury found, first, that double angle iron had not been applied to the purpose of constructing hydraulic joints to telescopic gasholders before the date of the patent; secondly, that double angle iron was a known article of commerce, of a variety of sizes, and applied to a variety of purposes in the form in which the plaintiff claimed to use it:—Held, that this was an application of a known article to purposes analogous to those to which it had been before applied, and, therefore, not the subject of a patent. *Horton* v. *Mabon*, 31 Law J. Rep. (N.S.) C.P. 225; 12 Com. B. Rep. N.S. 437—affirmed in Ex. Ch. 16 Com. B. Rep. N.S. 141.

The plaintiff claimed as an invention an improvement in the construction of tubular boilers by casting them in one piece. Before the plaintiff's invention similar tubular boilers had been made in several pieces, which pieces were fastened together by means of iron cement. The jury found that the invention was one which was useful and beneficial to the public:—Held, that this was a mere application of the well-known process of casting to an article previously well known, and was therefore not the subject of a patent. *Ormson* v. *Clark*, 32 Law J. Rep. (N.S.) C.P. 8; 13 Com. B. Rep. N.S. 337—affirmed in Ex. Ch., 32 Law J. Rep. (N.S.) C.P. 291; 14 Com. B. Rep. N.S. 475.

*(c) When previous Patent for same Object incapable of being worked.*

The plaintiff obtained a patent for a new manufacture of a material to be employed in making capsules, and other purposes, consisting of combining lead with tin, by covering the lead with tin on one or both surfaces, and reducing the combined metal into thin sheets, suitable to the purpose to which it was to be applied. The mode of working described in the specification was by casting the lead and the tin into ingots, rolling each of the metals separately: the lead to about one-quarter of an inch, the tin to about one-twentieth the thickness of the lead, whatever that thickness might be; then rolling both the lead and tin together with considerable pressure, so as to make the metals adhere to each other, passing the strip of conjoined metal several times through the rollers to make the adhesion more complete, and to reduce it to the required thickness for the manufacture of capsules. The specification went on to say, that the new composed material might be applied for other purposes stated; it did not shew in what proportions the lead and tin were to be combined for those purposes, nor did it state that the proportions of about one to twenty were essential. The specification stated, that the plaintiff claimed as the invention, first, the manufacture of the new material, lead combined with tin on one or both its surfaces, by rolling or other mechanical pressure, as herein described; secondly, the manufacture of capsules of the new material of lead and tin combined by mechanical pressure, as herein described. In 1804 one Dobbs obtained a patent for an invention of plating, coating or uniting lead with tin, and also their various alloys or mixtures, which he denominated "Albion metal," and applied to the manufacture of cisterns, &c. His mode of coating the lead, or alloyed lead, with tin was by taking a plate or ingot of lead, or alloyed lead, and a plate of tin, or alloyed tin, of equal or unequal thicknesses, and, their surfaces being clean, passing them between the rolls of a flatting or rolling mill so as to make the metals cohere. He passed them several times through the mill, when necessary, until a sufficient degree of cohesion was obtained. It was found by the jury that the new metal of lead coated with tin had been produced by pressure previous to the plaintiff's patent; but that it had never been made for public use, or sold by a manufacturer in the way of his trade:—Held, by all the Court, except *Williams*, *J.* and *Willes*, *J.*, that the plaintiff's patent was void for want of novelty, on the ground that Dobbs's prior patent disclosed the same invention. Held, by *Williams*, *J.* and *Willes*, *J.*, that the plaintiff's patent was good, and not invalidated by Dobbs's; since Dobbs's patent was practically incapable of being carried into effect. *Betts* v. *Menzies* (Ex. Ch.), 30 Law J. Rep. (N.S.) Q.B. 81; 1 E. & E. 1020.

The judgment in this case was reversed in the House of Lords, where it was held that where A has in a specification described a result, but has not added such a statement of means as to make that result practically attainable, and B afterwards takes out a patent for the same result, but fully explains the means to be employed to attain it, the patent of

B is sustainable. *Betts* v. *Menzies* (House of Lords), 31 Law J. Rep. (N.S.) Q.B. 233; 10 H.L. Cas. 117.

### (C) SPECIFICATION.

The construction of a specification, as the construction of all other written instruments, belongs to the Court; but the explanation of the words or technical terms of art, the phrases used in commerce, and the proof and results of the processes which are described (and in a chemical patent the ascertainment of chemical equivalents) are matters of fact upon which evidence may be given, contradictory testimony may be adduced, and upon which it is the province and right of a jury to decide. In the comparison of two specifications, each of which is filled with terms of art, and with the description of technical processes, the duty of the Court is confined to giving the legal construction of such documents taken independently, but the comparison of the two instruments and ascertaining whether the words, as interpreted by the Court, and contained in one specification, do or do not denote the same external matter as the words, as interpreted and explained by the Court, contained in the other specification, is a matter of fact, and within the province of a jury. *Hills* v. *Evans*, 31 Law J. Rep. (N.S.) Chanc. 457.

The specification of a patent must be considered as amounting to a publication. In a question of the novelty of a patent, the antecedent statement in the prior patent must be such that a person of ordinary knowledge of the subject would at once perceive, understand, and be able practically to apply, the discovery without the necessity of making further experiments and gaining further information before the invention can be made useful. Ibid.

In construing a specification it is not competent to the inventor to pray in aid the provisional specification in order to explain or enlarge the meaning of the complete specification. *Mackelcan* v. *Rennie*, 13 Com. B. Rep. N.S. 52.

### (D) DISCLAIMER.

A patentee claimed by his specification "the application of the principle of centrifugal force to the flyers employed in" certain machinery for roving cotton and other fibrous substances, but declared that his improvements "apply solely to such part of the machinery called the flyers which is employed in connexion with the spindle for the purpose of winding cotton," &c. He attached drawings to his specification, and went on to say that these drawings and the specification represented "one particular and practicable mode of applying" his invention, but "I do not intend to confine myself to this particular method, but I claim as my invention the application of the law or principle of centrifugal force to the particular or special purpose above set forth, that is, to flyers used in machinery" for preparing cotton. He afterwards disclaimed "all application of the law or principle of centrifugal force as being part of my said invention, or as being comprised in my claim of invention contained in the said specification, except only the application of centrifugal force by means of a weight acting upon a presser so as to cause it to press against a bobbin as described in the said specification:"—Held, that this disclaimer did not extend the claim, but confined it to a particular mode of applying the principle of centrifugal force, and did not claim the discovery of that principle or the application of it except in a particular way, and that therefore the patent was good. *Seed* v. *Higgins* (House of Lords), 30 Law J. Rep. (N.S.) Q.B. 314; 8 H.L. Cas. 550.

Held also, that as the defendants applied it in a different way, their machine was not an infringement. And further, that the Judge at the trial, on seeing the difference between the two machines, ought to have told the jury that there was no evidence of infringement. Ibid.

The specification of a patent for improvements in embossing and finishing woven fabrics alleged the invention to consist in the use of rollers having any design grooved, fluted, engraved, milled or otherwise indented upon them. The disclaimer which was afterwards filed stated that the effect desired could only be produced by the use of a certain species of roller not particularly described in the specification, namely, a roller having circular grooves round its surface; and all other rollers were disclaimed. The Court held, that as the true invention resided entirely in the process described in the disclaimer, and as the specification did not describe, or even suggest, the form of roller that would effect the purpose, the specification was bad, and that the patent could not be supported. *Ralston* v. *Smith* (Ex. Ch.), 31 Law J. Rep. (N.S.) C.P. 102; 11 Com. B. Rep. N.S. 471—affirmed by the House of Lords, 11 H.L. Cas. 223.

A specification for an impracticable generality cannot by a disclaimer setting forth a specific process be turned into a grant for such process; though in one sense such process be comprised within the generality, but cannot be discovered to be within it without going through the same course of experiments as led to the discovery of the specific process itself. Ibid.

### (E) GRANT OF.

Notice of objections to the sealing a patent were filed and afterwards withdrawn. The costs of the objections and of the petition rendered necessary by them were ordered to be paid by the objector. *In re Cobley's Patent*, 31 Law J. Rep. (N.S.) Chanc. 333.

### (F) CO-PATENTEES.

A, B & C were co-patentees of an improvement upon a prior invention of which C was the sole patentee. B & C having worked the joint patent,—Held, that assuming the general rule to be that each of several co-patentees may work the joint patent on his own account, yet inasmuch as here A could not use the improvement profitably without the consent of C as owner of the prior patent, A was entitled to a third of so much of the profits made by B & C from the use of the joint patent as were exclusively due to the improvement on C's invention. *Mathers* v. *Green*, 34 Law J. Rep. (N.S.) Chanc. 298; 34 Beav. 170.

### (G) ASSIGNMENT AND REGISTRATION THEREOF.

The executors of a patentee assigned the patent, and registered the assignment, but the probate was not registered until afterwards:—Held, that the assignment was good, and that the title of the assignee was completed in accordance with 15 & 16

Vict. c. 83. s. 35. *Ellwood* v. *Christy*, 34 Law J. Rep. (N.S.) C.P. 130; 18 Com. B. Rep. N.S. 494.

(H) LICENCE TO USE.

The licensee under a patentee is estopped from disputing the validity of the patent during the continuance of the licence. *Crossley* v. *Dixon* (House of Lords), 32 Law J. Rep. (N.S.) Chanc. 617; 10 H.L. Cas. 293.

The appellants were the owners of patents for the manufacture of carpets. The respondent applied for a licence to use the patents, and it was agreed that certain machines, embodying the inventions of the appellants, should be prepared under their superintendence, the respondent paying for the machines, and also paying certain agreed royalties upon the carpets manufactured therewith. This agreement was acted upon, and whilst being acted upon the respondent obtained, from a different quarter, other machines, which also embodied the appellants' inventions, and used these machines as well as those supplied by the appellants. The appellants filed a bill in Chancery for an account of royalties in respect of the user of both sets of machines, whereupon the respondent, by way of defence to the appellants' claims in respect of the machines not obtained from them, disputed the validity of the appellants' patents: —Held, that the agreement constituted the respondent a licensee of the appellants, and that, so long as he thought fit to claim the benefit of the agreement in respect of the machines supplied by the appellants, he was estopped from denying the validity of the patents, and must pay royalties in respect of the user of both sets of machines. Ibid.

Held also, that no term being stipulated for the continuance of the agreement, the respondent might, if he chose, decline to pay royalties thereunder altogether, leaving the appellants to their remedy for infringement in respect of the use of any of the machines. Ibid.

An exclusive licensee of a patent has a right to use the name of the patentee to restrain any infringement of the patent, and an interlocutory injunction for that purpose will in a proper case be granted. *Renard* v. *Levinstein*, 2 Hem. & M. 628.

It is no sufficient answer to a motion for an interlocutory injunction in such a case that the defendant has volunteered to keep an account. Ibid.

If a patentee, in consideration of a royalty, grants to another licence to use the patent invention, and the latter uses it, the licensee cannot plead to an action for the royalty, that the invention was not new, or that the patentee was not the first inventor. *Noton* v. *Brooks*, 7 Hurls. & N. 499.

One who makes a patent article under a licence from the inventor, cannot, in an action against him for royalties, set up any objection to the novelty or utility of the invention or the validity of the specification; but, if the claim in the specification is susceptible of two constructions, one of which would make the specification bad, and the other and more natural one would make it good, it is competent to him to insist that the latter is the true construction. *Trotman* v. *Wood*, 16 Com. B. Rep. N.S. 479.

A licence to A to manufacture a patent article is an authority to his vendees to vend it without the consent of the patentees. *Thomas* v. *Hunt*, 17 Com. B. Rep. N.S. 183.

(I) INFRINGEMENT.

(*a*) *Action for.*

The specification of a patent reaping-machine described the improvements as having for their object the holding of the straw in a favourable position while being cut, and the more conveniently arranging, collecting and disposing of it when cut. Underneath a set of spear-head shaped fingers, placed at regular intervals apart from each other, was placed the cutting-blade, formed of a thin plate of steel, toothed upon its front edge and fitted into a groove, the blade having perfect freedom to slide from one side of the machine to the other. Wheel gearing, being set in motion by the horse attached to the machine, caused a reel or gatherer to revolve and so prevent the straws from being pressed forward when coming in contact with the cutting-blade, which had a rapid reciprocating motion imparted to it by the action of a crank and connecting-rod; the straws were thus speedily cut through and fell backwards on the platform. The blade was represented by two figures, the one blade being straight in the cutting edge, while the other was zigzag or indented. "In every case, however, it has been found (the specification stated) to be of great advantage to have the cutting edge toothed somewhat similar to a sickle, and to have those teeth divided into sections corresponding to the number of fingers, each section having one half of the teeth inclined in one direction, and the other half having the teeth inclined in the opposite direction." The inventor claimed "the construction of reaping-machines according to the improvements before described; that is to say, the constructing and placing of holding-fingers, cutting-blades and gathering-reels respectively, as before described, and the embodiment of those parts as so constructed and placed, all or any of them, in machines for reaping purposes, whether such machines are constructed in other respects as before described, or however else the same may in other respects be constructed": —Held *(Martin, B. dubitante)*, that the making of indented cutting-blades in sections, having half of the teeth inclined in one direction, and the other half inclined in the opposite direction, and resembling the blades figured and described in the specification, and capable of being used in the reaping-machines, was not an infringement of the patent. *M'Cormick* v. *Gray*, 31 Law J. Rep. (N.S.) Exch. 42; 7 Hurls. & N. 25.

The published description of a previous patent machine stated it to be "for improvements in that kind of the machine in which the grain is cut by the serrated edge of a straight and vibrating cutter operated by a crank, the grain being sustained by fingers. The blade is serrated like a sickle, except that the angle of the teeth is reversed for every alternate tooth. . . The fingers for supporting the grain are spear-formed": —Held *(Bramwell, B. dissentiente)*, that in an action for an infringement of the subsequent patent, the defendant was, by reason of this prior publication, entitled to the verdict on the plea that the manufacture was not new. Ibid.

Held, by *Bramwell, B.*, that in the absence of proof that the machine in its entirety was not new, the plaintiff was entitled to the verdict on that issue, notwithstanding the want of novelty in its separate parts. Ibid.

(*b*) *User.*

A patent was granted to an invention for the purification of gas by means of precipitated or hydrated oxides of iron, and the specification stated the mode of obtaining such oxides. The use of a natural substance containing precipitated oxide of iron was held not to be an infringement of the patent; but upon this substance being revivified in the manner described in the specification, an injunction to restrain the use of the substance so revivified was granted. *Hills* v. *the Liverpool United Gaslight Co.*, 32 Law J. Rep. (N.S.) Chanc. 28.

It is sufficient to constitute user of a patented article, that the same sort of benefit, however temporary and indirect, has been in fact derived from it as would arise from it in its ordinary use. It is immaterial whether the use of the article he active or passive. *Betts* v. *Neilson*, 34 Law J. Rep. (N.S.) Chanc. 537; 3 De Gex, J. & S. 82.

Ale was sent from Scotland to England for transhipment to India, in bottles covered with capsules made abroad, according to a mode of manufacture patented in England only:—Held, that the transitory resting in England of the bottles so covered constituted a user in infringement of the English patent; and an injunction, granted by *Wood, V.C.*, against such user of the patented article, was upheld by the Lords Justices on appeal. Ibid.

(*c*) *Certificate.*

The 43rd section of the Patent Law Amendment Act (15 & 16 Vict. c. 83), enacts that it shall be lawful for the Judge before whom an action for infringing letters shall be tried, to certify on the record that the validity of the patent came in question; and that "the record, with such certificate, being given in evidence in any suit or action for infringing the said letters-patent," shall entitle the plaintiff, on obtaining final judgment, to "his full costs, charges, and expenses, taxed as between attorney and client," unless the Judge shall certify that he ought not to have such full costs. *Bovill* v. *Hadley*, 17 Com. B. Rep. N.S. 435.

An action having been brought by a patentee (substantially) for the recovery of royalties under a due licence, a compromise was entered into before the plaintiff's case was closed, and an order of *Nisi prius* was drawn up, under which the defendant was to pay an agreed sum, and a verdict was to be entered for the plaintiff in the action for 40*s.* damages, and costs, with all "usual certificates." After the cause was thus disposed of, the presiding Judge, upon an *ex parte* application, indorsed on the record a certificate that the record in a certain action wherein Bovill was plaintiff, and Keyworth was the defendant, and the certificate thereon indorsed, was given in evidence at the trial of this action:—Held, that this certificate was improperly granted; the record and certificate in the former action not having been given in evidence, and it not being the circumstances of a "usual certificate" within the contemplation of the parties. Ibid.

(*d*) *Practice in Suits for.*

The defendant in a suit to restrain the infringement of a patent, has no right to have the issue of fact referred to a jury *ex debito justitiæ;* and where the issues raised have been already determined, such reference will in general be refused. But if it appear that there is a really doubtful question at issue, the Court will not decide it for itself if either party desire a jury. *Davenport* v. *Goldberg*, 2 Hem. & M. 282.

The defendant, having in ignorance infringed the plaintiff's patent, submitted and offered before suit to pay the amount of profits made, which were very trifling. At the hearing, though a perpetual injunction was granted, no costs were given, and an account was granted only upon the plaintiff's request and at his peril. *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

(K) Account of Profits.

The Court, in making an order for an account under 15 & 16 Vict. c. 83. s. 42, will only direct an inquiry into the profits actually made by the defendant, and will not direct a general inquiry into any other damages alleged to have been sustained by the plaintiff in consequence of the infringement. *Ellwood* v. *Christy*, 34 Law J. Rep. (N.S.) C.P. 130; 18 Com. B. Rep. N.S. 494.

The assignee of a patent is only entitled to an account of profits from the time that his title is complete, that is, when the assignment is completely registered. Ibid.

## PAUPER LUNATIC.

[See Lunatic.]

## PAYMENT.

[See Contract (C) (*a*) *Cochrane* v. *Green.*]

The plaintiff's attorney wrote to the defendant, who resided at some distance from plaintiff, requiring him to remit the balance of his account with the plaintiff, together with 13*s.* 4*d.* costs. The defendant remitted a bank bill for the balance of the account only, which the attorney did not return, although he refused to accept it as payment because his costs were not included:—Held, that this was evidence of payment for the jury. *Caine* v. *Coulson*, 32 Law J. Rep. (N.S.) Exch. 97; 1 Hurls. & C. 764.

Per *Martin, B.*, where a debt is paid before action brought, the plaintiff cannot recover the costs of his attorney's application. *Gordon* v. *Strange* and *Hough* v. *May* distinguished. Ibid.

## PEERAGE.

A claim of a barony by tenure was made by devisee (tenant for life) of the estate which was said to give the right to the peerage. A person who did not claim the estate was held to have no *locus standi* to be heard in opposition to the claim. *The Berkeley Peerage*, 8 H.L. Cas. 21.

Assuming that, in fact, there existed in the reign of Hen. 2, a barony of Berkeley, enjoyed by successive barons in respect of the possession of certain hereditaments, no legal right to be summoned to and sit in Parliament for such a barony can exist at the present day in any tenant for life or devisee of such hereditaments. Ibid.

The 11th section of the 12 Car. 2. c. 24. has not the

effect of preserving such barony by tenure, if it ever existed. Ibid.

The Committee for Privileges may in its discretion permit documents to be proved by printed minutes of proceedings before a former committee on the same peerage, but as a rule the production of the original documents will be required. Ibid.

*Semble*—That where the nature of the peerage and not the pedigree of the claimant is in question, a plate erected in St. George's Chapel, Windsor, on the installation of a particular person as Knight of the Garter, is not admissible in evidence to prove the description given of him. Ibid.

A report of the proceedings on another and different claim of peerage can only be referred to for the purposes of argument, but cannot be received as evidence. Ibid.

## PENAL SERVITUDE.

[The Penal Servitude Acts amended by 27 & 28 Vict. c. 47.]

## PENALTY AND PENAL ACTION.

[The law relating to small penalties amended by 28 & 29 Vict. c. 127.]

By the Croydon Improvement Act, 10 Geo. 4. c. lxxiii. a penalty of 200*l.* is imposed upon any gas or other company for suffering any impure matter to flow into any stream, &c., to be sued for by any common informer. By the 21st section of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), a like penalty is imposed for the same offence, such penalty (by s. 22.) "to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act":—Held, that the latter provision was *pro tanto* a repeal of the former. *Parry* v. *the Croydon Commercial Gas Co.*, 11 Com. B. Rep. N.S. 579.

A guardian, &c., of the poor knowingly supplying goods for any workhouse for profit, upon the verbal order of the master of the workhouse, renders himself liable to the penalty imposed by the 53 Geo. 3. c. 137. s. 6, as extended by the 4 & 5 Will. 4. c. 76. s. 51, although the master was not expressly authorized by the guardians to make the purchase, as required by the orders of the Poor Law Commissioners. *Greenhow* v. *Parker*, 31 Law J. Rep. (N.S.) Exch. 4; 6 Hurls. & N. 882.

A penal action is within the 3 & 4 Will. 4. c. 42. s. 22, and therefore the issue may be ordered to be tried in any other county than that in which the venue is laid. Ibid.

## PENSION AND PENSIONERS.

By s. 4. of 47 Geo. 3. sess. 2. c. 25. an assignment of a pension granted by the Crown to a military officer on his retirement from service is void. *Lloyd* v. *Cheetham*, 30 Law J. Rep. (N.S.) Chanc. 640; 3 Giff. 171.

A pension awarded by the late East India Company to a military officer on his retirement from service is assignable. *Heald* v. *Hay*, 31 Law J. Rep. (N.S.) Chanc. 311; 3 Giff. 467.

A pension awarded by the Secretary of State for India, subsequently to the Act for the better Government of India (21 & 22 Vict. c. 106), to an officer in Her Majesty's Indian army upon his retirement from service, and also an annuity granted by the Secretary of State for India to the same officer, in addition to his retiring pension, held to be assignable. *Carew* v. *Cooper*, 33 Law J. Rep. (N.S.) Chanc. 289; 4 Giff. 619.

## PERJURY.

### *Jurisdiction.*

The Judge of the Sheriffs' Court in London has no power to amend a summons issued upon a judgment recovered in a plaint by a single woman, by adding the name of a man whom she had married subsequently to obtaining the judgment:—Held, therefore, that the person against whom such judgment had been recovered could not be convicted of perjury committed by him upon the hearing of such an amended judgment summons. *R.* v. *Pearce*, 32 Law J. Rep. (N.S.) M.C. 75; 3 Best & S. 531.

An indictment for perjury against the prisoner alleged that S K, a beershop-keeper, was duly summoned to appear before Justices to answer an information for selling beer at his beerhouse between the hours of three and five in the afternoon of a Sunday; that S K appeared before the Justices; that the prisoner then appeared as a witness for S K, and swore that he was not in the beerhouse on the particular day, and that he had not been in the township on that day, or for a fortnight before. Perjury was assigned on these allegations of the prisoner. On the trial of the prisoner, it was proved that a policeman had reported to his superintendent that he had seen the prisoner in S K's beerhouse between three and five in the afternoon of the Sunday in question. The superintendent submitted this report to the magistrate's clerk, who thereupon filled up a summons, and the superintendent laid the summons so filled up before the magistrate, who read it and signed it without making any inquiries. The summons was not produced on the trial, but no objection was made to its non-production. S K appeared before the magistrates, in answer to the charge of having opened his beerhouse for the sale of beer between three and five of a Sunday afternoon, and called the prisoner as his witness. The prisoner then gave the evidence set forth in the indictment. The policeman, to prove the perjury, swore that he had seen the prisoner in S K's house between three and five on the day in question, and to corroborate the policeman two other witnesses were called; one swore that he had seen the prisoner in the township at two o'clock on that day, another that she had seen the prisoner between three and four on the road leading to S K's beerhouse and close to the beerhouse:—Held, that production of further proof of an information as the basis of the summons against S K was not necessary on the trial of the prisoner, as the magistrates had jurisdiction, on S K appearing before them, to convict him of the charge, though there had been no information or summons; secondly, that there was sufficient corroborative evidence of the policeman's statement.—*Quere*, per *Channell*, *B.* and *Mellor*, *J.*, whether, if the objection had been taken that the

summonses was not proved, the conviction could have been supported without it. *R.* v. *Shaw*, 34 Law J. Rep. (N.S.) M.C. 169; I L. & C. 579.

*Matter Material to the Inquiry.*

On the hearing of an application for an order of affiliation against H, in respect of a full-grown bastard child born in March, the mother, in answer to questions put to her in cross-examination, denied having had connexion with G in the September previous to the birth. G was called to contradict her; the Justices admitted his evidence, and he wilfully and falsely swore that he had had connexion with her at the time specified:—Held, by eleven of the Judges (*Crompton, J.* and *Martin, B.* dissenting), that although the evidence of G ought not to have been admitted to contradict the mother on a matter which went only to her credit, still, as it was admitted, it was evidence material to her credit; and, consequently, so far material in the inquiry before the Justices as to be capable of being made the subject of an indictment against G for perjury. *R.* v. *Gibbons*, 31 Law J. Rep. (N.S.) M.C. 98; 1 L. & C. 109.

On the trial of a plaint, the County Court Judge having decided that a debt was due from the defendant, while considering how it was to be paid, asked the defendant what was his christian name. The defendant wilfully and corruptly and falsely swore that his name was "Edward," and not "Bernard":—Held, that the defendant was liable to be indicted for perjury. *R.* v. *Mullany*, 34 Law J. Rep. (N.S.) M.C. 111; 1 L. & C. 593.

## PETITION OF RIGHT.

The prerogative of the Crown to plead double, or to plead and demur without leave of the Court, has not been taken away by the 23 & 24 Vict. c. 34, which regulates the proceedings on a petition of right. *Tobin* v. *the Queen*, 32 Law J. Rep. (N.S.) C.P. 216; 14 Com. B. Rep. N.S. 505.

To a petition of right under that act in which the suppliant sought compensation from the Crown for the seizure and destruction on the coast of Africa by one of Her Majesty's ships of a vessel of the suppliant as being wrongly supposed to be engaged in the slave trade, the Crown pleaded "that the several averments and statements contained in the said petition of right are not nor is any of them true in fact":—Held, that the Crown was entitled to deny in such general terms the whole of the statements in the petition relied upon by the suppliant as constituting his claim; and the Court refused to set aside or amend such plea, as being a plea which would prejudice the fair trial of the said petition. Ibid.

In a petition of right it was stated that a ship belonging to the suppliants, which was engaged upon the African coast and which was not registered as a British vessel, was seized and destroyed by an officer commanding one of Her Majesty's ships assuming to act under the authority of Her Majesty for the suppression of the slave trade, in pursuance of the statutes in such case made and provided. The suppliants stated that their vessel was not at the time it was so seized and destroyed in any way engaged in the slave trade, and prayed that they might be compensated for its loss, and for special damage which they had thereby sustained:—Held, first, that the officer by whom the alleged wrongful act was committed was not acting under the authority of Her Majesty, but in the performance of a duty imposed by act of parliament; secondly, that assuming him to have been engaged under the control and directions of the Crown, the act of which he was guilty was not done in execution of the powers to which he was restricted by act of parliament. But held, thirdly, that no proceedings in the nature of a petition of right to recover unliquidated damages could be maintained against the Crown for the trespasses of its officers or agents. *Tobin* v. *the Queen*, 33 Law J. Rep. (N.S.) C.P. 199; 16 Com. B. Rep. N.S. 310.

## PETROLEUM.

[The safe keeping of petroleum provided for by 25 & 26 Vict. c. 66.]

## PHYSICIAN.

[See MEDICINE and SURGERY.]

*Semble*—The rule that a physician shall not maintain an action for his charges, is founded upon the general custom of the profession not to charge; and there is nothing to prevent him from making a special contract that he shall be paid for his services, and recovering under the contract. *The Attorney General* v. *the Royal College of Physicians*, 30 Law J. Rep. (N.S.) Chanc. 757; 1 Jo. & H. 561.

## PLEADING, AT LAW.

[See PRACTICE, AT LAW—SET-OFF.]

(A) FORM AND REQUISITES GENERALLY.
- (*a*) *Certainty.*
- (*b*) *Argumentative Traverse.*
- (*c*) *Departure.*

(B) PLEAS.
- (*a*) *General Issue by Statute.*
- (*b*) *Never indebted.*
- (*c*) *Non acceptavit.*
- (*d*) *Nul Tiel Record.*
- (*e*) *To Action by Tenant in common against his Co-tenant.*

(C) EQUITABLE PLEADINGS.
- (*a*) *Pleas.*
- (*b*) *Replications.*

(D) IN CRIMINAL CASES.

### (A) FORM AND REQUISITES GENERALLY.

#### (*a*) *Certainty.*

The declaration alleged that the plaintiff being indebted to C for rent, and C having distrained his effects, the defendant being an attorney, and pretending that he was authorized by C to act as her attorney, and to enter into an agreement on her behalf, it was agreed between the plaintiff and the defendant, as such attorney, that in consideration of

the plaintiff paying certain charges and accepting a bill of exchange for part of the arrears of the rent, C would withdraw the distress and not take further proceedings for six months. Averment of performance by the plaintiff, and an allegation that defendant, pretending that he was authorized as C's attorney, distrained within six months, and the plaintiff trusting in the defendant's representations sued C, but was nonsuited by reason of the defendant not having been authorized by C, and by reason of the defendant, who was called as a witness to prove the authority of C, denying any authority from her, whereby the plaintiff suffered damage and was put to costs, &c.:—Held, that the declaration was bad for want of an express allegation that the defendant was not authorized by C to act on her behalf. *Oxenham* v. *Smythe*, 31 Law J. Rep. (N.S.) Exch. 110; 6 Hurls. & N. 690.

A plea of judgment recovered in a foreign court of competent jurisdiction must shew that the judgment so recovered is final and conclusive between the parties according to the law of the place where such judgment is pronounced. *Frayes* v. *Worms*, 10 Com. B. Rep N.S. 149.

(*b*) *Argumentative Traverse.*

To a declaration against the defendant as assignee of a lease of certain premises, alleging the non-payment of rent, he pleaded: first, that administration *de bonis non* of the lessee of the demised premises was granted to A, whom he afterwards married, and that neither he nor his wife ever entered into or took possession of the demised premises, nor did they vest in the defendant otherwise than as in and by the plea appears; secondly (after repeating the grant of administration and that the defendant married the administratrix), that the plaintiff sued the defendant and his wife as administratrix for the recovery of the same rent, and they pleaded *plene administravit præter;* that the plaintiff recovered judgment against them for the amount claimed, part thereof to be levied *de bonis testatoris*, and the residue to be levied of assets *quando acciderint;* thirdly (after repeating the matter alleged in the preceding plea), *plene administraverunt præter*, goods not sufficient to satisfy the judgment debt:—Held, per *totam Curiam*, that all the pleas afforded a good answer as an argumentative traverse that the defendant was assignee. Per *Channell, B.*—That the first plea was also good as shewing that the defendant, if liable at all, was only liable in a representative character, and that he never entered or took possession of the demised premises. Per *Pollock, C.B.* and *Pigott, B. (Martin, B. dubitante.)*—That the second plea was also good as a plea in the nature of a judgment recovered. Per *Martin, B.* and *Channell, B.*—That the third plea would have been bad, if it had not amounted to an argumentative traverse that the defendant was assignee. *Kearsley* v. *Oxley*, 3 Hurls. & C. 896.

(*c*) *Departure.*

Departure in pleading is ground of general demurrer. *Brine* v. *the Great Western Rail. Co.*, 31 Law J. Rep. (N.S.) Q.B. 101; 2 Best & S. 402.

Declaration, that the defendants wrongfully raised, made and continued an embankment of earth near the plaintiff's dwelling-house, by reason whereof large quantities of water flowed down to the house, rendering it damp and less fit for habitation. Plea, that the embankment was raised and continued by the defendants under the powers of certain acts of parliament. Replication, that, although the embankment was raised and continued under the acts, yet it is no bar, because the flowing of the water down to the plaintiff's house was occasioned by the wrongful construction, negligent and improper raising and making of the embankment, and the want of proper and sufficient drains to the same, and continuing it so wrongfully constructed and insufficiently drained, by reason whereof, after the completion of the embankment, the flowing of the water against the plaintiff's house took place:—Held, that the replication was good and no departure, by *Crompton, J.* and *Mellor, J.; dissentiente Cockburn, C.J.* Ibid.

A replication, "on equitable grounds," to a plea of infancy, that the defendant fraudulently contracted the debt by means of a false and fraudulent representation that he was of full age, is bad, on the ground of departure and disclosing no answer in equity. *De Roo* v. *Foster*, 12 Com. B. Rep. N.S. 272.

(B) PLEAS.

(*a*) *General Issue by Statute.*

The two companies, incorporated pursuant to the 6 Geo. 1. c. 18, for the purpose of granting marine insurances, are empowered by the 11 Geo. 1. c. 30. s. 43, in all actions of covenant, on any policy of assurance under their common seal, to plead generally that they have not broken the covenants of the policy:—Held, that this right of pleading generally was not taken away by the 5 & 6 Vict. c. 97. s. 3, which repeals so much of any act, commonly called "public (local and personal)," or of any act of a local and personal nature, whereby a party is enabled to plead the general issue, and give any special matter in evidence: for that that section must be read in conjunction with the preamble of the statute, and an action for a breach of a covenant in a policy would not result in "a trial for any matter done in pursuance of or under the authority" of the defendants' special acts, within the meaning of the preamble. *Carr* v. *the Royal Exchange Assurance*, 31 Law J. Rep. (N.S.) Q.B. 93; 1 Best & S. 956.

*Quære* — Whether the 6 Geo. 1. c. 18. and 11 Geo. 1. c. 30. are acts of a local and personal nature within the meaning of the 5 & 6 Vict. c. 97. Ibid.

(*b*) *Never indebted.*

"Never indebted" is a good plea to an action for calls founded on Colonial acts; such calls constituting a simple contract debt. *The Welland Rail. Co.* v. *Blake*, 30 Law J. Rep. (N.S.) Exch. 161; 6 Hurls. & N. 410.

To an action by a seaman for wages, a defence that the 189th section of the Merchant Shipping Act, 1854, prohibits any suit in a superior court for the recovery of wages under 50*l.* is not open under the plea of "never indebted," but must be pleaded specially. *Johnson* v. *Hilberry*, 3 Hurls. & C. 328.

(*c*) *Non acceptavit.*

The words "now overdue," in the form of declar-

ations on bills of exchange given in Schedule B to the Common Law Procedure Act, 1852, are part of the description of the bill, and are put in issue by the plea of *non acceptavit*. *Hinton* v. *Duff*, 31 Law J. Rep. (N.S.) C.P. 199; 11 Com. B. Rep. N.S. 724.

*(d) Nul Tiel Record.*

To a declaration alleging that the plaintiff at the Supreme Court of Victoria recovered the sum of 787*l.*, whereof the defendant was convicted, as by the record and proceedings thereof remaining in the said court fully appears, the defendant pleaded that there was no such record in the said court as in the declaration alleged:—Held, that the plea was bad as a plea of *nul tiel record* to a foreign judgment, and that it could not be supported as a traverse of a material allegation in the declaration. *Philpott* v. *Adams*, 31 Law J. Rep. (N.S.) Exch. 421; 7 Hurls. & N. 888.

*(e) To Action by Tenant in common against his Co-tenant.*

Where one tenant in common brings an action against his co-tenant, and the declaration takes no notice of the plaintiff's limited interest, but alleges an expulsion or total destruction, the defendant may pay money into court in respect of the damage to the plaintiff's share, and as to the residue plead *liberum tenementum* or traverse the plaintiff's property. *Cresswell* v. *Hedges*, 31 Law J. Rep. (N.S.) Exch. 497; 1 Hurls. & C. 421.

(C) EQUITABLE PLEADINGS.

*(a) Pleas.*

[EQUITABLE SET-OFF. See CONTRACT (C) (*a*). *Cochrane* v. *Green*—CONTRACT (C) (*d*).]

To a declaration in an action for the infringement of a patent the defendant pleaded that the patentee died; that his administrator granted by deed to S & A, and to such persons as they should from time to time license, empower or authorize in that behalf, exclusive liberty and licence to make, use and vend the said invention throughout England, Scotland, Ireland, Wales and Berwick-upon-Tweed, and that S & A granted and assigned to the defendant the exclusive liberty and licence, &c. To this plea the plaintiff replied on equitable grounds that by a certain other indenture, bearing even date with the deed of licence, and made between the administrator of the patentee of the first part, the plaintiff and five other persons of the second part, and S & A of the third part, reciting that by arrangement with the patentee, the parties of the second part were entitled to participate in the profits to be derived from the letters patent, and that S & A had cootracted with the parties of the first and second parts for the absolute purchase of a licence for the exclusive use of the invention, and that the contract and agreement were carried out by the said deed of licence in the fourth plea mentioned; it was witnessed, in pursuance, &c., that each one of the several parties agreed that S & A should not manufacture machines under or by virtue of the said licence for sale out of Great Britain and Ireland, of all which the defendant before the granting to him of the said licence had notice. The replication then alleged that the said S & A, by deed, reciting the facts above mentioned, assigned the licence to the defendant, and that by the said deed it was witnessed that the defendant did covenant to pay certain moneys to the said S & A, and that he would at all times thereafter observe and perform all the covenants, &c. on the part of the said S & A, not excepting the covenant that the said S & A would not manufacture machines under the said licence for sale out of Great Britain and Ireland, and should and would at all times save and keep harmless the said S & A from and against all actions, &c. for or by reason of the breach, non-observance or non-performance of the said covenants or any of them. The replication then went on to allege several breaches by the manufacture in England for sale out of England, &c., and the sale out of Eogland, of machines made according to the said invention or parts thereof:—Held, on demurrer, that the replication was bad, on the ground that it was impossible for the Court to do justice between the plaintiff and the defendant without bringing all the parties before it, which a Court of common law had no power to do. *Schlumberger* v. *Lister*, 30 Law J. Rep. (N.S.) Q.B. 3; 2 E. & E. 870.

A declaration—after stating an agreement, by which the plaintiff agreed to sell and transfer to the defendant the lease of a certain farm, subject to his being approved of as tenant by Lord S, and on the terms of the defendant paying down to the plaintiff the sum of 500*l.* as a deposit, and completing the purchase by a day then named—alleged that, in consideration that the plaintiff would dispense with the payment down of the 500*l.* and take an I O U of defendant for that sum, the defendant promised that he would pay the plaintiff the sum of 500*l.* as soon as he could write to his banker at B, and procure him to remit the same. Breach, non-payment of the 500*l.* Pleas—Fifth, that before the defendant could procure his banker to remit, the defendant was disapproved of as tenant by Lord S. Sixth, on equitable grounds, that before demand by the plaintiff of payment of the I O U the defendant was disapproved of as tenant by Lord S, and the plaintiff was thereby rendered unable to transfer the lease. Replication to the sixth plea—That before any disapproval of Lord S, the defendant applied to Lord S to accept him as tenant, and that afterwards, and before any disapproval, the defendant withdrew his application, and declined to Lord S to be accepted as tenant, and by the defendant's own act, and without any default of the plaintiff, procured Lord S to disapprove of him as tenant:—Held, that the fifth plea was a good answer to the plaintiff's claim. *Davis* v. *Nisbett*, 31 Law J. Rep. (N.S.) C.P. 6; 10 Com. B. Rep. N.S. 752.

*Semble*—That the sixth plea was bad, as it confessed a breach of the contract, entitling the plaintiff to the use of the 500*l.* until the time for the completion of the purchase, and did not shew that a Court of equity would restrain the plaintiff from proceeding in respect of such breach. Ibid.

Held, however, that the replication was a good answer to the plea, as it shewed that the disapproval of Lord S was procured by the act of the defendant himself. Ibid.

To a declaration on a joint and several promissory note given by the defendant and E to the plaintiff, the defendant pleaded, on equitable grounds, that he

joined in the note as surety for E, and that, at the time the note was made, the plaintiff, knowing this, agreed with the defendant, in consideration of his making such note as surety, that he (the plaintiff) would call in and demand payment of the said note from the said E within three years from the date thereof; which the plaintiff wholly omitted to do, whereby the plaintiff lost the means of obtaining payment from the said E, who had since become insolvent:—Held, that this plea disclosed a good equitable defence. *Lawrence* v. *Walmsley*, 31 Law J. Rep. (N.S.) C.P. 143; 12 Com. B. Rep. N.S. 799.

A and B, merchants in Australia, agreed each to buy gold-dust as a joint speculation, and to divide the profit, if any, on a re-sale, by giving A half the profit of the gold-dust bought by B, and giving B half the profit of the gold-dust bought by A. Having each bought a certain quantity of gold-dust, they then entered into a further agreement, that each should consign his gold-dust to the plaintiffs for sale as on their joint account, and that each should instruct the plaintiffs to divide the net proceeds, and to credit A with one moiety and B with the other moiety. B accordingly consigned the gold-dust so bought by him to the plaintiffs on the joint account of himself and A, with direction to sell the same, and give credit for one moiety of the proceeds to A, and the other moiety to himself. A also consigned the gold-dust bought by him to the plaintiffs for sale, but unintentionally omitted to inform the plaintiffs that it was consigned on joint account of A and B, and to instruct the plaintiffs as to the division of the proceeds; and B wrote to the plaintiffs, telling them that if A had so omitted to instruct them as to the gold-dust sent by A, they were not to pass the half profits of B's gold-dust to the credit of A. The plaintiffs wrote to A, informing him that they would pass to his credit half the proceeds of the said gold-dust, and they subsequently received both consignments, and having sold them, gave B credit as well for a moiety of the proceeds arising from the sale of the gold-dust sent by A, as also for the whole of the proceeds arising from the sale of the gold-dust sent by B, setting the same off against a debt due to them from B, who had become bankrupt between the time of his consigning and the sale of such gold-dust. After the plaintiffs had so given B credit for the whole of the proceeds of B's consignment, and B had become bankrupt, B informed the plaintiffs that A was entitled to a moiety thereof:—Held, that A had a right in equity to such moiety, and to set off the same by way of equitable defence to an action of debt against him by the plaintiffs. *Elkin* v. *Baker*, 31 Law J. Rep. (N.S.) C.P. 177; 11 Com. B. Rep. N.S. 526.

The defendants, the East India Company, being entitled by escheat to real property of S in India, in consequence of his will not being executed to pass such estate, and he being illegitimate, granted it, together with all the rents and profits which had arisen between the death of the testator and the date of the grant, to the plaintiffs, in trust for the persons entitled to the personal estate. To a declaration on this grant, averring that the company held and enjoyed the land, and took and had and received to their use the rents and profits of the land from the testator's death to the date of the grant, and alleging the non-payment to the plaintiffs, as a breach, and also to a count, alleging that the Crown, being entitled by escheat, had granted to the plaintiffs the rents due from the defendants, the defendants pleaded, as an equitable defence, that the testator, by will, appointed P his executor in India, who agreed with the officers of the company to grant a lease of the property, and they, without the company's knowledge, entered into occupation, and the rent was paid, to the date of the grant, by the government of India, to P during his life, and, after his death, to T, his executor, and that the government of India and the company were ignorant of the fact that the will of the testator was invalid, and that the property had escheated to the Crown or to the company, and that notwithstanding the plaintiffs were aware of such payment, they were now suing the defendant for the amount of such rents, and that the parties interested in the will were the same persons as those represented by the plaintiffs, and that the company were induced to make the grant sued upon in consequence of, and upon the faith of, the statements in a petition, on behalf of the plaintiffs, setting out all the facts, and alleging that the Crown had refused to entertain any memorial as to the escheated property until the concurrence of the company had been obtained, and which petition stated, among other things, that T was then in possession of the rents and profits; and the plea averred that the directors, at the time of the grant, had no knowledge that the company had been in possession:—Held, that the plea was an answer to the action; and, *semble*—That it was a good plea in law. *Billing* v. *the East India Company*, 31 Law J. Rep. (N.S.) Exch. 240.

To a declaration against T W & J C H for not loading according to the terms of a charter-party, the defendants pleaded, on equitable grounds, that they entered into the charter-party solely as agents of D & Co., and that before they signed it was agreed between the plaintiff and the defendants that the defendants were only to sign as such agents so as to bind D & Co., and were not to make themselves liable as principals for the performance of the charter; that they signed the charter in the following manner: "For D & Co., T W & J C H, agents," the defendants and the plaintiff *bona fide* believing at the time that the defendants having so signed would not be personally liable as charterers, notwithstanding the charter professed to be made between the plaintiff as owner and the defendants as merchants and freighters; that the defendants had power to bind D & Co. by signing the charter as their agents, and that D & Co. are bound by the charter; and that the plaintiff is inequitably taking advantage of the mistake in drawing the charter so as to make the defendants personally liable, contrary to the intention of the plaintiff and defendants:—Held, (affirming the judgment of the Court of Exchequer, 30 Law J. Rep. (N.S.) Exch. 273; 6 Hurls. & N. 768) a good equitable plea. *Semble*—per *Willes, J.* that the plea raised a good defence at law. *Wake* v. *Harrop* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 451; 1 Hurls. & C. 202.

To a declaration on a contract for the sale of 150 cases of oil by the plaintiffs to the defendants at a certain price per gallon, to be cleared and paid for in fourteen days, alleging, as a breach, that, although the defendants had cleared a portion of the cases,

they had not cleared the residue, nor paid for the cases, according to the contract. The defendants pleaded, by way of equitable defence, that the contract did not relate to any specific cases of oil, but was a contract that the cases of oil should agree with a certain sample then shewn to the defendants, and that the brokers, who negotiated the contract, and afterwards wrote out the bought and sold notes, by mistake omitted to state that the cases of oil were to agree with the sample, and that through inadvertence the mistake was not discovered till long after the fourteen days, and after the defendants had cleared the portion of the cases so alleged to have been cleared by them; that the only cases which the plaintiffs were ready and willing to sell did not agree with the sample, and were of less value, and that as soon as the defendants discovered this they gave notice to the plaintiffs of their refusal to be bound by the contract:—Held, on demurrer, a good plea, as the contract had been put an end to by the default of the plaintiffs, and it would be useless for a Court of equity to reform it. *Borrowman* v. *Rossel*, 33 Law J. Rep. (N.S.) C.P. 111; 16 Com. B. Rep. N.S. 58.

To a count in trespass for cutting down and carrying away timber growing on the plaintiff's land, the defendant pleaded, for defence on equitable grounds, that the person who devised the land to the plaintiff had, by parol agreement, sold certain timber growing thereon to the defendant, with liberty for him to go on the land from time to time to cut it down and carry it away, paying for it as he took it; and that the defendant had, during the lifetime of the testator, cut down, carried away and paid for a portion of the timber sold, and that the alleged trespass was committed in further pursuance of the agreement. On demurrer, the plea was held to be bad, on the ground that a Court of law could not do final justice between the parties. *Wakley* v. *Froggatt*, 33 Law J. Rep. (N.S.) Exch. 5; 2 Hurls. & C. 669.

P borrowed a sum of money from a loan society of which he was a member, and the defendants, who were not members of the society, joined him in a bond and promissory note for the amount. By the terms of the loan P was to repay the money by weekly instalments. One of the society's rules directed the managing committee to inform the sureties when the instalments were four weeks in arrear, and empowered them to commence legal proceedings against the sureties. P died in 1859, after having repaid a portion of the loan, but being at the time of his death more than four weeks in arrear. The defendants were not informed of this till an action was brought in 1862 on the bond and note:—Held, that the rules of the society formed no part of the defendants' contract so as to afford them any ground of equitable defence to the action. *Price* v. *Kirkham*, 34 Law J. Rep. (N.S.) Exch. 35; 3 Hurls. & C. 437.

The defendant agreed to buy from the plaintiff a quantity of cotton "to be delivered, at seller's option, in August or September, 1864; payment within ten days from date of invoice." The plaintiff afterwards gave notice to the defendant that the cotton was ready for delivery on a certain day in August, and that the invoice would be dated from that day:—Held, that the plaintiff, having exercised his option, was bound to deliver the cotton in August; and that the non-delivery in that month was a good equitable defence to an action against the defendant for not accepting the cotton. *Gath* v. *Lees*, 3 Hurls. & C. 558.

By articles of agreement, H agreed with W (the plaintiff) to complete certain fittings for a warehouse for 3,450*l*., to be paid by instalments during the progress of the work. The contract contained a stipulation, "That W (the plaintiff) shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract." By agreement reciting in part the contract, the defendant agreed with the plaintiff to guarantee the due performance of the works by H. The plaintiff advanced 1,800*l*. to H during the progress of the works; after which the fittings to the value of 2,300*l*. while still unfinished were destroyed by accidental fire in the workshop of H. The plaintiff had not insured the fittings. H became insolvent, and never repaid the 1,800*l*., or any part of it. The plaintiff was compelled to pay a sum greater by 340*l*. than the original contract price to complete the work contracted for:—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plaintiff was bound to insure the fittings, and that his omission to do so, in equity, discharged the defendant's liability, not merely to the extent of the benefit he would have derived from the insurance if effected, but *in toto*. *Watts* v. *Shuttleworth*, 7 Hurls. & N. 353.

In an action by assignees of a bankrupt to recover the price of machinery supplied by the bankrupt, the Court allowed the defendant to plead an equitable plea of set-off for unliquidated damages arising out of the same contract. *Wakeham* v. *Crow*, 15 Com. B. Rep. N.S. 847.

### (*b*) *Replications.*

To a declaration for goods sold and delivered, the defendant pleaded infancy, to which the plaintiff replied, on equitable grounds, that at the time of contracting the debt, the defendant, knowing his true age, falsely and fraudulently represented that he was of full age, whereby the plaintiff (having no knowledge and means of knowledge as to the defendant's age) was induced to enter into the contract and supply the goods:—Held, that the replication was bad as a departure; and also as not alleging facts to avoid the plea, on equitable grounds, within the 85th section of the Common Law Procedure Act, 1854. *Bartlett* v. *Wells*, 31 Law J. Rep. (N.S.) Q.B. 57; 1 Best & S. 836.

Declaration—after stating an agreement under seal between the plaintiffs and the defendants, who were a joint-stock company, by which the plaintiffs agreed to build a ship for the defendants for a specified sum, and by which it was stipulated that no alterations should be made in the building of the ship unless on the authority of a letter signed by the secretary of the defendants' company, stating that the directors had directed such alterations—alleged that during the progress of the works the defendants required alterations to be made in the building of the ship, which the plaintiffs accordingly made, and that the defendants discharged the plaintiffs from the said stipulation in the agreement as to requiring the autho-

rity of such letter signed by the secretary. Breach, the non-payment of the cost of such alterations. Plea, that such discharge was not a discharge by deed. Replication on equitable grounds, that the defendants, by parol, directed the plaintiffs to make the alterations, and that the plaintiffs, at the request of the defendants, made such alterations, and that the defendants took to the said ship and enjoyed the benefit of the said alterations, and that, by reason of the premises, the plaintiffs were in equity discharged by the defendants from the said stipulation, and the defendants ought not, in equity, to be allowed to set up the want of a discharge by deed in bar to the plaintiff's claim for the cost of the said alterations: —Held, that the replication was bad, as contradicting the declaration and shewing that the plaintiffs had no legal right; but, if any, only an equitable one. *The Thames Ironworks* v. *the Royal Mail Steam Packet Co.*, 31 Law J. Rep. (N.S.) C.P. 169.

To trespass for entering the plaintiff's land and breaking open his gate, the defendant pleaded, as an equitable plea, that a dispute had arisen between the plaintiff and the defendant and other persons, whether there was a highway over the land, and thereupon, in order that the defendant and R, the plaintiff's solicitor, might arrange to come to a definite understanding as to the course to be pursued in deciding or trying the question, and in consideration that the defendant and the other persons, at the plaintiff's request, then signed the same, it was, by a memorandum in writing, signed by the plaintiff, R, the defendant and the other persons, agreed that, without prejudice to the question of right, the way should remain open and unobstructed for the passage of the defendant and the other persons until R and the defendant should come to a definite understanding as to the course to be pursued in trying the question then in dispute. The plea then alleged that the trespasses were committed before any agreement had been come to, and justified them in the use of the way:—Held, that the plea was no answer to the action either at law or in equity. *Hyde* v. *Graham*, 32 Law J. Rep. (N.S.) Exch. 27; 1 Hurls. & C. 593.

A plea pleaded as an equitable plea may be supported as a defence in law. Ibid.

In an action for freight the defendant pleaded a set-off, to which the plaintiff replied, on equitable grounds, that while the freight was in the course of being earned he assigned it for value to A, of which the defendant, before the debt became due, and before an action was brought, had notice; and that the plaintiff was suing only as trustee for A:—Held, no answer to the plea. *Wilson* v. *Gabriel*, 4 Best & S. 243.

*Quære*—If the replication had alleged that the defendant had notice before the subject-matter of the set-off accrued? Ibid.

To an action for non-payment of 45*l.*, the balance due upon a building agreement, the defendant pleaded a set-off of a judgment for 40*l.* 2*s.* against the plaintiff. To this plea the plaintiff replied, that, before the recovery of the said judgment, he for a good consideration assigned the debt of 45*l.* to one J S; that the defendant before the recovery of the judgment had notice of the assignment; and that the plaintiff was suing as trustee for J S:—Held, that the replication was bad, and disclosed no legal answer to the plea. *Watkins* v. *Clark*, 12 Com. B. Rep. N.S. 277.

### (D) In Criminal Cases.

The prisoner was tried on the 6th of April, 1863, upon an indictment which charged him with having, on the 22nd of January, 1863, stolen 25 lb. of copper, the property of A, and was acquitted. He was again tried on the 29th of June, 1863, upon an indictment which charged him in the first count with having, on the 20th of September, 1862, stolen a riddle, the property of A, and in the second count with having, on the 16th of January, 1863, stolen five shovels, the property of A. The prisoner had been in A's employ several years; and the riddle and shovels were found in his possession on the 21st of January, 1863, but there was no evidence to shew when they were stolen:—Held, first, that the prisoner was not entitled to be acquitted upon the second trial, on the ground that the charge of stealing the riddle and shovels ought to have been included in the first indictment, and that on these facts a verdict was rightly against him upon a plea of *autrefois acquit;* and, secondly, that he was not entitled to be acquitted on the ground that the stolen property was not proven to have been in his possession recently after it was stolen. *R.* v. *Knight*, 1 L. & C. 378.

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## PLEADING, IN EQUITY.

(A) Bill.
- (*a*) *Statements in, and Prayer.*
- (*b*) *Multifariousness.*
- (*c*) *Supplemental Bill.*

(B) Demurrer.
(C) Plea.
(D) Answer.

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### (A) Bill.

#### (*a*) *Statements in, and Prayer.*

A defendant cannot refuse to answer an interrogatory on the ground that there is no allegation of pretence in the bill, on which the interrogatory is founded. *March* v. *Keith*, 30 Law J. Rep. (N.S.) Chanc. 127; s.c. *sub nom. Marsh* v. *Keith*, 1 Dr. & S. 342.

A prayer for an injunction to restrain a trustee from selling involves relief, although no substantial relief is asked. Ibid.

A defendant cannot defend himself from answering part of the bill, on the ground that a demurrer would lie. Ibid.

If rights of discovery and relief are incidental, the right to relief will not support the bill, except in aid of other proceedings. *Evan* v. *the Portreeve, &c., of Avon*, 30 Law J. Rep. (N.S.) Chanc. 165; 29 Beav. 144.

R B was equitable owner of copyhold lands of a certain manor, the surface of which he had let to a yearly tenant. C M was owner of the W Colliery, and was lessee of the coal-mines under the manor, which he drew to the surface at W. C M was also working coal under an estate called H, no part of the manor, and he brought the coal from H to the surface at W by conveying the same, by an underground tramway, through the estate of R B. To a bill by R B, alleging these facts, and praying

for an injunction to restrain C M from so using the tramway, C M filed a demurrer for want of equity, which *Stuart, V.C.* allowed on the ground that R B had not averred that the tramway was his; but upon appeal, the demurrer was overruled by *Lord Campbell, C.J.*, with costs. *Bowser* v. *Maclean*, 30 Law J. Rep. (N.S.) Chanc. 273.

An assignee of a debt seeking to have the trusts of a creditors' deed carried into execution must shew by his bill how he became assignee. *Jerdein* v. *Bright*, 30 Law J. Rep. (N.S.) Chanc. 336; 2 J. & H. 325.

The plaintiff, in a suit for carrying into execution the trusts of a creditors' deed, charged fraud against a purchaser of a part of the estate, and prayed relief in respect of such fraud:—Held, that the bill was multifarious. Ibid.

If a bill seeks discovery from a bankrupt merely as incidental to relief prayed against him, the bankrupt, not being a necessary party to the suit in respect of the relief, may demur to the discovery. *Gilbert* v. *Lewis*, 32 Law J. Rep. (N.S.) Chanc. 347; 1 De Gex, J. & S. 38.

An allegation of fraud is insufficient without a statement of the circumstances constituting the fraud. Ibid.

C filed a bill against A and B, alleging that a sum of money was deposited in a bank by C, in the names of A and B, in pursuance of an agreement in writing, upon trust to pay the same according to the result of an action at law to be brought for its recovery by A against C, and to be duly and diligently prosecuted; and also alleging that such action, although it had been commenced, had not been duly and diligently prosecuted; and praying for an order for payment by A and B of the above sum to C. A demurrer by A to the bill for want of equity, was overruled, with costs. *The King of Portugal* v. *Scott Russell*, 31 Law J. Rep. (N.S.) Chanc. 34; 3 Giff. 287.

The plaintiff by deed, reciting a contract for sale by him of certain lands and shares to the defendant, conveyed the land to the defendant in consideration of 20*l.* therein expressed to be paid, and of a covenant by the defendant to indemnify the plaintiff against all liability in respect of the shares. The plaintiff afterwards filed his bill, alleging that the deed was executed merely for the purpose of enabling the defendant to manage the property for the plaintiff during his absence from the neighbourhood, and was not intended to give the defendant any beneficial interest; that the 20*l.* had never been paid, and that the plaintiff had subsequently paid calls in respect of the shares; and praying for a reconveyance, or if the Court should be of opinion that the defendant was entitled to the property as purchaser according to the terms of the deed, then that the plaintiff might be declared entitled to a lien for the 20*l.* and the amount of calls paid, and might have relief on that footing:—Held, that the bill was not demurrable on the ground that it set up two inconsistent cases. *Davies* v. *Otty*, 2 De Gex, J. & S. 238.

Where alternative relief is prayed, a distinct line should be drawn, clearly stating the respective facts on which the interference of law is to arise on each alternative view. *Rawlings* v. *Lambert*, 1 J. & H. 458.

A plaintiff is not entitled to allege two inconsistent states of facts and ask relief in the alternative; but he may state the facts and ask alternative relief according to the conclusion of law which the Court may draw from them. Ibid.

A bill filed for the protection of assets before administration granted, is demurrable for want of parties if it prays an account of the estate. Ibid.

Where the bill prays alternate relief and the plaintiff would only be entitled to the discovery asked for under one of the alternatives, which is not the one principally relied on by the bill, and the information desired could not be material for the purpose of determining to which of such alternatives the plaintiff is entitled, such discovery will not be compelled before the hearing. *Lett* v. *Parry*, 1 Hem. & M. 517.

In a bill to restrain the infringement of a design for ornamenting lace, registered under the 5 & 6 Vict. c. 100, compliance with the act is sufficiently pleaded by alleging that the design and proprietorship have been duly registered, and a bill containing those allegations is not open to a demurrer for not alleging in detail that the plaintiff has complied with the various requirements of the act. And if a defendant insists that a plaintiff has lost his copyright by non-compliance in respect of matters subsequently to registration, he must raise the defence by plea or answer. *Sarazin* v. *Hamel*, 32 Law J. Rep. (N.S.) Chanc. 378; 32 Beav. 145.

Specific performance of an agreement to take a lease of lands for the purpose of a tannery will not be enforced when the proposed lease contained the usual covenant against carrying on noxious trades, although the defendants had represented that they were about to conduct their business in a way which could not be open to objection on that score. Where it appears from the bill that the plaintiff is unable from causes which he cannot control to make a good title, a demurrer will be allowed, and the plaintiff will not be permitted to bring the cause to a hearing on the chance that he may by that time or before certificate be enabled to sue the defendant. *Reeves* v. *the Greenwich Tanning Co. (Lim.)*, 2 Hem. & M. 54.

A shareholder suing a company and the directors for a breach of trust must sue on behalf of himself and all other the shareholders. *White* v. *the Carmarthen and Cardigan Rail. Co.*, 33 Law J. Rep. (N.S.) Chanc. 93.

An allegation in a bill that a defendant has in her possession or under her control parliamentary and other stocks or funds more than sufficient to satisfy the plaintiff's claim, is not a sufficient allegation that the subject of the suit is situate in England to bring the case within the 4 & 5 Will. 4. c. 82. *Foley* v. *Maillardet*, 33 Law J. Rep. (N.S.) Chanc. 335; 1 De Gex, J. & S. 389.

An affidavit displacing statements in a bill, introduced for the purpose of bringing the case within 4 & 5 Will. 4. c. 82. ought to be received, on an application to discharge an order for service abroad. Ibid.

A bill by executors to enforce the performance of a contract entered into by the defendants with the testator for sale of leaseholds alleged, as the fact was, that the executors had not proved. Notice of motion for an injunction was given, and at that time and

when the motion would but for pressure of business have been heard, there was no probate; but when the motion was actually heard, the probate was in court: —Held that the defendants could not resist the motion upon the ground that the allegations in the bill were insufficient. *Newton* v. *the Metropolitan Rail. Co.*, 1 Dr. & S. 583.

A plaintiff claiming as heir need not set out his pedigree in the bill. *Barrs* v. *Fewkes*, 33 Law J. Rep. (N.S.) Chanc. 484; 2 Hem. & M. 60.

The case raised by a bill was essentially a case for specific performance of an agreement. The plaintiffs possibly were entitled in fact to some other relief independently of the agreement, but the bill was not so framed as to give the defendants distinct notice that they would be called upon to meet such a case. The cause having come on for hearing upon motion for decree,—Held, by the Lords Justices (affirming generally a decree of *Romilly, M.R.*), that leave to amend ought not to be given, and that the motion ought not simply to be refused, but that the bill should be dismissed, though without prejudice to any suit by the plaintiff for any other purpose than that of obtaining specific performance of the agreement. *Firth* v. *Ridley*, 33 Law J. Rep. (N.S.) Chanc. 598; 33 Beav. 516.

When a bill alleges a judgment obtained by fraud, and subsequent compromise, and seeks to set aside the whole transaction on the ground of fraud, or in default to have the compromise carried out, and the Court is of opinion that the case of fraud fails, it will not enforce the compromise, but the whole bill must be dismissed. *Cawley* v. *Poole*, 1 Hem. & M. 50.

A bill to restrain a defendant from setting up a certain plea in an action at law, on equitable grounds, which the plaintiff might equally have availed himself of at law, is not demurrable merely because it does not go on to pray compensation or any other consequential relief in equity. *Stewart* v. *the Great Western Rail. Co.*, 2 De Gex, J. & S. 319.

A plaintiff who seeks the interference of a Court of equity is not bound, as the price of such interference, to bring the whole matter into equity. Ibid.

A bill to perpetuate testimony cannot be converted into a bill of discovery. *Ellice* v. *Roupell*, 32 Law J. Rep. (N.S.) Chanc. 624; 32 Beav. 308.

The distinctions between bills of discovery proper, bills to perpetuate testimony, and proceedings to obtain the examination *de bene esse* of a single witness or of aged or infirm witnesses, pointed out and explained. Ibid.

Real estates were devised to A for life, remainder to his sons in tail, remainder to B for life; and powers were given to the tenants for life of jointuring and charging portions for younger children, and of limiting terms to secure them. The will also enabled H, who was trustee and one of the executors, to enter the estates during minorities and accumulate the rents, which were to be applied in the purchase of lands to be settled to the same uses. The personal estate was given to A absolutely. During A's minority H entered and accumulated the rents. A on his marriage limited terms to trustees to secure a jointure and portions, and settled the residuary personalty, and died, leaving a son. B disputed the legitimacy of the son, and took possession. A's wife and infant son filed a bill against B, H, and the trustees of the term, alleging that the trustees of the term refused to bring ejectment without the direction of the Court, and praying for an account of the testator's estate, and to have it secured on the trusts of the settlement; for an account of the rents received by H during the minority of A; for an account of rents received by the defendants respectively since A's death; for a receiver and for an injunction to restrain B from receiving the rents, and for further relief. B demurred for want of equity, multifariousness and want of parties, and the demurrer was allowed by the Master of the Rolls on the first two grounds: —Held, on appeal, that as the bill distinctly shewed that there were outstanding terms which B might set up if the infant plaintiff brought ejectment, and there was a prayer for general relief, the demurrer for want of equity could not be sustained, though the bill contained no allegation that B intended to set up the outstanding term, and no prayer that he should be restrained from so doing. Held, also, that the rent accumulated during the minority of A furnished a sufficient equity to support the bill, although they had been paid into court in another suit, no decree having been made in that suit. Held, also, that the bill was not multifarious, for that there was an entire case against H in respect of the accumulated rents, the personal estate, and his duty to enter and accumulate rents during the minority of the infant plaintiff, if the legitimate son of A, and that B could not complain of the bill as multifarious, because he was only interested in the last question. Held, that the demurrer for want of parties was good, for that the other executor was a necessary party to the account of the personal estate, and B, though not interested in the personal estate, had a right to require the suit to be properly constituted. *Hamp* v. *Robinson*, 3 De Gex, J. & S. 97.

Whether an injunction and receiver might not nevertheless be granted—*quære*. Ibid.

The plaintiff entered into an agreement with the principal defendant to sell to him certain leasehold property, in consideration of a debt due from the plaintiff to the defendant, with a stipulation giving to the plaintiff the right of re-purchase on payment of a specified sum, with interest on a specified day, or so much of the re-purchase money as should then be "due and owing after deducting the net proceeds of all sales (if any) which should be made in the mean time, including all moneys laid out in repairs and improvements." The agreement provided that time should be considered of the essence of the permission to re-purchase, and that the same should, under no circumstances, be exercisable after the specified day, any rule of equity to the contrary notwithstanding. The bill, which was filed one day before the expiration of the time for re-purchase, alleged that the principal defendant had sold portions of the property to an amount more than sufficient, or very nearly sufficient, to pay the amount of the re-purchase money, but had only rendered insufficient and unsatisfactory accounts of his receipts, and refused to give any others. The bill also stated that another defendant (who was the solicitor to the principal defendant) claimed to be and was under agreements, deeds and assurances, the particulars whereof were unknown to the plaintiff, interested in the premises comprised in the agreement, and that this defendant alleged that he was in fact a necessary party to the suit. The prayer was for an account of

the moneys received by the principal defendant on account of the sales, and of what was due to him in respect thereof, and that he might account for and set off against his debt the sums received by him, and that the plaintiff, who offered to pay the balance (if any), might be at liberty to re-purchase notwithstanding the expiration of the time. On appeal from an order overruling the demurrer of the principal defendant, and allowing that of the other,—Held, first, that a sufficient case was alleged for some relief against the principal defendant; secondly, that there was a sufficient allegation of interest in the other defendant, and that consequently neither demurrer was sustainable. *Ponsford* v. *Hankey*, 3 De Gex, F. & J. 544; 2 Giff. 604.

A bill by a person entitled to a mortgaged estate under the mortgagor's will, against the mortgagee and the mortgagor's representative to have the mortgagor's estate applied in payment of the mortgage, cannot be sustained. *Hughes* v. *Cook*, 34 Beav. 407.

A bill by a person claiming under a mortgagor, against the mortgagee is irregular, unless it offers to redeem. Ibid.

The plaintiff was entitled to an estate subject to a mortgage created by his ancestor. He instituted a suit against the mortgagee and the representatives of his ancestor, praying to have the mortgage paid out of his assets or by a sale of the estate, and also for the delivery up of independent securities given by the plaintiff to the defendant:—Held, that the suit was multifarious, and a demurrer to it was allowed. Ibid.

(*b*) *Multifariousness.*

[See *Hamp* v. *Robinson*, *supra*.]

Where a person has been induced, by a joint fraudulent scheme of two others to make sales to them at an undervalue, a single bill against both to set aside the sales, though they were entirely distinct transactions, is not multifarious. *Walsham* v. *Stainton*, 33 Law J. Rep. (N.S.) Chanc. 68; 1 De Gex, J. & S. 678.

In the year 1771, G assigned fifty-five shares in a Scotch company called Carron Company to his bankers as a security for a debt and further advances. In 1813 the bankers sold fifteen of the shares to J S, the then manager of the Carron Company, and in 1817 the then personal representative of G sold the remaining forty shares to H S, the then London agent of the company. J S continued manager of the company up to his death in 1825, and the fifteen shares bought by him were subsequently sold by his representatives. H S continued agent of the company until his death in 1851, and the forty shares were still standing in his name. In 1862 a bill was filed by the personal representative of G, then recently constituted in England, against the personal representatives of J S and H S, alleging that J S and H S had fraudulently misrepresented the state of affairs of the company, whereby they had been enabled to purchase the fifteen and forty shares respectively at an undervalue, and praying re-transfer of the forty shares, and that the estates of J S and H S might jointly and severally answer for the difference between the purchase-money and the value of the fifteen shares. To this bill a general demurrer was filed by the representatives of J S for want of equity and multifariousness, and this demurrer was allowed by *Wood, V.C.*, without liberty to amend the bill. On appeal, the Lords Justices overruled the demurrer. *Walsham* v. *Stainton*, 33 Law J. Rep. (N.S.) Chanc. 68; 1 De Gex, J. & S. 678.

Where the rules of a Marine Insurance Club provided that the committee might sue and be sued on behalf of all the members, and that claims were to be drawn for by the secretary at the order of the committee, and a bill was filed by a member, whose claim was disputed, against the committee and the secretary, praying that the committee may order the secretary to draw upon the members for the amount of his claim, and that the secretary should thereupon draw accordingly,—Held, first, that the plaintiff was entitled to sue in equity; secondly, that the committee sufficiently represented all the members for the purposes of the suit; thirdly, that the secretary was properly joined as a party in respect of the personal relief prayed against him. *Harvey* v. *Beckwith*, 2 Hem. & M. 429.

Where a trust estate has become distributable in shares, and the person entitled to one distributive share has died, a bill by persons beneficially interested in his share seeking to rectify an alleged breach of trust affecting the whole trust estate, will be multifarious if it pray for administration of the deceased's share, even though such prayer be expressly limited to the purposes of the bill. *Bent* v. *Yardley*, 2 Hem. & M. 602.

*Semble*—The executor of the deceased could not defend himself against such a bill on the ground that there would be no residue of the share, and that therefore the plaintiff had no interest. Ibid.

A railway contractor, employed to construct the lines of several railway companies, all forming part of the same railway system, employed an engineer, and paid him various sums generally on account. The payments were mostly made with moneys advanced by the plaintiff company to the contractor, for the specific purpose of discharging their debt to the engineer, and the sums so advanced and paid were sufficient to pay the whole of that debt. He, however, claimed to appropriate the payments to the debts due from the other companies, and brought an action against the plaintiff company, for their whole debt. A bill against the engineer, the contractor, and other companies for a declaration that the engineer was not at liberty so to appropriate the payments made to him, for an account, an apportionment (if necessary) of the sums paid between the several companies, and an injunction against the action, is demurrable, as the question of appropriation might have been raised at common law, and multifarious, as the other companies are not properly parties to a suit between the company and its employés. *The Aberystwith and Welsh Coast Rail. Co.* v. *Piercy*, 2 Hem. & M. 713.

A bill to protect a testator's estate until a legal personal representative has been appointed, and also to administer the estate, is irregular. It should be limited to the first object. *Overington* v. *Ward*, 34 Beav. 175.

(*c*) *Supplemental Bill.*

If there be no title to sue at the time of filing an original bill or information, a decree cannot be founded upon a subsequently acquired right brought

forward by supplemental bill, for there must be a right of suit when the litigation commenced; and a supplemental bill is merely the continuance of a suit already instituted. *The Attorney General* v. *the Portreeve, &c. of Avon*, 33 Law J. Rep. (N.S.) Chanc. 172; 33 Beav. 67.

(B) DEMURRER.

The defendant, W F C, in 1855, filed a bill to foreclose the now plaintiff, G W, and others, in respect of an estate, alleging that he had acquired the legal estate in the reversion of the property expectant on the decease of T W, one of the defendants in that suit; or seeking (if G W should be held to have a prior mortgage) to redeem him. That bill was dismissed at the Rolls, except as to an annuity of 80*l.*, W F C's right to which was not disputed. On the death of T W, W F C commenced an action of ejectment, alleging that his legal right was now perfect, and that it was not affected by the decree of the Rolls. Thereupon G W filed the present bill, for the purpose of restraining the action; and to this bill the defendant W F C demurred, and the Master of the Rolls allowed the demurrer. On appeal, the decision was affirmed; the Lords Justices being of opinion that the former bill had been dismissed only because there had not been shewn to be any equity in the then plaintiff to displace the legal estate. *Waine* v. *Crocker*, 31 Law J. Rep. (N.S.) Chanc. 285; 3 De Gex, F. & J. 421.

In 1843 H filed a bill in equity, in the Supreme Court at Sydney, claiming to be admitted as a shareholder in respect of certain shares, and the Court dismissed the bill; but on the ground of the allegations and equity of the bill at Sydney being different from the allegations and equity of the bill in this court, the decision at Sydney was held by *Lord Westbury, C.* (reversing the decision of *Wood, V.C.*) not to be conclusive against the plaintiff here. *Hunter* v. *Stewart*, 31 Law J. Rep. (N.S.) Chanc. 346.

The plaintiff's bill in Sydney having been dismissed in December, 1843, he did not file his bill in this court until the 10th of January, 1859; but as the shares still remained in the name of the original allottee, and the dividends thereon had been from time to time applied in payment of an alleged lien, the plaintiff's right was not lost by delay. Ibid.

The 9th Rule of the 14th Consolidated Order of Hilary Term, 1860, has not abolished the rule that a plea will overrule a demurrer. It was merely intended to provide for the accidental overlapping of two defences. *Lowndes* v. *the Garnett and Moseley Gold-Mining Co. of America (Lim.)*, 31 Law J. Rep. (N.S.) 451; 2 Jo. & H. 282.

Where, therefore, a defendant demurs, and also pleads to the whole bill, the demurrer must be overruled. Ibid.

Where plaintiff's interest is a mere possibility, he cannot sustain a bill to secure a legacy. *Davis* v. *Angel*, 31 Law J. Rep. (N.S.) Chanc. 613; 31 Beav. 223.

A testator having lent A B 600*l.* on a promissory note bequeathed the money so due to him, with interest, to trustees for the separate use of his daughter for life, then to her husband for life, and then to her children equally. The only trustee who proved the will was the husband of the testator's daughter, and he, being indebted to A B, delivered over to him the promissory note for 600*l.* in payment of his debt. The daughter filed this bill twenty years, less one day, after this transaction, against A B and her husband, the trustee, setting up a constructive trust against A B, and asking for payment of the whole amount, with interest. Upon demurrer for want of equity and parties,—Held, that notwithstanding the bill was filed within the twenty years, the plaintiff is bound in such a case as this to shew a sufficient reason for not filing the bill earlier, which had not been done. It was also necessary that all the children and the testator's daughter should be parties. Demurrer allowed on both grounds, but with liberty to amend. *Rolfe* v. *Gregory*, 31 Law J. Rep. (N.S.) Chanc. 710.

Previously to obtaining their act the projectors of a railway agreed to pay to a landowner claiming under a settlement 20,000*l.* over and above the value of the land and the compensation to be paid for severance. The money not being paid, the landowner filed a bill for specific performance, but died *pendente lite*, and a person who came into possession of the estates, under a remote limitation in the settlement which the prior landowner had treated as barred, filed another bill, in substance the same as the former, and prayed that, "if necessary and proper, his suit might be taken as supplemental to the former suit." The defendants demurred for want of equity to so much of the bill as sought to make the suit supplemental.—Demurrer overruled, with costs. *The Earl of Shrewsbury* v. *the North Staffordshire Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 674.

Where a probable, though not a perfectly clear, equity was alleged by the bill, the Court overruled a demurrer and allowed the plaintiff to go to the hearing, reserving the points raised. *Bromley* v. *Williams*, 32 Law J. Rep. (N.S.) Chanc. 716; 32 Beav. 177.

A demurrer for want of parties which does not name or describe the necessary parties is bad. *Pratt* v. *Keith*, 33 Law J. Rep. (N.S.) Chanc. 528.

But a demurrer *ore tenus* naming the necessary parties will be admissible when the special demurrer is overruled as irregular. Ibid.

*Semble*—A general demurrer for want of equity includes want of jurisdiction as a ground of demurrer, and the latter ground need not be alleged specially. *Thomson* v. *the University of London*, 33 Law J. Rep. (N.S.) Chanc. 625.

Persons who under a will were executors and also beneficial devisees subject to debts and legacies, borrowed money on mortgage of the devised real estate. The testator's property proved insufficient, apart from the premises thus charged, to pay his debts; and a bill was filed, by a creditor, seeking to have the mortgagees postponed to the testator's unsatisfied creditors, and stating circumstances in the transactions respecting the loan leading to the implication that the mortgagors had been dealt with as beneficial owners rather than as executors. On an appeal from an order of *Stuart, V.C.* overruling a general demurrer founded on the proposition that in order to postpone the mortgagees they must be fixed with actual knowledge that the money was not wanted for payment of debts and legacies,—Held, by *Knight Bruce, L.J.*, but *dubitante Turner, L.J.*, that a sufficient *prima facie* case had been stated

to entitle the plaintiffs to call for an answer, and that the demurrer must be overruled, without costs, reserving the benefit of the defence to the hearing. *Collingwood* v. *Russell*, 34 Law J. Rep. (N.S.) Chanc. 22.

The fact that, in the dealings for a loan, executors who happen to be also beneficial owners have been treated with in their latter character, is not sufficient ground for inferring that the money was not borrowed to pay the testator's debts—per *Turner. L.J.* Ibid.

### (C) PLEA.

A demurrer to a bill was allowed, but with liberty to amend, and that in default of such amendment the bill should be dismissed. The plaintiff not having amended his bill, it was accordingly dismissed, and the order dismissing it was enrolled. Subsequently the plaintiff filed another bill with the same prayer as that of the former bill, but containing allegations equivalent to a charge of fraud and concealment on the part of the defendant not contained in the former bill. The defendant pleaded the former bill in bar to the latter suit:—Held, by *Stuart, V.C.*, that as the two bills were different, the former bill was not a bar to the latter suit. *The Marchioness of Londonderry* v. *Baker*, 30 Law J. Rep. (N.S.) Chanc. 895; 3 Giff. 128.

The plea did not aver that the allegations in the two bills were the same:—Held, by *Stuart, V.C.*, that the plea was bad in point of form, and on appeal the Lords Justices affirmed the decision, considering that the allegations contained in the second bill made a new case from that presented by the first bill. Ibid.

To a bill for accounts of an alleged partnership between plaintiff and defendant, the defendant put in a plea of no partnership, accompanied by an answer, in which the defences of laches and the Statute of Limitations were taken:—Held, that notwithstanding the 37th Order of August, 1841, the plea and answer were bad for duplicity, that Order being intended to prevent failure of justice from accidental slips, not to justify two distinct defences by plea and answer. The answer also admitted certain specific documents mentioned in a schedule to an affidavit referred to (which document the defendant declined to produce); and, save as appeared by the said schedule, denied the possession of any relevant documents. The bill contained no charge of books and papers, but there was an interrogatory on the plea, and the plea ordered to stand for an answer. *Mansell* v. *Feeney*, 2 Jo. & H. 313.

A being entitled to the equity of redemption in fee in certain lands, by a deed of family arrangement, dated in February, 1820, granted to his brother B an annuity of 20*l.* charged on those lands and payable on the death of his mother C. By a settlement made on his marriage in May, 1821, A settled the above lands, subject to the mortgage existing thereon, and he at the same time covenanted that they were not otherwise incumbered. A died in 1825, and C died in 1839. The first payment of the annuity became due in March, 1840. In 1859 B filed a bill against those claiming under the settlement for payment of the annuity. The defendants set up orally at the bar the defence that they were purchasers for value without notice of B's annuity:—Held, that such defence should have been pleaded formally, and could not be set up orally at the hearing, and a decree was made against the defendants for payment of the annuity. *Phillips* v. *Phillips*, 31 Law J. Rep. (N.S.) Chanc. 321; 3 Giff. 200.

A bill was filed to perpetuate testimony, charging that the matter in dispute (viz. whether a particular deed was a forgery) could not be made the subject of judicial investigation, and interrogatories were filed. The defendants put in an answer, and witnesses were examined and cross-examined. The bill was then amended and further interrogatories filed seeking more extensive discovery. The defendants then pleaded in bar, that since the filing of the answer the plaintiffs had filed a bill in another branch of the Court against the defendants and other persons, whereby they had made the matter in dispute the subject of judicial investigation, and that it was not the fact that the matter in dispute could not be made the subject of judicial investigation:—Held, that the substance of the plea was, that the matter of dispute could be made the subject of immediate judicial investigation; and that as this might have been pleaded to the original bill, it could not be pleaded to the amended bill, and the plea was ordered to stand for an answer, with liberty to except. *Ellice* v. *Roupell*, 32 Law J. Rep. (N.S.) Chanc. 563; 32 Beav. 299.

*Semble*—That a plea to the same effect to the original bill would have been good. Ibid.

The defence of purchase for valuable consideration, without notice, is available when the subject-matter purchased is an equitable estate. *Ernest* v. *Vivian*, 33 Law J. Rep. (N.S.) Chanc. 513.

The defence of laches applies with peculiar force to a bill seeking to set aside a sale or lease of mineral property. Ibid.

It is sufficient to plead the statute 3 & 4 Will. 4. c. 27. to a bill seeking the benefit of a trust without also pleading the statute 3 & 4 Will. 4. c. 42. *Dickenson* v. *Teasdale*, 1 De Gex, J. & S. 52.

In a bill seeking to make S liable in respect of breaches of trust committed by her deceased husband, it was alleged that S was executrix of her husband, had proved his will, and as such executrix had possessed herself of real and personal estate of the testator. To this bill S put in a plea, that she had not proved the will, and had never administered as such executrix as in the bill mentioned:—Held, that the plea was insufficient as not denying that S had possessed estate of the testator. *Hinde* v. *Skelton*, 34 Law J. Rep. (N.S.) Chanc. 378; 2 Hem. & M. 690.

A bill, by one of the members, against H, the secretary of an insurance association, by the rules of which the committee were empowered to settle all claims, and the secretary was directed to draw for and collect all claims passed by the committee, was filed seeking discovery of the names of the members of the committee, and to enforce contributions from the members of the association. After bill filed H became bankrupt, and put in a plea of bankruptcy:—Held, that H was properly made a party for the purpose of discovery, and properly so remained, notwithstanding his bankruptcy, and the plea was overruled. *Pepper* v. *Henzell*, 34 Law J. Rep. (N.S.) Chanc. 531; 2 Hem. & M. 486—see also *Pepper* v. *Green*, 2 Hem. & M. 478.

The defendants mortgaged some leasehold pro-

perty to the plaintiffs, who filed their bill to realize their security. Three days afterwards, the defendants were made bankrupts on their own declaration of insolvency, and they then pleaded their bankruptcy in bar, without averring that their assignee had elected to take the lease. The plea was allowed without costs, with liberty to amend the bill. *Jones* v. *Binns*, 33 Beav. 362.

(D) ANSWER.

[See MORTGAGE; Right to redeem.]

To a bill by *cestuis que trust* against the representatives of the trustees, charging breaches of trust and asking, as consequential to other relief, that the defendants might admit assets or set out accounts, one of the defendants put in an answer denying the breaches of trust, and alleging that the accounts had been settled and a release given in the lifetime of the trustee, and refusing to admit assets or set out accounts. Exceptions to such answer were allowed, and the Court refused to let them stand over till the hearing, on the ground that the plaintiffs were entitled, before going to the expense of establishing their case, to know whether there would be assets to satisfy their claim in case of success. *Brookes* v. *Boucher*, 31 Law J. Rep. (N.S.) Chanc. 821.

Upon a bill of discovery in aid of a defence to an action at law, the plaintiff in equity is entitled to a discovery only of such facts, deeds, papers, &c. as may help him to make out his defence at law. He cannot compel the plaintiff at law to disclose how he means to establish his case there. *Ingilby* v. *Shafto*, 32 Law J. Rep. (N.S.) Chanc. 807; 33 Beav. 31.

A plaintiff sought to set aside a lease, and to obtain the mesne profits. The defendant, the assignee of the lease, insisted on its validity, and that he was a purchaser for valuable consideration without notice: —Held, that the defendant was bound to answer as to the amount of rents and profits, the particulars of his underletting, and of his receipts, and what charges he had created. *Robson* v. *Flight* (No. 1), 33 Beav. 268.

## POISON.

[The sale and use of poisoned grain or seed prohibited by "The Poisoned Grain Prohibition Act, 1863" (26 & 27 Vict. c. 113).—The said Act extended by 27 & 28 Vict. c. 116.]

*Administering Noxious Thing with Intent to injure.*

If a man administers cantharides to a female with intent to excite her sexual passions in order that he may obtain connexion with her, he is punishable under 23 Vict. c. 8. s. 2, which makes it a misdemeanor to administer to any person any poison or other destructive or noxious thing with intent to injure, aggrieve or annoy such person. *R.* v. *Wilkins*, 31 Law J. Rep. (N.S.) M.C. 72; 1 L. & C. 89.

## POLICE.

[The law relating to police superannuation funds amended by 28 Vict. c. 35.]

*Police Districts.*

The Quarter Sessions, under the 27th section of the 3 & 4 Vict. c. 88, have power to constitute a single parish a separate police district. *Ex parte Knowling*, 34 Law J. Rep. (N.S.) M.C. 68; 6 Best & S. 195.

*Towns' Police Clauses Act.*

The mere fact of a man being instructed to deliver papers at the house of a person is no answer to a complaint under the 10 & 11 Vict. c. 89. s. 28, charging him with having "wilfully and wantonly" disturbed the occupant and his family by violently knocking and ringing at the door at an unreasonable hour of the night. *Clarke* v. *Hoggins*, 11 Com. B. Rep. N.S. 545.

## POOR.

[The laws regarding the removal of the poor and the contribution of parishes to the common fund in unions amended by 24 & 25 Vict. c. 55.—Overseers in populous parishes enabled to provide offices for the proper discharge of parochial business by 24 & 25 Vict. c. 125.—The education and maintenance of pauper children in certain schools and institutions provided for by 25 & 26 Vict. c. 43.—Boards of guardians of certain unions enabled to obtain temporary aid to meet extraordinary demands for relief by 25 & 26 Vict. c. 110. This act extended by 26 Vict. c. 4.—The law relating to the removal of poor persons from England to Scotland, and from Scotland to England and Ireland, amended by 25 & 26 Vict. c. 113.—The Poor Law Board continued for a limited period by 26 & 27 Vict. c. 55. and by 28 & 29 Vict. 105.—The law relating to the removal of natives of Ireland from England further amended by 26 & 27 Vict. c. 89.—The provisions of the Union Relief Aid Acts extended further by 26 & 27 Vict. c. 91.—Certain provisions of the Union Relief Aid Acts further continued by 27 Vict. c. 10.—Superannuation allowances provided for officers of unions and parishes by 27 & 28 Vict. c. 42.—The statutes of Her present Majesty for amending the laws relating to the removal of the poor explained by 27 & 28 Vict. c. 105.—Provision made for distributing the charge of relief of certain poor persons over the whole metropolis by "The Metropolitan Houseless Poor Act, 1864" (27 & 28 Vict. c. 116).—The Metropolitan Houseless Poor Act, 1864, made perpetual by 28 Vict. c. 33.—The better distribution of the charge for the relief of the poor in unions provided for by 28 & 29 Vict. c. 79.]

(A) GUARDIANS; LIMITATION OF TIME FOR SUING.
(B) AUDIT AND AUDITOR.
(C) RELIEF; EXTRA-PAROCHIAL PLACE.
(D) SETTLEMENT.
  (*a*) *By Birth and Parentage.*
    (1) *Legitimate Child whose Parents have no Settlement.*
    (2) *Children under Sixteen.*
    (3) *Evidence of.*
  (*b*) *By Estate.*
  (*c*) *By renting a Tenement.*
  (*d*) *By Apprenticeship.*
(E) IRREMOVABLE POOR.
  (*a*) *Residence.*
  (*b*) *Relief to Children.*
  (*c*) *Sickness.*

(A) GUARDIANS; LIMITATION OF TIME FOR SUING.

The 22 & 23 Vict. c. 49. s. 1,—which enacts, that all debts due from the guardians of any union, &c. shall be paid within the half year in which the same are incurred, or within three months after the end of such half year, but not afterwards; provided that the Poor Law Board may extend the time of payment for a period not exceeding twelve months after the date of such debt—is a bar to an action brought against the guardians after the expiration of the half year and the three months, and before any extension of the time by the Poor Law Board, though within the period during which the Board has the power to extend the time. *Baker* v. *the Guardians of the Poor of the Billericay Union*, 33 Law J. Rep. (N.S.) M.C. 40; 2 Hurls. & C. 642.

*Semble*—That judgment for the defendants in such action would not, if the Board should afterwards extend the time, be a bar to a fresh action brought with that authority. Ibid.

(B) AUDIT AND AUDITOR.

In the auditing of the accounts of a poor-law union, the cost of maintenance of a pauper lunatic, irremovable by five years' residence, having, since March, 1854, been charged to the parish of irremovability and allowed in the half-yearly audits, at the audit of the half-yearly accounts unto Michaelmas, 1860, objection was taken by the parish, and the auditor disallowed the costs for those six months against the parish and charged it to the union, but refused to re-open the accounts previously audited. On a rule calling on the auditor to shew cause why he should not allow the parish the sums they had erroneously paid in previous years and charge them to the union, the Court discharged the rule, on the ground that the parish ought to have objected at the previous audits. *R.* v. *the Inhabitants of Chiddingstone*, 31 Law J. Rep. (N.S.) M.C. 121; 2 Best & S. 294.

The guardians of a union formed under 4 & 5 Will. 4. c. 76. had agreed, in pursuance of s. 33, that for the purpose of settlement the parishes should be considered as one parish. After the passing of 24 & 25 Vict. c. 55, which by s. 9. enacts, that the parishes comprised in any union formed under 4 & 5 Will. 4. c. 76. shall contribute to the common fund thereof in proportion to the annual rateable value of the lands, &c. assessable to the relief of the poor, and in no other manner, the poor-law auditor allowed accounts of the union, in which the proportion of the contribution to be paid by each parish to the common fund was ascertained in the manner provided by 4 & 5 Will. 4. c. 76. On motion to set aside the allowance, removed by *certiorari*, under 7 & 8 Vict. c. 101. s. 35,—Held, first, that 24 & 25 Vict. c. 35. s. 9. applies to unions under 4 & 5 Will. 4. c. 76. s. 33, and therefore the contributions of the parishes ought to be according to the annual rateable value of the lands, &c. Secondly, that the auditor had power to ascertain and assess the share of the common charges to be borne by the parishes in the union. *R.* v. *Calthrop*, 4 Best & S. 216.

(C) RELIEF; EXTRA-PAROCHIAL PLACE.

If the owners and occupiers of the lands in an extra-parochial place have not chosen to annex the place to some parish under s. 4. of 20 Vict. c. 19. the Poor Law Board may add the place as a parish to a poor-law union under s. 32. of the 4 & 5 Will. 4. c. 76. without the consent of any owners or occupiers of land in the place. *R.* v. *Boteler*, 32 Law J. Rep. (N.S.) M.C. 91.

The parish of S, in the county of M, being extra-parochial, having no overseers, no poor, no poor-rates, and not being included in any union, two Justices of M, pursuant to 20 Vict. c. 19. s. 1. (1857), appointed an overseer, and afterwards the Poor Law Board made an order annexing it, on and from the 29th of September, 1858, to the H Union, which had been duly constituted in March, 1836, pursuant to 4 & 5 Will. 4. c. 76. In May, 1862, the guardians of the H Union ordered the parish of S, still having no poor and no poor-rate, to pay 50*l.* as its first contribution to the common fund of the union, pursuant to 24 & 25 Vict. c. 55. s. 9:—Held, that the parish of S, having been duly annexed to the H Union, was liable to the contribution ordered by the guardians of the H Union. *The Overseer of the Parish of Staple Inn* v. *Guardians of Poor of Holborn Union*, 32 Law J. Rep. (N.S.) M.C. 181; 2 Hurls. & C. 284.

Under the 43 Eliz. c. 2. s. 1. there must be at least two overseers for a parish; and the appointment of one overseer (it appearing that there is no other appointment of another) is bad; and the Court quashed such appointment, although it appeared that there was in the parish but one inhabitant householder, who had been appointed. *R.* v. *Cousins*, 33 Law J. Rep. (N.S.) M.C. 87; 4 Best & S. 849.

In order to bring a place within the 1st and 2nd sections of the 20 Vict. c. 19, and render an appointment of one overseer valid, it must actually be, or be reputed to be, extra-parochial; and it is not sufficient that it has been separately entered in the Report of the Registrar General on the last Census as extra-parochial. Ibid.

(D) SETTLEMENT.

(a) *By Birth and Parentage.*

(1) *Legitimate Child whose Parents have no Settlement.*

A legitimate child, whose parents have no settlement, though unemancipated, has a settlement in the parish in which it is born. *R.* v. *the Inhabitants of*

*Newchurch*, 32 Law J. Rep. (N.S.) M.C. 19; 3 Best & S. 107.

Where a legitimate child born in England is removed, under the 16 & 17 Vict. c. 97, to an asylum as a lunatic pauper, being then above the age of sixteen, but unemancipated and living with his parents (the father being an Irishman and the wife an Englishwoman, but neither of them having any settlement), an order for his maintenance is properly made, under s. 97, on the parish of his birth, and ought not to be made, under s. 98, on the county, as for a pauper whose place of settlement cannot be ascertained. Ibid.

(2) *Children under Sixteen.*

An Irish single woman applied to the relieving officer of a union for an order of admission to the workhouse, stating (as were the facts) that she was very near her confinement, and that she had resided for nine months in C, one of the parishes of the union. He refused to give her an order, but told her, if she was taken bad to go to the workhouse, and she would be admitted. In the evening of the same day, finding labour coming on, she went to the workhouse, and told the master what had passed between her and the relieving officer, and she was then admitted, and was delivered of a child two hours afterwards. The master entered the mother on the books as "casual," and charged her and the child to the common fund; and the guardians, seeing the entries, charged their maintenance to the common fund of the union. The mother went from the workhouse with her child to parish G, and was afterwards admitted into a female reformatory in another parish, into which the child was not admissible, and, the child becoming chargeable to G, an order for its removal to C was made with its mother's assent:—Held, that the mother, when admitted into the workhouse, was "chargeable" to C within the meaning of the 7 & 8 Vict. c. 101. s. 56, and the child was therefore to be considered as born and settled in that parish by virtue of that section; and that, the mother being absent, the child could be removed alone, although within the age of nurture. *Semble*—That the child was to be taken as born in C by virtue also of 54 Geo. 3. c. 170. s. 3. *R.* v. *St. Clement's Danes*, 32 Law J. Rep. (N.S.) M.C. 25; 3 Best & S. 143.

(3) *Evidence of.*

Grounds of removal of a pauper stated the settlement to be derived from her great-grandfather through her grandfather and father; and that the settlement of the great-grandfather had been acknowledged by the appellant parish by relief given to his widow, and by an order submitted to for the removal of a grandson. On the trial of the appeal, the respondents tendered in evidence an order of removal to the appellant parish, and submitted to by them, of the wife of another grandson of the great-grandfather, under the same derivative settlement. The Sessions admitted the evidence, subject to a case for the opinion of the Court of Queen's Bench:—Held first, that the decision of the Sessions was final, and could not be reviewed by this Court, by reason of 11 & 12 Vict. c. 31. ss. 4. and 7. Secondly (by *Crompton, J.* and *Hill, J.*, *dubitante Cockburn, C.J.*), that, assuming the decision of the Sessions could be reviewed, the evidence was rightly admitted, either as confirming the other specified instances of acknowledgment, or as independent evidence of the settlement relied on. *R.* v. *the Inhabitants of Ruyton*, 30 Law J. Rep. (N.S.) M.C. 229; 1 Best & S. 534.

(*b*) *By Estate.*

A agreed with B to build a house, according to specifications, on land of B's, in consideration of which, and an annual rentcharge of 25*s.*, a lease for three lives was to be granted to A. The house was built by A, according to the specifications, at a cost of 85*l.*, whereupon the lease was granted. The rentcharge and the erection of the house were together of the pecuniary value to B, at the time of the grant, of more than 30*l.*:—Held, that A acquired a settlement, "by purchase of an estate, whereof the consideration amounted to 30*l. bona fide* paid," within the 9 Geo. 1. c. 7. s. 5. *R.* v. *the Overseers of Belford*, 32 Law J. Rep. (N.S.) M.C. 156; 3 Best & S. 662.

(c) *By renting a Tenement.*

The pauper rented and occupied the ground floor of a house, such ground floor consisting of a shop and two small rooms, access to which was obtained by means of a passage leading from the street to a yard at the back of the house. The passage had a door at each end, and was used, not only by the pauper as a means of getting to his shop and rooms, but also by K, who rented and occupied the first floor of the house, and who, as well as the pauper, had a key of the front door of the passage. Both of the doors were kept closed at night. K cleaned part of the passage, and the pauper the other part:—Held, that this ground floor was not such a separate and distinct dwelling-house as that the pauper could gain a settlement by the renting thereof. *R.* v. *Elswick*, 30 Law J. Rep. (N.S.) M.C. 66; 3 E. & E. 437.

By the practice of the Wesleyan congregation, certain persons are appointed stewards for a given circuit, and are called circuit stewards. It is their duty to take houses as residences for the ministers officiating within the circuit. If the rent and rates due in respect of such houses are paid by the minister, the amount is repaid to him by the circuit stewards. It is the custom to appoint a minister to officiate in a given place for one year certain, and to remove him after the lapse of three years:—Held, that a minister who resides in a house so taken by the circuit stewards does not gain a settlement by renting a tenement, or by payment of rates and taxes, although he has been assessed to and has paid the poor-rates in respect of the house so occupied by him. *R.* v. *the Churchwardens of Tiverton*, 30 Law J. Rep. (N.S.) M.C. 79; 3 E. & E. 555.

The principle applicable to the admissibility in evidence of the declarations of deceased persons is the same, whether the declaration be against proprietary or pecuniary interest, and whether it be verbal or written; and a verbal declaration against proprietary interest is evidence not only of the particular fact which is against interest, but also of any other fact contained in the declaration, and substantially connected with the same subject-matter. *R.* v. *the Churchwardens of Birmingham*, 31 Law J. Rep. (N.S.) M.C. 63; 1 Best & S. 763.

Therefore a verbal statement by a deceased person, made while in the occupation of a tenement, that "he occupies it as tenant at a rent of 20*l.* a year," is evidence, in an issue between strangers, not only of the fact of the tenancy, but also of the amount of rent; *e. g.* it is evidence between two parishes, litigating the settlement of a descendant of the deceased, to prove that the deceased had acquired a settlement by renting a tenement at 10*l.* rent. Ibid.

By agreement between J H, G M and M C and J W (the pauper), J H, G M and M C agreed to let, and the said J W agreed to take a cottage "for three months from the 25th of December, 1859, at the yearly rent of 18*l.*, the first monthly payment to be made on the 25th of January," &c.; and it was thereby agreed "that three months' notice from either party to the other shall be a sufficient notice to quit, and the said J W agrees upon receiving such notice to give up quiet possession," &c. J W occupied under the agreement for about eighteen months from the 25th of December, 1859, and paid some of the rates in respect of the same:—Held, that he gained a settlement. *R.* v. *the Churchwardens of Willesden*, 32 Law J. Rep. (N.S.) M.C. 109; 3 Best & S. 593.

In June, 1844, B and W rented and entered into possession of three acres of land, in order to sink a coal-pit therein, at a yearly rent of 135*l.* an acre for the coal, and 50*s.* an acre for the surface. The rent for the coal was not to commence until after the coal had been reached; and it was agreed that the first half-year's rent should be paid six months after the coal was reached. The coal was reached in December, 1844; and in June, 1845, B and W paid half a year's rent for the coal and one year's rent for the surface-land. In September, 1845, the pit fell in, and the coal and land were given up. From June, 1844, to September, 1845, B rented a cottage in the same township for 5*l.* 10*s.* a year, and occupied and paid the rent:—Held, that no settlement was gained by B, inasmuch as the rent of the tenements occupied by him did not amount to 10*l.* a year, for the year during which they were occupied. *R.* v. *the Inhabitants of West Ardsley*, 32 Law J. Rep. (N.S.) M.C. 255; 4 Best & S. 95.

*Quære*—Whether a coal-mine is a tenement sufficient to confer a settlement under the 6 Geo. 4. c. 57. s. 2. Ibid.

The pauper, on the 20th of March, 1858, agreed with P to take a house from the 25th of the same month, at the monthly rent of 1*l.* 16*s.* 8*d.*, and it was agreed that one month's notice, to expire either on the 25th of March, the 25th of June, the 25th of September, or the 25th of December, should be a good and sufficient notice on either side for the pauper to quit and deliver up possession of the house to P. The pauper occupied under the agreement up to Midsummer, 1860, and paid the rent and poor-rates:—Held, that he gained a settlement. *R.* v. *St. Giles, Cripplegate*, 33 Law J. Rep. (N.S.) M.C. 3; 4 Best & S. 509.

### (*d*) *By Apprenticeship.*

By a local act certain property was vested in the guardians of the poor of the city of C for the benefit of the poor of the said city, and the said guardians were required to give a bond to provide for and maintain sixteen poor boys of the said city, and to cause them to be instructed, &c., and to "put them and every of them out apprentices, after they and every of them respectively should have attained their respective ages of thirteen years, and before their said ages of fifteen years":—Held, that this statute did not authorize the guardians to apprentice a boy without his assent, especially if the boy was beyond the age of fifteen; and that consequently, where the boy never executed the indenture of apprenticeship, and was seventeen when the guardians apprenticed him, the indenture of apprenticeship was invalid, and the boy did not acquire a settlement under it. *The Churchwardens of St. Nicholas, Rochester*, v. *the Churchwardens of St. Botolph, Bishopsgate*, 31 Law J. Rep. (N.S.) M.C. 258; 12 Com. B. Rep. N.S. 645.

A was apprenticed to N for five years, but his father was bound to find him board and lodging. The workshop of N closed at two o'clock on Saturday, and A used to go to his father's house, which was in the parish of M, and to sleep there on Saturday night, and sometimes on Sunday night as well. The other nights he slept in B, where his master's works were. For the last year he slept on Saturdays and sometimes on Sundays at his father-in-law's, which was also in M. For the last eighteen months or two years he lodged in the house of C in the parish of B, but C was unable to accommodate him on Saturday nights, and he was always at M on such nights. On the night of Friday, the 27th of September, 1850, the last night but one of the apprenticeship, he slept in the house of C, and left his work as usual and slept in M, returning to the works of his master on Monday morning:—Held, that he gained a settlement in M, as that was the parish in which he slept for the last night of his apprenticeship, and as under the circumstances of the case it appeared that his so sleeping in M was in furtherance of and under the apprenticeship. *R.* v. *the Inhabitants of Burton-upon-Irwell*, 32 Law J. Rep. (N.S.) M.C. 102; 3 Best & S. 604.

Upon the hearing of an appeal, the respondents, in order to prove that S W had gained a settlement as a parish apprentice by serving T B in the appellant parish, put in evidence a document purporting to be an indenture of apprenticeship, by which S W had been bound by the parish officers of H to serve with T B till he was twenty-one years old. The document was signed and sealed by T B, but not by the churchwardens or overseers, and it was produced from the parish chest of H. It was proved that a search had been made among the papers of S W, which he had left at his decease, and that no indenture of apprenticeship could be found. No further search was made. The Sessions allowed the document to be used as evidence, and confirmed the order of Justices, removing the pauper to the appellant parish:—Held *(hæsitante Crompton, J.)*, that inasmuch as it was more probable that the indenture would be kept, after the expiration of the apprenticeship, by the apprentice than by the master, and taking into consideration the time which had elapsed, a sufficient search had been made to justify the Sessions in receiving the evidence. *R.* v. *the Inhabitants of Hinckley*, 32 Law J. Rep. (N.S.) M.C. 158; 3 Best & S. 885.

## (E) IRREMOVABLE POOR.

### (*a*) *Residence.*

S. 1. of 24 & 25 Vict. c. 55,—which enacts, "that

after the 25th of March, 1862, the period of three years shall be substituted for that of five specified in s. 1. of 9 & 10 Vict. c. 66, and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in a parish,"—is retrospective. Therefore, a pauper who had resided for three years in a union on the 14th of March, 1862, when an order for his removal was obtained, became irremovable by reason of the above section. *The Overseers of Preston* v. *the Overseers of Blackburn*, 32 Law J. Rep. (N.S.) M.C. 180; 3 Best & S. 793.

The pauper resided in the parish of B with his wife for more than five years prior to May, 1859, when he went to Cuba under a contract with a mining company to work for them as a miner, for a period of three years, at 9*l.* a month, of which 5*l.* was to be paid monthly to the wife of the pauper. It was always his intention to return to his wife and family at the expiration of the three years. He went to Cuba, and his wife and family continued to reside in the same house in the parish of B, receiving the allowance from the company for about one year and five months, when the pauper fell ill, and the wife became chargeable. On the 17th of November, 1861, the pauper returned to England and found his wife and family still residing in B, and he himself became chargeable there:—Held, that the absence in Cuba constituted a break of residence so as to render the pauper removable from B. *The Churchwardens of Wellington* v. *the Churchwardens of Whitchurch*, 32 Law J. Rep. (N.S.) M.C. 189; 4 Best & S. 100.

In 1855, a pauper, having resided more than three and less than five years in parish A, became chargeable, and an order was obtained for her removal to parish B. but she was not actually removed,—in consequence of the officers of parish B acknowledging her to be settled in that parish and requesting that she might not be removed, but be allowed to remain with her mother in parish A. The pauper accordingly remained in parish A, being relieved by parish B until June, 1862, and in August an order for her removal to B was obtained:—Held, that not having been actually removed in 1855, the pauper had become irremovable by virtue of 24 & 25 Vict. c. 55. s. 1. *R.* v. *the Overseers of Hendon*, 32 Law J. Rep. (N.S.) M.C. 202.

A pauper, having resided more than three years in the parish of his settlement, went to reside in another parish in the same union, and on his becoming chargeable, after a residence there of a few months, an order was made to remove him to his parish of settlement:—Held (by *Cockburn, C.J.* and *Shee, J.; dissentiente Crompton, J.*) that the order was rightly made: for that the pauper had not become irremovable under 24 & 25 Vict. c. 55. s. 1. and 9 & 10 Vict. c. 66. s. 1. by reason of this residence in his parish of settlement, though in the same union as the other parish. *R.* v. *the Inhabitants of Great Salkeld*, 33 Law J. Rep. (N.S.) M.C. 185; 5 Best & S. 377.

### (*b*) *Relief to Children.*

The 4 & 5 Will. 4. c. 76. s. 56. is a legislative exposition of what relief to children shall be relief to the parents so as to make the latter removable; and therefore relief to a child above the age of sixteen, although unemancipated and residing with the parent, is not relief to the parent. *R.* v. *the Guardians of St. Mary, Islington*, 31 Law J. Rep. (N.S.) M.C. 233; 3 Best & S. 46.

A female above the age of sixteen, but unemancipated and living with her widowed mother in the parish of P, became insane and was removed as a pauper lunatic to an asylum; and afterwards an order for her maintenance was made on the parish of her settlement. At the time of the removal the mother had resided more than five years in P, but during that residence the child, though generally residing with her mother, had, when above the age of sixteen, from time to time been confined in an asylum under an order of a Justice as a pauper lunatic at the charge of the parish of P, such confinement being necessary because the mother could not keep her under proper care and control. The time of the several confinements, if deducted from the period of the mother's residence, reduced it below five years:—Held that, the child being above sixteen, her confinement in the asylum at the charge of the parish was not "relief" to the mother within 9 & 10 Vict. c. 66. s. 1, and the time of her confinement in the asylum, therefore, ought not to be deducted from the mother's residence; and consequently the mother and child were both irremovable, and the order on the settlement bad. Ibid.

*Quære*—Whether, if the child had been under sixteen, her maintenance in the asylum at the charge of the parish would have been "relief" to the mother. Ibid.

### (*c*) *Sickness.*

The 4th section of 9 & 10 Vict. c. 66, which enacts that no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the Justices granting the warrant shall state in it that they are satisfied that the sickness or accident will produce permanent disability, applies only to the sickness of the person to be removed. *R.* v. *the Inhabitants of St. George, Middlesex*, 31 Law J. Rep. (N.S.) M.C. 85; 2 Best & S. 317.

Where therefore a man, on account of his sickness, leaves his wife and children in one parish, and becomes an inmate of an hospital in another parish, and the wife and children become chargeable by reason of relief made necessary by such sickness, the case is not within the section; and it is not necessary that the order for the removal of the wife and children should state that the Justices were satisfied that the illness would produce permanent disability. Ibid.

If the Justices who make an order of removal state in the order that they are satisfied that the sickness or accident, through which the pauper became chargeable, was such as would produce permanent disability, the Quarter Sessions, upon appeal against the order, cannot inquire into the fact whether it will do so or not. *R.* v. *the Overseers of Whittlesey*, 32 Law J. Rep. (N.S.) M.C. 78; 3 Best & S. 432.

## (F) ORDER OF REMOVAL.

### (*a*) *By what Justices.*

The effect of 35 Geo. 3. c. 101. s. 1. is to repeal entirely the 1st section of 13 & 14 Car. 2. c. 12; and an order for the removal of a pauper is good, although neither of the two removing Justices

be of the quorum. So held by *Wightman, J.* and *Blackburn, J.; dissentiente Cockburn, C.J. R.* v. *the Overseers of Llangian*, 32 Law J. Rep. (N.S.) M.C. 225; 4 Best & S. 249.

By *Cockburn, C.J.*, a mayor of a borough (who is a Justice of the Peace by virtue of his office under the 57th section of the 5 & 6 Will. 4. c. 76.) is not a Justice of the quorum. *Semble*, by *Blackburn, J.*, that he is. Ibid.

*(b) Appeal against.*

*(1) Notice of; Abandonment.*

A notice of appeal against an order of removal made by Justices acting in and for a borough was given, as to the next Quarter Sessions *for the county*. The day before the Borough Sessions were held, the appellants gave the respondents notice that, having discovered that the appeal ought to have been to the Borough Sessions, they abandoned the appeal to the County Sessions; on which the respondents obtained an order at the Borough Sessions for their costs on the abandonment of the appeal:—Held, that the Borough Sessions had jurisdiction to make the order. *R.* v. *the Recorder of Leeds*, 30 Law J. Rep. (N.S.) M.C. 86; 3 E. & E. 561.

*(2) Entry and Respite.*

Copies of the deposition on which an order of removal was made having been duly applied for and received by the parish affected on the 19th of September, that parish, on the 1st of October, sent notice of appeal to the removing parish. The first day of the next Quarter Sessions was the 16th of October. The appellants had not delivered any grounds of appeal:—Held, that the appellants were entitled to have the appeal entered and respited at those sessions, and were not bound to have delivered grounds of appeal, and to have been prepared to try at the October Sessions. *R.* v. *the Justices of Sussex*, 30 Law J. Rep. (N.S.) M.C. 73.

The delivery of grounds of appeal, against an order of removal, with the notice of appeal, is as valid for all purposes as a delivery of them fourteen days at least before the sessions begin. *R.* v. *the Justices of Sussex* (Ex. Ch.), 34 Law J. Rep. (N.S.) M.C. 69; 4 Best & S. 966.

The appellants have not, by 11 & 12 Vict. c. 31. s. 9, twenty-one days, plus the fourteen days after the delivery of the depositions, for giving notice of appeal absolutely, so as to entitle them as of right to have the appeal entered and respited, if after those days have expired there does not remain enough time before the sessions to deliver an effective notice of appeal according to the practice of the Sessions; and the sessions may, in their discretion, refuse to respite if they deem that the appellants have been guilty of unreasonable delay in giving their notice of appeal. Ibid.

Though the time for giving notice of appeal must be calculated with reference to the first day of the sessions, yet when for practical convenience the county is divided into distinct divisions, and a distinct court is held in each division, by adjournment from one to the other, and the rules of practice made by the Court in each division assume that the day when the Court for that division begins its sittings is the first day of the sessions, it is sufficient if the grounds of appeal are delivered fourteen clear days before the first day of the sitting of the Court for the division in which the appeal is according to the practice to be tried. Ibid.

An order for the removal of H H, a pauper, from A to C, was served on the overseers of C at the end of October. On the 6th of November a letter was written to the overseers of A on behalf of the overseers of C by the assistant overseer, saying, "I hereby apply for a copy of the depositions of the grounds of removal of H H, as it is intended to appeal against such order of removal." No notice was taken of this letter. On the 11th of December a formal notice of appeal from the overseers of C was served on the overseers of A; and at the next sessions the appeal was entered and respited:—Held, first, that the application for the copy of the depositions under 11 & 12 Vict. c. 31. ss. 3. and 9. must be made to the clerk to the Justices, and not to the officers of the removing parish; that the appellants therefore, not having properly applied for the depositions, had only twenty-one days to give notice of appeal, and, consequently, the notice of appeal of the 11th of December was too late; secondly, that the letter of the 6th of November was not a notice of appeal; and that, therefore, the Quarter Sessions had no jurisdiction to enter the appeal. *R.* v. *the Inhabitants of St. Alkmund*, 32 Law J. Rep. (N.S.) M.C. 99; 3 Best & S. 347.

A copy of an order for the removal of a pauper, accompanied by a notice of chargeability, and a statement of the grounds of removal and particulars of the settlement were sent to the appellants on the 30th of August. On the 17th of September the appellants applied for a copy of the depositions upon which the order was made. They were received on the 19th. On the 1st of October the appellants gave notice of appeal for the next General Quarter Sessions for the county of S. No grounds of appeal were delivered. The next sessions were holden on the 15th, and the appellants applied for permission to enter and respite the appeal. The Sessions refused to respite the appeal:—Held, by *Crompton, J.* and *Mellor, J.*, that they were wrong, for that the appellants were entitled to a period of fourteen days after the sending of the copy of the depositions, within which they were not bound to give notice of their grounds of appeal, and that such notice must be given fourteen days before the first day of sessions, and the appellants were therefore entitled to have the appeal entered and respited till the next sessions:—Held, by *Blackburn, J.*, that the Sessions were right, as notice of the grounds of appeal might have been given together with the notice of appeal. *R.* v. *the Justices of Sussex*, 31 Law J. Rep. (N.S.) M.C. 193; 2 Best & S. 664.

*(3) Amendment of Grounds.*

The powers of amendment of grounds of removal or of appeal conferred upon the Quarter Sessions by 11 & 12 Vict. c. 31. s. 4, extend to the addition of an entirely new ground. *R.* v. *the Inhabitants of Llangenney*, 32 Law J. Rep. (N.S.) M.C. 265; 4 Best & S. 311.

The decision of the Sessions as to such amendment is final. Ibid.

Where therefore the Sessions upon the hearing of an appeal against an order of removal, added a new ground of removal setting up a previous order

for the removal of the same pauper, which had not been appealed against, it was held that such an amendment was within the jurisdiction conferred upon them by the above section, and that this Court had no power to interfere. Ibid.

(c) *Notice of Chargeability.*

By 4 & 5 Will. 4. c. 76. s. 79. no poor person shall be removed, &c., until twenty-one days after a notice in writing of his being chargeable, &c. shall have been sent by post or otherwise:—Held, that 29 Car. 2. c. 7. does not apply, so as to make void the sending of the documents required by the above section, in a case where, by the ordinary course of post, they reached the hands of the officers of the parish to which the person is to be removed on a Sunday. *R.* v. *Leominster*, 31 Law J. Rep. (N.S.) M.C. 95; 2 Best & S. 391.

(d) *Costs of Maintenance after the Order.*

An order for the removal of a woman having been made, notice of chargeability, &c. served on the parish of settlement, and no notice of appeal given, the pauper, being pregnant (though not unable to travel at the time of the making of the order), was not removed until after her delivery, about six months from the service of the notice of chargeability, &c.:—Held, that the removing parish could recover from the parish of settlement, under 4 & 5 Will. 4. c. 76. s. 84, only the costs of maintenance for the twenty-one days next after the service of the notice of chargeability. *Hill* v. *Thorncroft*, 30 Law J. Rep. (N.S.) M.C. 52; 3 E. & E. 257.

The 35th section of 11 & 12 Vict. c. 43, which enacts that nothing in the act shall be construed to extend to any order of removal, does not exempt from the operation of the act an order (under 4 & 5 Will. 4. c. 76. ss. 84. and 99.) upon the parish of settlement for the payment of the costs of the maintenance of a pauper incurred between the service of the order of removal, &c. and the actual removal; and the information for the non-payment must, therefore, be laid within six months, under the general limitation of the 11th section. Ibid.

The 24 & 25 Vict. c. 55. s. 1, provides that, after the 25th of March, 1862, the period of three years shall be substituted for that of five years, specified in s. 1. of 9 & 10 Vict. c. 66. An order was made, on the 12th of March, 1862, for the removal of a pauper who had resided in the union for three years next before the application for the order. There was no appeal against it, and the order was duly executed. The removing parish had incurred expense in maintaining the pauper between the time of sending their notice of chargeability and the time of removal:—Held, that the removing parish could not recover such costs of maintenance in a proceeding under s. 84. of 4 & 5 Will. 4. c. 76. *The Overseers of Salford* v. *the Overseers of Manchester*, 32 Law J. Rep. (N.S.) M.C. 107; 3 Best & S. 599.

(e) *Costs of Suspension of the Order.*

On the hearing of a complaint, under 35 Geo. 3. c. 101. s. 2, for non-compliance with an order by two Justices for the payment of the charges incurred by the suspension of an order of removal, the Justice cannot inquire into the propriety of the order, although there is no appeal against it (the charges being under 20*l.*); but, if good on the face of it, he is bound to enforce it by issuing a warrant of distress. *R.* v. *Higginson*, 31 Law J. Rep. (N.S.) M.C. 189; 2 Best & S. 471.

(G) PAUPER LUNATIC.

[The Lunacy Acts amended in relation to the building of asylums for pauper lunatics by 26 & 27 Vict. c. 110.]

(a) *Order of Maintenance.*

(1) *Unsettled Pauper.*

The provisions of sections 95. and 98. of 16 & 17 Vict. c. 97. as to the expenses of removing and maintaining a pauper lunatic, apply to a case where the wife of a man born in Scotland, but who has no settlement in England, becomes lunatic in England, and is sent by the order of a Justice to a lunatic asylum under the powers given by section 67. *The Clerk of the Peace of Somerset* v. *the Overseers of Shipham*, 32 Law J. Rep. (N.S.) M.C. 83; 3 Best & S. 507.

(2) *When the Jurisdiction to make the Order attaches.*

Under 16 & 17 Vict. c. 97. s. 97. the jurisdiction of Justices to adjudicate on the settlement and maintenance attaches on a pauper lunatic being found confined in an asylum; and the validity of their order is not affected by the fact that the order of admission was made by a Justice having no jurisdiction—by *Wightman*, *J.* and *Mellor*, *J.*; but by *Crompton*, *J.*, the 97th section must be read in connexion with the 67th section, and applies only to a pauper lunatic *lawfully* confined. The Justices must, therefore, inquire into the validity of the order under which the lunatic was sent to the asylum, and if it has been made without jurisdiction they have no jurisdiction to adjudicate. *R.* v. *the Overseers of Faversham*, 31 Law J. Rep. (N.S.) M.C. 116; 2 Best & S. 275.

(3) *On whom to be made.*

Where a parish is comprised in a union, under the 22 Geo. 3. c. 83, an order of Justices, under 16 & 17 Vict. c. 97. s. 97, adjudging the settlement of a pauper lunatic confined in an asylum to be in that parish, and directing the guardians of the *union* to pay the costs of maintenance, &c., is made on the proper persons. *R.* v. *the Inhabitants of Bramley*, 31 Law J. Rep. (N.S.) M.C. 11; 1 Best & S. 732.

A pauper lunatic being in confinement in a lunatic asylum, two Justices made an order, under the 16 & 17 Vict. c. 97. s. 97, on the 24th of March, 1862, adjudging her place of settlement to be the parish of C, in the D union, and ordering the guardians of the union to pay for and on account of the parish of C, the costs of examination and conveyance, and a certain sum per week for her future maintenance:—Held, that the order, having been made before the 25th of March, 1862, was not affected by the 24 & 25 Vict. c. 55. s. 6, and was therefore good in point of form. *The Guardians of the Droitwich Union* v. *the Guardians of the Worcester Union*, 32 Law J. Rep. (N.S.) M.C. 196.

*Quære*—The effect of the section on the past costs, or on those of the future maintenance of the lunatic. Ibid.

(4) *Irremovability.*

A boy, eighteen years of age, having resided, unemancipated, with his father, for more than five years in A, a parish in the S union, became insane, and was removed as a lunatic pauper to an asylum, the expense of his maintenance, &c. being paid by the S Union. After three years, the lunatic still being in the asylum, the father removed altogether from A, upon which an order of Justices was made, under the 97th section of the 16 & 17 Vict. c. 97, adjudging the lunatic to be settled in the parish of G (the place of his father's settlement), and directing that parish to pay the costs of his maintenance, &c.:—Held, that the order was invalid, and that the costs of maintenance ought still to be borne by the S Union, under the 102nd section; for that, at the time of his being conveyed to the asylum, the lunatic was exempt from removal by reason of some provision in the 9 & 10 Vict. c. 66, coupled with the 11 & 12 Vict. c. 111, which must be taken to be incorporated with it. *R.* v. *the Overseers of St. Giles-in-the-Fields*, 30 Law J. Rep. (N.S.) M.C. 12; 3 E. & E. 224.

For more than five years before the 23rd of July, 1856, the pauper lunatic had resided in the respondent parish, with her father and mother. On that day her father died, and she continued, being unemancipated, to reside with her mother in the same parish till October, 1858, when she was sent into the workhouse, where she remained until the 24th of January, 1860. In December, 1859, her mother removed from the respondent parish, and went to reside in C. On the 24th of January, 1860, the pauper lunatic was sent from the workhouse to the County Lunatic Asylum, and was confined there until the 25th of April in the same year, when she was discharged and sent to her mother, in C. Her mother had acquired no settlement in her own right; and an order was made, adjudicating the pauper lunatic to be settled in the appellant parish, the place of her father's settlement, and ordering that parish to pay the expenses of maintenance, &c.:—Held, that the order was good, for that the mother had ceased to be irremovable by reason of her having left the respondent parish, and that the daughter had also ceased to be irremovable, as she was unemancipated, and still a member of her mother's family. *R.* v. *the Churchwardens of St. Mary Arches*, 31 Law J. Rep. (N.S.) M.C. 77; 1 Best & S. 890.

*Quære*—Whether an unemancipated child can acquire a status of irremovability in its own right. Ibid.

Where a woman has been removed to a lunatic asylum at the instance of her husband, and is maintained there at the cost of the parish of settlement, such maintenance is parish relief to the husband within the 9 & 10 Vict. c. 66. s. 1, and the period of the wife's confinement in the asylum must be excluded in computing the time the husband has resided in a parish. Where, therefore, a man has resided six years in a parish, but during three of those years his wife has been confined in a lunatic asylum at his instance and at the cost of his parish of settlement, and the wife again becomes lunatic and is sent to an asylum, an order for her maintenance is properly made on the parish of settlement, under section 97. of 16 & 17 Vict. c. 97, and ought not to be made on the parish of residence under section 102. *R.* v. *the Overseers of St. George, Bloomsbury*, 32 Law J. Rep. (N.S.) M.C. 217; 4 Best & S. 108.

Where a woman, who is residing separate from her husband and in a different parish, is sent to a lunatic asylum as a pauper lunatic under 16 & 17 Vict. c. 97, the order for her maintenance is properly made on the parish of her husband's settlement under section 97, and ought not to be made under section 102. on the union of the parish from which the husband is irremovable by reason of five years' residence. *R.* v. *the Guardians of East Retford*, 32 Law J. Rep. (N.S.) M.C. 17.

A pauper, having occupied lodgings in a parish, left the parish intending to return as soon as his trade became better; he did not retain his lodgings, but left some old clothes there in the hands of the landlord, and in his absence his lodgings were not occupied, and he could have had them at any time on his return. After three months' absence, he returned:—Held, that the pauper was not constructively resident in the parish during the three months, and that the absence formed a break in the residence. *R.* v. *the Guardians of Stourbridge*, 34 Law J. Rep. (N.S.) M.C. 179.

(*b*) *Appeal.*

On an appeal against an order made on a board of guardians for the maintenance of a criminal lunatic, under the statute 3 & 4 Vict. c. 54. s. 5, the practice follows the procedure in use in appeals against orders of removal; and when application is made within the twenty-one days from the service of the order for a copy of the depositions, the board have, as in the case of poor-law appeals, fourteen days from the time the copy is sent in which to give their notice of appeal. The clerk of the board, an attorney, signed the notice of appeal "H H, clerk to the aforesaid guardians":—Held, that this was a sufficient notice of appeal on the part of the guardians. *R.* v. *the Guardians of the Newport Union*, 33 Law J. Rep. (N.S.) M.C. 155.

A lunatic pauper was sent from a parish into a lunatic asylum, and an order was subsequently made by Justices, under section 96. of 16 & 17 Vict. c. 97, directing the guardians of the union comprising such parish to pay the costs of maintenance to the treasurer, &c. of the asylum:—Held, by *Cockburn, C.J.*, *Mellor, J.* and *Shee, J.*, that the guardians upon whom the order was made could not appeal against such order, as it was a mere interim order necessary for the support of the lunatic until his settlement was adjudged to be in some particular parish, or until, by reason of its being impossible to ascertain the parish of settlement, the costs of maintenance were thrown upon the county. Held, by *Blackburn, J. (sed hæsitante)*, that the guardians might appeal against the order. *The Guardians of Kettering* v. *the Northampton Lunatic Asylum*, 34 Law J. Rep. (N.S.) M.C. 198.

## POWER.



### (A) CONSTRUCTION OF POWERS IN GENERAL.

A power to sell or convey in exchange all or any part of the manors, lands, tenements, hereditaments and premises, and the inheritance thereof, will not enable trustees to sell the lands, &c. with an exception or reservation of the mines and minerals under the same. *Buckley* v. *Howell*, 30 Law J. Rep. (N.S.) Chanc. 524; 29 Beav. 546.

In 1812, under a power to raise portions for younger children, A B, tenant for life, charged the estates and demised the same to trustees for 500 years upon trust to raise the amount, and to stand possessed thereof on the trusts to be afterwards declared. Power was then reserved to A B to revoke, alter or vary all, every or any of the trusts, powers and provisions thereinbefore contained, &c.:—Held, that this power of revocation did not extend to a revocation of the term, but only of the trusts of the money. *Vivyan* v. *Vivyan*, 31 Law J. Rep. (N.S.) Chanc. 158; 30 Beav. 65.

A testator gave his executors full power to sell his ships by public or private sale, to sell under mortgage by private valuation to any party holding shares with him therein, if they should be desirous of purchasing the same:—Held, that this was a discretionary power, and conferred no benefit on the part-owners. *Brown* v. *Gellatley*, 31 Beav. 243.

Power of sale of realty given to trustees with the consent of the tenant for life, held exercisable after his bankruptcy with the consent of the tenant for life, and of all persons who had become interested in his estate. *Eisdell* v. *Hammersley*, 31 Beav. 255.

Where a testator, who has devised estates in settlement, has by his will given to the tenant for life leasing powers which are expressly to be exercised only with the consent of a person named (devisee for life of contiguous property), the Court will not exercise the powers given to it by the Settled Estates Act, so as to enable the tenant for life to dispense with such consent, even though it appear that the person whose consent is required has arbitrarily, but not maliciously refused. *In re Hurle's Settled Estates*, 2 Hem. & M. 196.

A voluntary settlement in favour of several persons contained a power authorizing the tenant for life (a volunteer) to revoke the trusts of the property, and again re-settle the same upon such trusts as to her should seem meet:—Held, that this general power could not be controlled, and that an appointment of the property to herself absolutely, to the exclusion of the other persons entitled under the settlement, was a good execution of the power. *Meade King* v. *Warren*, 32 Beav. 111.

Where lands are devised to trustees in fee, upon trusts, or with powers which, in their execution, require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends to the heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will. *Robson* v. *Flight*, 34 Law J. Rep. (N.S.) Chanc. 226; 34 Beav. 110.

A testator devised real estate, the legal estate in which was outstanding in a mortgagee, to trustees, in trusts as to one moiety for A for life, with remainder to his children, and as to the other moiety for B for life, with remainder to her children; and directed that the trustees, or the survivor of them, or the executors or administrators of the survivor, "should and might" lease the property at rack-rent for any term not exceeding twenty-one years. The trustees disclaimed. A, who was the testator's heir-at-law, granted a rack-rent lease for twenty-one years:—Held, reversing the decision of *Romilly, M.R.*, that the lease was void as having been granted by a stranger to the power. Ibid.

A testator devised freeholds and copyholds to his wife for life, with remainder to trustees in fee, in trust to sell the freeholds as soon as conveniently might be after his decease:—Held, that the absolute interest in the estate might be sold by the trustees in the life of the widow with her consent. *Mills* v. *Dugmore*, 30 Beav. 104.

A mortgage contained a power enabling the mortgagor, until foreclosure, &c., to grant leases; and the mortgagor, in exercise of the power, granted a lease to a trustee for himself,—Held, that the lease was a valid exercise of the power. *Bevan* v. *Habgood*, 30 Law J. Rep. (N.S.) Chanc. 107; 1 Jo. & H. 22.

It is an established doctrine that a tenant for life, with power to grant leases or sell, may make a valid bargain with a trustee for himself. Ibid.

### (B) POWER OF APPOINTMENT.

#### (*a*) *Construction of.*

##### (1) *In general.*

A testator, after making specific devises of his property real and personal, thus provided for the disposal of his residuary estate: "As to all the residue, &c. not hereinbefore specifically bequeathed, I give, &c. to my executors, their heirs, &c. upon the trusts following," to pay debts and legacies, to permit his nephew, H B C, to receive the rents for life, and "after the death of my said nephew, provided he shall leave any child or children him surviving, &c., I direct that my executors, &c. shall stand seised of my said residuary estate upon trust for such persons and for such ends and purposes as my said nephew shall by his last will direct, appoint, or devise; but if my said nephew shall die without leaving any child or children him surviving, &c., and my said nephew shall not previous to his decease make any such appointment as aforesaid, then my executors shall stand possessed of my said residuary estate, &c. upon trust for B Y and R, their heirs, &c." The nephew died without ever having had a child, leaving a will in which he recited his uncle's will, and, declaring himself thereby entitled to appoint, he appointed the residue to E and J:—Held, affirming the decision of *Romilly, M.R.*, that

the nephew never having had a child, the condition on which the power to appoint was founded had not occurred, and the power to appoint never came into existence; that the nephew's appointment was therefore invalid; and the residuary estate went, under the uncle's will, to B Y and R. *Earle* v. *Barker*, 11 H.L. Cas. 280.

Devise to A for life or until insolvency, and from and immediately after his death or insolvency, to his children as he should by deed or will appoint, and in default to the children equally:—Held, that an appointment by A after his insolvency was valid. *Wickham* v. *King*, 2 Hem. & M. 436.

A testator bequeathed his residuary real and personal estate to trustees upon trust for his nephew H B C for life, and after his decease, "providing he shall leave any child or children him surviving, upon trust for such persons, and for such ends and purposes as my nephew shall by his will direct or appoint, give, devise or bequeath the same; but if my nephew shall die without leaving any child or children him surviving, *and* shall not previous to his decease make any such appointment, gift or bequest as aforesaid," then upon trust for other persons. H B C, by his will, appointed, or assumed to appoint, the whole real and personal estate mentioned in his uncle's will to trustees upon the trusts declared respecting his own residuary estate. Upon the decease of H B C without leaving any child or children surviving,—Held, that the word *and* could not be read as *or*, but that as the nephew had died without leaving a child, no power had arisen, and therefore no appointment had been made, and consequently that the gift over took effect in favour of the persons named in the uncle's will. *Barker* v. *Young*, 33 Law J. Rep. (N.S.) Chanc. 279; 33 Beav. 353.

(2) *General or special.*

By a marriage settlement real estate was settled, after the decease of the husband and wife, in case there should be any issue living of the marriage, to such uses generally as the husband should appoint, and in default of appointment, to the use of all the children equally; and in default of such issue, to such uses as the wife should appoint, and in default of appointment, to the use of her right heirs. There was issue of the marriage:—Held, that the husband had a general power of appointment, and not merely a power of appointment amongst the issue. *Peover* v. *Hassall*, 30 Law J. Rep. (N.S.) Chanc. 314; 1 Jo. & H. 341.

A testator directed his trustees to pay the interest of one-third of his residuary property to his wife for life, and after her death the capital to be paid "to such and so many of the relations or friends of his said wife" as she should by will appoint. His wife survived and made a will, by which she bequeathed her residuary estate, but did not in any way refer to the power:—Held, first, that the power was a special and not a general power, and therefore that the general bequest contained in the will did not operate as an execution thereof. Secondly, that by the will an implied trust, in default of appointment, was created in favour of the "relations or friends." Thirdly, that under this implied trust the "next-of-kin" of the wife were alone entitled. *In re Caplin's Will*, 34 Law J. Rep. (N.S.) Chanc. 578.

(3) *Exclusive or Not exclusive.*

Bequest to A or such of her "children," in such parts, shares and proportions as B should appoint, and in default to A for life, with remainder to her children equally:—Held, to authorize an exclusive appointment to one of several children of A. *Turner* v. *Bryans*, 31 Beav. 303.

The donee of a power (which was a non-exclusive one), after she had made the first appointment, appointed other portions of the fund to other objects of the power, on the assumption of the complete validity of the previous appointment. The subsequent appointments would, if the former one had been wholly valid, have exhausted the fund without including all the objects, and thereby have been invalid:—Held, that the partial failure of the first appointment, setting free a portion of the fund and leaving it to devolve as unappointed, removed all objection to the subsequent appointments on the ground of exclusiveness. *Ranking* v. *Barnes*, 33 Law J. Rep. (N.S.) Chanc. 539.

A testator gave to trustees certain freehold and leasehold property, upon trust to pay the rents, issues, and profits to his granddaughter for life, and after her decease, "in case she should leave issue of her body lawfully begotten, then upon trust to dispose of his said estate in such manner amongst such issue as his said granddaughter by deed or will should appoint, and for default of such issue," then upon certain ulterior trusts. The granddaughter had several children and grandchildren, and by her will, purporting to be made in execution of the power, appointed the whole of the property amongst some only of her children:—Held, upon the construction of the above clause, that issue living at the death of the donee of the power of appointment were alone objects thereof; that an exclusive appointment was not authorized, and the appointment was therefore invalid; and that the issue of the granddaughter of every degree living at her death became entitled to the property on her death as tenants in common. *Stolworthy* v. *Sancroft*, 33 Law J. Rep. (N.S.) Chanc. 708.

A power was given to A B to appoint a fund, by will, to his wife alone, or to his wife and such of his children as he should direct. The wife died, and A B appointed the fund exclusively to five out of his seven children:—Held, that the appointment was valid. *Paske* v. *Haselfoot*, 33 Beav. 125.

Where there is a power to divide a fund amongst the members of a particular class, the death of some of the members of that class, before the exercise of the power, will not prevent its exercise in favour of the survivors. Ibid.

(*b*) *Exercise of the Power.*

(1) *In general.*

A power in a marriage settlement authorized two persons by deed "to be by them duly executed under their respective hands and seals, in the presence of, and to be attested by, two or more credible witnesses," to appoint a sum of money. The deed of appointment was signed by these two persons, their seals were attached thereto, and the attestation was in this form—"Signed, sealed, and delivered in the presence of G B, E C, clerks to Mr. S, solicitor, Cheltenham":—Held, that this was a sufficient attestation, and that the power was duly executed. *New-*

*ton* v. *Ricketts* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 247; 9 H.L. Cas. 262.

The deed of appointment had appointed a sum to N, a married woman, for her separate use. She and her husband had appeared in a proceeding in the Court of Chancery on a petition for the distribution of the fund subject to the power. The Court decided against them, and made an order for the payment of costs. The money specially belonging to the wife was by her mortgaged. The mortgagees and the husband and wife appeared together on the petition, and a general order for payment of costs was made against them:—Held, that this was not an order against the wife's money as such, but against the money to which the mortgagees were entitled, and that the order as to costs was properly made. Ibid.

A testator reciting that under the settlement in 1819, on his second marriage, he had power to charge 5,000*l.* amongst the children of his second marriage, proceeded to appoint it. The settlement of 1819 contained no such power, but a re-settlement of 1839 contained a power to appoint that sum to his younger children:—Held, that the will was a valid execution of the power. *In re Eardley Wilmot*, 29 Beav. 644.

A father, by his will, gave all his property to his daughter F. By a settlement made on his marriage he had a power by deed, writing or will, to appoint a sum of money to arise on a policy of assurance on his life. By a memorandum made at the same time as his will he gave directions to F, and suggested that some benefits should be given to his sons, and at the foot, after his signature, he said "the money from the Equitable Insurance Office I would have equally divided between my daughters F, G and A":—Held, that the memorandum was a good execution of the power, and that the benefits conferred on F were not made under a promise to distribute the testator's property in compliance with the memorandum. *Proby* v. *Landor*, 30 Law J. Rep. (N.S.) Chanc. 593.

The trustees of a deed had a discretionary power of distribution over a fund amongst a class of children, who in default took equally. There were originally five trustees, one of whom was a member of the class. After the death of the surviving trustee, three new trustees were appointed under a power, one of whom (A) was a member of the class. These three apportioned the fund, except a minute portion, amongst the three survivors of the children equally, including A:—Held, that the appointment of three trustees instead of five was not void; and, secondly, that the appointment of the fund was good. *Reid* v. *Reid*, 30 Beav. 388.

In order to make the acceptance of a gift under a supposed power of appointment operate as a confirmation of the power, there must be full knowledge, on the part of the person accepting the gift, of the invalidity of the power. *Sandeman* v. *Mackenzie*, 30 Law J. Rep. (N.S.) Chanc. 838; 1 Jo. & H. 613.

A will executed in pursuance of a power in a settlement made by a lady who had gone through the ceremony of marriage with the husband of a deceased sister, which marriage was invalid by law, will pass the property comprised in the settlement, though she had survived her husband, and become entitled to the property absolutely under the ultimate trust in the settlement. *Jones* v. *Southall*, 30 Law J. Rep. (N.S.) Chanc. 875; 30 Beav. 187.

By a deed of arrangement large real estates were vested in trustees upon trusts for sale, and payment of mortgages made by a husband, and, subject thereto, to pay the income to the wife for life; and an absolute power was reserved to her to appoint by deed or will not only the surplus income, but also the real estates themselves. The husband subsequently deserted the wife, leaving her in possession of the estates, one of which was reserved for her occupation free of rent, so long as the interest on the mortgages was paid. The husband afterwards went to live with another woman; and after a lapse of years the wife, by collusion with her husband, induced him to go to Scotland and commit adultery, to afford her an opportunity of obtaining a divorce there. During the negotiations she made her will and appointed the estates, together with the proceeds and income thereof, to P, a Frenchman, whom she knew before her marriage, his heirs and assigns. She obtained the divorce, and afterwards executed two deeds appointing the estates to P, his heirs and assigns, and then went through the ceremony of marriage with P in Scotland and France. After her death, upon a suit by P, and upon another suit by a creditor of the husband who had become insolvent, the one to carry the deeds into effect, and the other to impeach the appointments both by deed and will,—Held, on P submitting to carry out the trusts of the will, that the will was not revoked by the deeds, as they contained no declaration to that effect. That the omission to revoke the will rendered it necessary to decide whether the deeds could have been carried into effect. That the appointment made by the will was good, and that the trusts ought to be carried into effect; and the cross-bill to impeach the appointments was dismissed, with costs. *Ford* v. *De Pontès; De Pontès* v. *Kendall*, 31 Law J. Rep. (N.S.) Chanc. 185; 30 Beav. 572.

A and his wife, in exercise of a general power of appointment, reserved to them in a voluntary settlement executed after their marriage, appointed certain lands after the death of the survivor of them to trustees, their executors, administrators and assigns, upon trusts, for sale, and to divide the proceeds of such sale among the seven children of A and B. A and B both died. Upon a bill by six of their children against the heir-at-law of A, who was entitled in default of appointment,—Held, that such heir-at-law was a trustee for the benefit of the parties interested under the appointment. *Dilrow* v. *Bone*, 31 Law J. Rep. (N.S.) Chanc. 417; 3 Giff. 538.

By a marriage settlement the husband had a power to appoint a sum of 1,800*l.* (invested in 3*l.* per cent. annuities) among the children of the marriage. By his will, without referring to the power, he gave, devised and bequeathed to three of his children a third part of the money which he had in the 3*l.* per cent. consols and 3*l.* per cent. annuities. He likewise gave and bequeathed to his grandson, who was not an object of the power, 100*l.* out of his money in the Government funds, the same to be made up by each of his three children. The testator had eight children; two of them had died, and to one of these he had taken out administration for property sworn under 200*l.* He had no money in the funds at the time of his death:—Held, that the will was a good execution of the power, but the bequest of the 100*l.* to the testator's grandson was void. *Rooke* v. *Rooke*, 31 Law J. Rep. (N.S.) Chanc. 636; 2 Dr. & S. 38.

Under the Wills Act, 1 Vict. c. 26, a general devise by will executed after the 1st of January, 1838, operates as an execution of a power of appointment vested in the testator after the execution of the will. *Thomas* v. *Jones*, 31 Law J. Rep. (N.S.) Chanc. 732; 2 Jo. & H. 475: 32 Law J. Rep. (N.S.) Chanc. 139; 1 De Gex, J. & S. 63.

The 8th section of the act does not prevent a general devise by a married woman from operating as such an appointment. Ibid.

*Semble*—A general power of appointment over an equitable estate given to the survivor of two persons to be executed by deed or will would, independently of the Wills Act, be well exercised by a will made during the lives of both the persons by that one of them who afterwards proved to be the survivor, for a contingent power is in equity analogous to a contingent equitable interest, and as such an interest is (independently of the 8 & 9 Vict. c. 106.) capable of being alienated, so is the power capable of being exercised before the contingency occurs. Ibid.

A testamentary power of appointment over real estate was given to the survivor of A, B and C; C afterwards became a married woman, and by her will, executed after the 1st of January, 1838, made a general devise of her residuary real estate, giving, amongst other things, a life interest to B. C afterwards became the survivor:—Held, that the will operated as an execution of the power, and that the gift of a life estate to B, whom the testatrix must necessarily survive before the power could vest in her, was not a sufficient expression of a contrary intention to take the case out of the act. Ibid.

A testator was under covenant to pay 2,000*l.* to the trustees of his settlement, upon trust for his wife for life, with remainder to his general appointees by deed or will. By his will he directed the executors to pay the 2,000*l.* to the trustees in order that they might invest it and pay the income to the wife for life; and then bequeathed his residuary estate subject to certain legacies to the wife absolutely:—Held, that the residuary bequest was a good execution of the power. *Scriven* v. *Sandom*, 2 Jo. & H. 743.

*Semble*—Nothing short of inconsistency can amount to the contrary intent required by the statute. Ibid.

By marriage settlement certain property was settled on the husband and wife for life, and afterwards to such children as the husband should by deed or will appoint, and in default of appointment to the children equally at twenty-one or on marriage. There were three children: one died an infant, another attained twenty-one and died before the father, and the third married and survived. The father by his will gave the residue of his estate and effects which he might die possessed of or entitled to, including the stocks, funds and securities which should be in the names of the trustees of his marriage settlement upon the trusts thereof, and which he directed should be considered as part of his residuary personal estate, to trustees to pay the interest to his wife for life, and then to his daughter:—Held, that it was not the testator's intention to exercise his power of appointment under the settlement, but only to dispose of that moiety of the trust funds which became his own absolutely by the death during his life of the child who had acquired a vested interest. *In re Bidwell's Settlement*, 32 Law J. Rep. (N.S.) Chanc. 71.

A testatrix bequeathed her residuary estate to such persons as B C should appoint by deed or will, and in default of appointment to his next-of-kin; B C made his will, but died before the testatrix:—Held, that the will could not operate as an execution of the power, but that the gift in default of appointment took effect, and the next-of-kin were entitled. *Jones* v. *Southall*, 32 Law J. Rep. (N.S.) Chanc. 130; 32 Beav. 31.

A, having a power to appoint 1,000*l.* by will,—which, in default of appointment was given over to B,—duly appointed it to C, who died in the testator's lifetime. He afterwards made a codicil, giving his residue and the dividends due at his death on the 1,000*l.* to his wife:—Held, that, under the Wills Act, the 1,000*l.* passed to the wife under the residuary gift. *Bush* v. *Cowan*, 32 Beav. 228.

A testator by his will gave all his personal property, except a specific portion, to his wife absolutely, subject to payment of debts; and he gave the specific portion of his property in manner therein mentioned. A few days afterwards he executed a deed, by which he settled a portion of his property upon his wife for life, and after her decease for himself for life, and after the death of the survivor, for such persons as the husband and wife should jointly appoint; and in default of appointment, either jointly by the husband and wife, or by the husband by will, the property was to go to the survivor. Another deed was subsequently executed in December, having only one witness, by which the testator covenanted that his devisees, or heirs, executors or administrators, should after his death convey and assign all his realty and personalty of or to which he should at his death be seised or entitled for a beneficial interest, or which he should have disposed of by his will, to trustees, in trust to pay debts and transfer the residue to his wife, if living at his death, or to his next-of-kin:—Held, that the specific bequest contained in the will operated in exercise of the power of appointment contained in the subsequent deed; that the instrument of December was a valid deed, and did not operate as a will so as to revoke the former will, and that the property passing under the appointment constituted assets available for the payment of debts provided for by the voluntary deed. *Patch* v. *Shore*, 32 Law J. Rep. (N.S.) Chanc. 185.

Under a power to appoint to children an appointment was made by deed-poll to trustees upon the trusts of a contemporaneous settlement on the marriage of one of the daughters. This settlement, to which the daughter was a party, declared trusts for the daughter for life, with limitations over to her husband and children:—Held, that the appointment was good, being equivalent to an appointment to the daughter and a settlement by her. *Daniel* v. *Arkwright; Courthope* v. *Daniel; Daniel* v. *Courthope*, 2 Hem. & M. 95.

Another appointment was made in favour of another daughter already married, and in this case the deed of appointment itself declared trusts in favour of the daughter, her husband and children:—Held, that this appointment was bad; but, on the evidence of intention, the appointment was rectified. Ibid.

Testamentary power to appoint a trust fund among all or any of donee's children. Bequest by

donee as follows: "all my personal estate upon trust to pay all just debts and funeral expenses, to pay my daughter E 19*l.*, and to my daughter J the whole of my furniture and household effects; and as to my money in the funds and all my residue of my personal estate, upon further trusts for the benefit of J." At the date of the will and of the death, the testator had no money in the funds, and the trust fund consisted of a sum of consols:—Held, that the will was not an appointment. *In re Mattingley's Trust*, 2 Jo. & H. 427.

An appointment by a married woman, under a general testamentary power, to trustees upon trust for conversion and payment of debts and legacies, followed by a gift of the residue of her estate, which failed partially by lapse, &c., held not to make the property absolutely the estate of the married woman, but that so far as the gift of residue failed, the property devolved as unappointed. *Hoare* v. *Osborne*, 33 Law J. Rep. (N.S.) Chanc. 586.

Trust money was settled on a married woman for life, for her separate use, without power of anticipation, but with power to her to appoint the capital after her death by deed. The trustees lent part of the trust money to the husband on mortgage, and she consented to the investment by the mortgage deed. Part of the trust money having thereby been lost,—Held, that the wife had not, by executing the deed, appointed the reversion so as to make it liable for the loss. *Fletcher* v. *Green*, 33 Beav. 426.

A power of appointment which is not in terms a power to appoint "by will," is not well exercised by a will executed in the manner required by the Wills Act, I Vict. c. 26, unless the formalities required by the power are also observed. *Taylor* v. *Meads*, 34 Law J. Rep. (N.S.) Chanc. 203.

An appointment of personal estate in England made by a person, who died domiciled abroad, by a will not attested as required by the law of England, but valid according to the law of the country of the testator's domicil, and consequently admitted to probate in England, was held to be a valid execution of a power (created by an English will) to appoint "by will duly executed." *D'Huart* v. *Harkness*, 34 Law J. Rep. (N.S.) Chanc. 311; 34 Beav. 324.

A married woman having, under a deed, a power of general testamentary appointment over a trust fund, by her will appointed the same amongst certain persons, and made A and B her executors:—Held, that A and B, and not the trustees of the deed, were the proper persons to distribute the fund amongst the appointees, and that it ought to be paid over to the former for distribution by them. *In re Philbrick's Settlement*, 34 Law J. Rep. (N.S.) Chanc. 368.

A tenant for life had a power to appoint 5,900*l.* consols. She appointed 1,400*l.* to each of her three sons, but not to vest until her death; and reserved to herself a power of revocation. She also appointed irrevocably to her daughter the residue of the 5,900*l.*, after setting apart a sufficient portion to satisfy the appointment of her three sons to vest in the daughter *instanter*:—Held, that the appointment to the daughter comprised only a residue after deducting 4,200*l.*; and the appointment in favour of two of the sons having failed by their death in the life of the appointor,—Held, that the shares intended for them went as in default of appointment. *Lakin* v. *Lakin*, 34 Beav. 443.

A father, under a power to appoint to his children, appointed a share to a daughter for life for her separate use, with remainder as she should by will appoint:—Held, that this was a good execution of the power. *Morse* v. *Martin*, 34 Beav. 500.

The Court aided the defective execution of a power in favour of a daughter as against her brothers, who, in default of appointment, would participate in the property. Ibid.

(2) *Excessive and undue.*

A parent, having by his settlement an exclusive power of appointing a fund to his children, was desirous of preventing his daughter from marrying a particular gentleman. With that object he appointed part of the fund to his son, who, about a month afterwards, at the suggestion of the father, settled it upon trusts, conferring upon himself and another son the power of appointing the fund to the daughter and her issue, or of withholding it from them, and, subject thereto, upon trust for himself absolutely:—Held, that the transaction was a fraud upon the power, and that the appointment was void in equity. *The Duke of Portland* v. *Topham; Bentinck* v. *Topham* (House of Lords), 34 Law J. Rep. (N.S.) Chanc. 113; 11 H.L. Cas. 32.

The same parent out of his own property and with the same object, not however apparent upon the deeds, executed settlements providing for accumulation during his own life, and after his death for payment of the income of the trust funds to the daughter in question and another daughter, or their respective issue according to the appointment of certain nominees of his own, whom he selected as likely to carry out his views, and in default of appointment for payment to the daughter and her sister equally during their joint lives. After his death the daughter married the gentleman objected to, and the donee for the time being of the power appointed the whole income to the sister, with a view to the accumulation of one moiety thereof during the continuance of the coverture for the ultimate benefit if thought fit of the daughter or her issue or the sister:—Held, that the appointment was bad. Ibid.

Whether by the effect of the void appointment, the exercise of the power was precluded as to future income—*quære*. Ibid.

A marriage settlement gave to the parents a power, with the consent of the trustees, to make void the trusts, and of appointing the estate to new uses. This power was exercised for the purpose of mortgaging the estate to one of the trustees for a sum advanced to the father. The estate was afterwards sold under a power of sale contained in the mortgage deed:—Held, that a good title could not be made under it. *Eland* v. *Baker*, 29 Beav. 137.

T K P, a tenant for life of an estate, had a power of appointment over it in favour of his children, or any one or more of them. No power of leasing was given to him. He had granted a lease to F, and the term became vested in G, and to the latter he agreed to grant a new lease for a term commensurate with the remainder of the old term. T K P and his daughter executed a joint bond to indemnify G against the determination of the lease by T K P's death before the end of the term, and on the same day T K P executed his will, by which he made an appointment of the whole estate in favour of his

daughter. Thereupon G surrendered the old term, and the lease was executed to him for the remainder of the original term. A son of T K P filed a bill to set aside the transaction as being a corrupt bargain between T K P and his daughter and a fraud upon the power; but *Kindersley, V.C.*, dismissed the bill with costs; and on appeal, the Lords Justices held that the will formed no part of the arrangement with reference to the lease and the bond. *Pickles* v. *Pickles*, 31 Law J. Rep. (N.S.) Chanc. 146.

The donees of a power which authorized the appointment of personal estate amongst their children, appointed it "upon the trusts following, that is to say"; then followed trusts for the benefit of some of the children, and to pay the interest to them for life, and after the decease of each child to dispose of her share amongst her children, who were not objects of the power:—Held, that the whole trust must be read together, and could not be treated as an absolute appointment in the first instance followed by an attempt to settle the shares; consequently, the appointees took only life interests, and the residue of the fund was unappointed. *Rucker* v. *Scholefield*, 32 Law J. Rep. (N.S.) Chanc. 46; 1 Hem. & M. 36.

The donee of a power cannot delegate its exercise to any other person; and where the Court sees that the purposes for which it is reserved have not been observed, but the appointment has for its object to effect intentions not in accordance with those of the donor of the power, it will treat that appointment as a fraud on the power; and it makes no difference whether the power is created by another person, or by the donee himself, without valuable consideration, the same rule of equity applying equally to both cases. *Lady Mary Elizabeth Topham* v. *the Duke of Portland*, 32 Law J. Rep. (N.S.) Chanc. 257; 1 De Gex, J. & S. 517.

The intentions of the donor of a power are to be collected from the instrument creating it, and not from parol evidence; but such evidence is admissible to shew the purposes for which the power is exercised, although those purposes do not appear from the instruments by which it is exercised; therefore, where it appeared from such evidence that an appointment was made in favour of an object of the power, in order that other deeds might be executed by the appointee to raise inducements for a daughter of the donee of the power, who was herself an object of the power, to abstain from marrying a person objected to by the father, the appointment was set aside as not having been made for a purpose contemplated by the donor of the power. Ibid.

Where a power of appointment was created by a Scotch deed over a sum of money charged on estates in Scotland, the Court of Chancery in England declined to decide the validity of appointments made under it without first ascertaining the law of Scotland on the subject; and for that purpose directed a case to be stated for the opinion of the Court of Session, pursuant to the provisions of the statute 22 & 23 Vict. c. 63. (an Act to afford facilities for the more certain ascertainment of the law, &c.) Ibid.

A title cannot be derived under a fraud upon a power in the absence of valuable consideration. Ibid.

The rights of persons entitled in default of appointment can be defeated only by its *bona fide* exercise. Ibid.

*Secus*—Where a *bona fide* appointment is made to an object of the power, with a view to an immediate settlement of the appointed property with the approbation of the appointee; as in the instance of an appointment by a parent to a child in contemplation of a settlement on the marriage of the latter, in which case the parental influence of the donee of the power may be legitimately exerted in procuring a proper settlement. Ibid.

M P, having a power of appointing a fund by deed or will amongst her children, exercised the power by will in favour of two of her children. A month afterwards she exercised her power in almost the same terms by a deed, and, on the faith of the latter appointment, M P obtained a loan, and the appointees joined in charging the shares appointed to them as security for the repayment of this loan. The appointment by deed was admittedly invalid, as between the children, as a fraud upon the power; and the will, the deed of appointment, and the security, were all drawn by the same solicitor, who was also the solicitor for the persons who advanced the money:—Held, that these circumstances, though giving rise to strong suspicion that the will was executed with a view to the subsequent fraudulent transaction, were not sufficient to justify the Court in arriving at that conclusion, and that as fraud was not clearly proved, the appointment made by will must be treated as valid. *Pares* v. *Pares*, 33 Law J. Rep. (N.S.) Chanc. 215.

If a power of appointment be exercised in favour of an object of the power, upon the understanding that deeds shall be executed by the appointee, settling the property on persons not objects of the power, in furtherance of the desire of the donee of the power to appoint to those persons, the appointment, although made without any corrupt motive, is void in equity as a fraud upon the power; the case being different from that of an appointment to a son or daughter (an object of a power) before marriage with a view to a settlement on the issue of the marriage, though not objects. *Pryor* v. *Pryor*, 33 Law J. Rep. (N.S.) Chanc. 441; 2 De Gex, J. & S. 205.

An appointment to an object of a power upon a bargain to make a settlement in favour of another person, also an object thereof, is valid (per *Knight Bruce, L.J.*). Ibid.

The donee of a power to appoint a fund amongst her children appointed two-sixths to a married daughter, with the view of enabling the daughter's husband, with one-half of the appointed fund, to pay a debt which he had incurred on account of his brother-in-law, an object of the power:—Held, that the appointment was invalid as to one moiety of the appointed fund. *Ranking* v. *Barnes*, 33 Law J. Rep. (N.S.) Chanc. 539.

A married woman, having a power of appointment by will amongst her children, in consideration of a supply of goods to one of her sons for the purposes of his business upon credit, covenanted with the son and the persons giving the credit that she would so exercise the power in favour of such son as effectually to appoint to him not less than 1,000*l.* She subsequently made her will, and in exercising the power she gave the son 1,100*l.* stock, and directed him to pay the appointed sum to the creditors:—Held (following former decisions, though doubting their conformity to sound principles), that the ap-

pointment was valid. *Caffin* v. *Cooper*, 84 Law J. Rep. (N.S.) Chanc. 692; 2 Dr. & S. 365.

(c) *Extinguishment of the Power.*

A settlement made in 1794 gave to A E a power to appoint the fee by deed or will. By deed, in 1830, she exercised this power of appointment, but reserved to herself power of revocation and new appointment by deed. In 1833, by another deed, she revoked that of 1830, made a new appointment, and repeated the same reservations. She did the like by another deed in 1835. In 1836 she executed another deed, revoking the uses of 1835, but not making any new appointment, nor making any reservation as to the power of new appointment. In 1848 she made a new appointment by will:—Held, affirming the decree of the Lords Justices, and overruling a previous decision of *Kindersley, V.C.*, that the original power of 1794 was not exhausted by the deeds of 1830, 1833, 1835 and 1836, but that, under the original power, it was still competent to A E to appoint by will. *Saunders* v. *Evans* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 233; 8 H.L. Cas. 721.

A sum of money was vested in trustees for a husband for life, or until he should become insolvent, with remainder to his wife for life; with remainder, after the determination of the trusts thereinbefore created, for the children of the marriage, as the survivor of the husband and wife should by deed or will appoint; and, in default of appointment, after the death of the husband and wife or the sooner determination of the interests limited to them respectively, for the children of the marriage. The husband became insolvent, and it was declared by the Court that his interest in the fund had ceased with his insolvency. The wife afterwards died, and, upon the petition of the children, it was held, affirming the decision of *Romilly, M.R.*, that on the death of the mother the fund became divisible, the father's power of appointment being then extinguished. *Haswell* v. *Haswell*, 30 Law J. Rep. (N.S.) Chanc. 97.

By a marriage settlement real estate was conveyed to trustees for the husband for life; but in case he should assign, charge, encumber or otherwise anticipate the income,—then, on either of the events, for the wife for life, for her separate use, and after her decease for the children of the marriage. Powers of sale and exchange were given to the trustees, with the joint consent of the husband and wife. The husband became bankrupt:—Held nevertheless, that his power of consenting to the sale by the trustees was not extinguished. *Holdsworth* v. *Goose*, 30 Law J. Rep. (N.S.) Chanc. 188; 29 Beav. 111.

Real estates were devised to trustees upon trust to pay the rents and profits to T P W for life, or until he should become bankrupt, and from and after his decease, or from and immediately after he should become bankrupt, the estates were devised to the trustees and their heirs to the use of the children of T P W as he should appoint, and in default to all the children equally. Part of the property had been sold under a power of sale contained in the will, and the purchase-money had not all been reinvested in land. T P W became bankrupt, and subsequently exercised the power of appointment:—Held, that the power did not determine on the bankruptcy of T P W, and that the appointment subsequently made by him was valid. *Wickham* v. *Wing*, 34 Law J. Rep. (N.S.) Chanc. 425.

*Haswell* v. *Haswell* (2 De Gex, F. & J. 456; 29 Law J. Rep. (N.S.) Chanc. 421) explained. Ibid.

(C) Power of Leasing.

A testator devised his freehold dwelling-house and trade premises to his daughters and the survivor for life, "with full power to them or her to grant leases thereof, or of any part thereof, for a term or terms not exceeding twenty-one years, at a rack-rent, and without taking any premium or premiums for the same, or building or repairing leases for the term of sixty-one years":—Held, by the Court of Exchequer Chamber (*Cockburn, C.J. dubitante*), reversing the judgment of the Court of Exchequer, that a lease for forty years with a covenant by the lessee to well and sufficiently repair, maintain, amend and keep the demised premises in, by and with all manner of needful and necessary reparations and amendments, and at the end of the term to yield them up, so being in all things well and sufficiently repaired, amended, and kept together, with a power to the lessor to enter and view and give written notice of all defects and want of reparation, and a covenant by the tenant within three months to make good all such defects, was a valid lease in execution of the power. *Easton* v. *Pratt* (Ex. Ch.), 33 Law J. Rep. (N.S.) Exch. 233; 2 Hurls. & C. 676—reversing the judgment below, 33 Law J. Rep. (N.S.) Exch. 31; 2 Hurls. & C. 676.

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## PRACTICE, AT LAW.

[See Production and Inspection of Documents—Venue—Witness.]

[Her Majesty in Council enabled to make alterations in the circuits of the Judges by 26 & 27 Vict. c. 122.—Fees payable in the superior courts of law at Westminster, and in the offices belonging thereto, to be collected by means of stamps, 28 Vict. c. 45.—The procedure and practice in Crown suits in the Court of Exchequer at Westminster amended by 28 & 29 Vict. c. 104.]

(A) Process.
- (a) *Writ of Summons.*
  - (1) *Renewal and Re-sealing.*
  - (2) *Cause of Action within the Jurisdiction.*
- (b) *Service of, in Substitution of Personal Service.*
- (c) *Order to proceed where Defendant out of the Jurisdiction.*

(B) Appearance.

(C) Particulars.
- (a) *Under Plea of Payment into Court.*
- (b) *Of Plea of Fraud.*
- (c) *Plaintiff's Name and Abode.*

(D) Declaration.
- (a) *Time and Notice to declare.*
- (b) *Misjoinder of Causes of Action.*
- (c) *Several Counts.*

(E) Plea; Several Pleas.

(F) Interrogatories.
- (a) *When to be delivered.*
- (b) *When allowed in general.*
- (c) *In what Actions.*

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## (A) PROCESS.

### (a) *Writ of Summons.*

#### (1) *Renewal and Re-sealing.*

Within six months of the issuing of a writ of summons the plaintiff's attorney paid the proper fees at the office for its renewal, under the 11th section of the Common Law Procedure Act, 1852, but he inadvertently neglected to get the seal of the Court impressed upon it; after the lapse of the six months the omission was discovered. There having been no default in their officer, the Court refused to order the seal to be impressed *nunc pro tunc* in order to prevent the operation of the Statute of Limitations. *Nazar* v. *Wade,* 31 Law J. Rep. (N.S.) Q.B. 5; 1 Best & S. 723.

Where a plaintiff has by inadvertence allowed the time for re-sealing a writ of summons to elapse without having the writ re-sealed, the Court will not order it to be done *nunc pro tunc,* unless there has been some default in the conduct of an officer of the Court. *Anonymous,* 31 Law J. Rep. (N.S.) Q.B. 61.

Where a writ of summons, issued on the 23rd of January, 1861, was duly renewed at intervals of six months up to and on the 19th of July, 1862, and an application to renew it again was made on the 19th of January, 1863 (the 18th being Sunday) to the proper officer, who refused to affix the seal as provided by s. 11. of 15 & 16 Vict. c. 76, on the ground that six months had elapsed since the date of the last renewal,—this Court refused to grant a rule to renew the writ. *Anonymous,* 32 Law J. Rep. (N.S.) Exch. 88; 1 Hurls. & C. 664.

The time for re-sealing a writ of summons, so as to save the Statute of Limitations, expired on Saturday the 28th of December, within the Christmas holidays. The person who attended the office on that day for the purpose, found it shut, and the officer having refused to re-seal the writ on the following Monday, the 30th, the Court refused to order him to do it afterwards, *nunc pro tunc. Evans* v. *Jones,* 1 Best & S. 45.

#### (2) *Cause of Action within the Jurisdiction.*

An Irish judgment for a debt contracted in England does not constitute a cause of action which arose within the jurisdiction of the superior Courts of this country, within the meaning of the 18th section of the Common Law Procedure Act, 1852; nor does its remaining unsatisfied, the debtor being in this country, constitute "a breach of a contract made within the jurisdiction." *Thelwall* v. *Yelverton,* 16 Com. B. Rep. N.S. 813.

A sued B in Ireland for a debt alleged to have been contracted at Hull, and obtained a judgment for 259*l.* 17*s.* 3*d.* debt and 470*l.* 14*s.* 11*d.* costs. B having gone abroad, A sued out a writ against him for service out of the jurisdiction, under the 15 & 16 Vict. c. 76. s. 18, indorsed for 730*l.* 12*s.* 2*d.* and 10*l.* for costs, and, upon affidavits that B was justly and truly indebted to him in the sum of 730*l.* 12*s.* 2*d.*, "upon and by virtue of the judgment recovered in Ireland," "that the sum of 259*l.* 17*s.* 3*d.*, part of the sum recovered by the said judgment, was a debt contracted by B at Hull, and the sum of 470*l.* 14*s.* 11*d.*, the residue of the sum of 730*l.* 12*s.* 2*d.* so recovered, was for his costs of suit in that behalf," and that B was personally served with the writ in Paris, obtained an order to proceed, and filed a declaration and particulars of demand claiming the whole 730*l.* 12*s.* 2*d.* "upon and by virtue of the judgment" obtained against B. The Court, upon an affidavit of B that he was never served with the writ, and that, at the time of the alleged service, and for some time before and since, he was residing upwards of 200 miles from Paris, set aside the service, the order, and the subsequent proceedings, on the ground that there had been no service of the writ, and that the affidavits disclosed that A was proceeding for a cause of action which did not arise within the jurisdiction of the English Courts. Ibid.

*Quære*—Whether the order would have been good if it had been limited to the original cause of action alleged to have arisen at Hull. Ibid.

A claim for a balance due as the result of cross-consignments and remittances between a merchant here and a merchant (a British subject) domiciled and carrying on business exclusively at the Cape of Good Hope, is a cause of action which arose within the jurisdiction of the superior Courts at Westminster, or "in respect of the breach of a contract made within the jurisdiction," within the 18th section of the Common Law Procedure Act, 1852. *Horwood* v. *Wood,* 17 Com. B. Rep. N.S. 749.

### (b) *Service of, in Substitution of Personal Service.*

The exception of Scotland and Ireland from s. 18. of the Common Law Procedure Act, 1852, has not the effect of allowing a writ of summons to be issued in the ordinary form, under s. 2, against a person resident in Scotland and Ireland, and service of it at a place of business of the defendants in England, to be treated as a substituted service under s. 17. *Flower* v. *Allan,* 33 Law J. Rep. (N.S.) Exch. 83; 2 Hurls. & C. 688.

"Reasonable efforts" to effect personal service mean "reasonable" according to the actual facts, and not according to the information possessed at the time by the person making the efforts. Ibid.

The defendant had a warehouse in the city of London, but was a native of, and always resident in Scotland. The attorney's clerk waited repeatedly to serve him at his warehouse, and a copy of the writ (issued in the usual form), left at the warehouse for that purpose, was forwarded to and received by the

defendant. The Court set aside a Judge's order for leave to proceed as if personal service had been effected. Ibid.

The Court has power, under 15 & 16 Vict. c. 76. s. 17, to allow a plaintiff to proceed as if personal service of the writ of summons had been effected, although the defendant is a lunatic, and will so order, if satisfied that reasonable efforts have been made to effect personal service, and that the writ has come to the defendant's knowledge. *Kimberley* v. *Alleyne*, 2 Hurls. & C. 223.

*(c) Order to proceed where Defendant out of the Jurisdiction.*

Where a defendant had been personally served abroad with a writ issued under the Common Law Procedure Act, 1852, s. 18, and there was an affidavit of the debt being due, and that the defendant's property was being disposed of, the Court made an order under that section for the plaintiff to have liberty to proceed, without giving the defendant notice of the declaration. *Bates* v. *Bates*, 30 Law J. Rep. (N.S.) C.P. 191; 9 Com. B. Rep. N.S. 561.

The fact that a person carries on his business in England, where the cause of action arose, is *prima facie* evidence of his residence there, so as to give jurisdiction to issue a writ of summons against him under section 2. of the Common Law Procedure Act, 1852; and where after such writ has been so issued a Judge's order to proceed without personal service has been made under section 17. of that act, the defendant cannot set aside such order, on the ground of being resident out of the jurisdiction, without making an affidavit shewing distinctly where his residence was when the writ was issued. *Naef* v. *Mutter*, 31 Law J. Rep. (N.S.) C.P. 357.

An affidavit by the manager of the defendant's business in England, stating that when the action was brought the defendant was resident at Edinburgh in Scotland, and further stating that to the best of his belief the defendant had not been in England during the year in which the action was brought, is not sufficient to set aside such order to proceed. Ibid.

*Quære*, per *Willes, J.*, whether the order to proceed would not be good, though the defendant was resident in Scotland at the time the action was brought. Ibid.

(B) APPEARANCE.

The day which, under ordinary circumstances, would have been the last day for entering an appearance, was Good Friday, and no appearance had been then entered. On that day and the four following days the offices were closed, as usual at Easter. On Easter Wednesday, when the offices reopened, the plaintiff signed judgment for want of appearance:—Held, that this judgment was irregular, as being signed too soon, for that the defendant had the whole of Wednesday within which to appear. *Mumford* v. *Hitchcock*, 32 Law J. Rep. (N.S.) C.P. 168; 14 Com. B. Rep. N.S. 361.

After the plaintiff, in a cause in which the defendant appeared by attorney, had signed judgment, proceedings in error was taken by the defendant, on the ground that, being an infant, he ought to have appeared by his guardian:—Held, that the Court had no power, either under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 222, or otherwise, to amend the proceedings, by alleging an appearance by guardian; but that they had power to set them aside, and order the defendants to appear by guardian. *Carr* v. *Cooper*, 1 Best & S. 230.

(C) PARTICULARS.

*(a) Under Plea of Payment into Court.*

Where a declaration comprises several causes of action, and not several actions, and money is paid into court generally, it is not the practice to order the defendant to give particulars stating to what items of the plaintiff's claim the money is paid into court. Therefore, where in an action on a contract for building a ship, the declaration contained a special count for extras, and also money counts in respect of the same claim, and the defendant paid money into court as to those extras, the Court refused to order particulars. *Baxendale* v. *the Great Western Rail. Co.* commented on and explained. *The Thames Iron Works Co.* v. *the Royal Mail Steam-Packet Co.*, 30 Law J. Rep. (N.S.) C.P. 265; 10 Com. B. Rep. N.S. 375.

In an action against carriers for the loss of and injury to goods, sent to different places at different times, comprising a variety of claims specified in particulars delivered under a Judge's order, the defendants paid a sum of money into court in satisfaction of the plaintiffs' claim:—Held, *Bramwell, B., dubitante*, that the plaintiffs were entitled to an account of the particular items of the plaintiffs' demand in respect of which the sum was paid into court. *Baxendale* v. *the Great Western Rail. Co.*, 30 Law J. Rep. (N.S.) Exch. 63; 6 Hurls. & N. 95.

*(b) Of Plea of Fraud.*

To an action for calls commenced by a joint-stock insurance company, and continued by the official manager under the Winding-up Acts, the defendant pleaded that he was induced to become the holder of the shares by the fraud of the company, and that on notice of the fraud he had repudiated and disclaimed the shares. Upon affidavits of the official manager and secretary of the company that they had no knowledge of any fraud, or of any act or circumstance to justify the plea or the allegation of repudiation,—the Court ordered the defendant to give particulars in writing of the acts of fraud relied upon, and of the acts constituting the repudiation and disclaimer. *M'Creight* v. *Stevens*, 31 Law J. Rep. (N.S.) Exch. 455; 1 Hurls. & C. 454.

*(c) Plaintiff's Name and Abode.*

Though it is a matter of discretion whether a Judge at chambers will order an attorney to disclose the name and place of abode of his client, under the Common Law Procedure Act, 1852, s. 7, the motives of the party making the application ought not to be narrowly inquired into; and it is not sufficient to deprive the party of his right to such information, that he will thereby be enabled to enforce some other right against the party whose name and abode he seeks to obtain. *Cox* v. *Bockett*, 34 Law J. Rep. (N.S.) C.P. 125; 18 Com. B. Rep. N.S. 237.

(D) DECLARATION.

*(a) Time and Notice to declare.*

Neither the Common Law Procedure Act, 1852,

nor the Practice Rules of Hilary Term, 1853, interfere with the old practice, by which a plaintiff has the whole of the term next after the appearance in which to declare, before the defendant can demand a declaration. *Medway* v. *Gilbert*, 32 Law J. Rep. (N.S.) Exch. 30; 1 Hurls. & C. 496.

Notice to declare, under s. 53. of the Common Law Procedure Act, 1852, may be given in vacation as well as in term time. Ibid.

A Judge's order was made in Trinity vacation to stay the proceedings in an action against the drawers of a bill of exchange until an action against the acceptor was tried. The latter action was settled before trial, at the sittings in Michaelmas Term, by the parties in that action consenting to a *stet processus*. On the 24th of December the defendant in the action against the drawers served a four days' notice to declare, and on the 15th of January signed judgment:—Held, that the judgment was irregular. Ibid.

*(b) Misjoinder of Causes of Action.*

After counts by the plaintiff, as executor, for an excessive distress and for distraining for more rent than was due, after the death of the testator, the declaration proceeded: "And the plaintiff, as such executor as aforesaid, also sues the defendant for money paid by the plaintiff, as such executor as aforesaid, for the defendant at his request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on an account stated between them, and the plaintiff, as such executor as aforesaid, claims 500*l.*":—Held, on demurrer, that the claims for money received and on an account stated could not be treated as causes of action arising to the plaintiff in his representative capacity, and that the declaration was therefore bad for misjoinder. *Davies* v. *Davies*, 31 Law J. Rep. (N.S.) Exch. 476; 1 Hurls. & C. 451.

A declaration alleged that A, administrator of B and C, sued D for money payable by him to A, as administrator, and C; for money paid by C and B in his lifetime, &c.; and for money paid by A, administrator, &c., and C; and for money lent by C and B in his lifetime; and for money lent by A, administrator, &c., and C; and on accounts stated between the defendant and A, administrator, &c., and C. To this declaration the defendant demurred:—Held, first, that the declaration was bad for misjoinder; secondly, that the defect was not cured by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 19. *Bellingham* v. *Clark*, 1 Best & S. 332.

Since the Common Law Procedure Act, 1852, s. 40, a count for breaking and entering the premises of the husband may be joined with a count by the husband and wife for assaulting and imprisoning the wife. *Morris* v. *Moore*, 19 Com. B. Rep. N.S. 359.

*(c) Several Counts.*

As a general rule counts in trover and detinue ought not to be allowed together, and the latter ought to be struck out; this is, however, subject to exception if the plaintiff satisfies the Judge that there is good reason for allowing both. *Mockford* v. *Taylor*, 34 Law J. Rep. (N.S.) C.P. 352; 19 Com. B. Rep. N.S. 209.

(E) PLEA; SEVERAL PLEAS.

A, assuming to be the owner of land over which eight other persons claimed rights of common, inclosed it. In order to assert their claim, the eight signed a document professing to authorize *each other*, and B & C, *as agents for all and each of them*, to enter upon the land and remove the fences, which B & C accordingly did. Separate actions having been brought against the eight for this trespass,—each was allowed to plead several pleas justifying under the titles of the other seven, as well as under his own title. *Church* v. *Wright*, 15 Com. B. Rep. N.S. 750.

(F) INTERROGATORIES.

*(a) When to be delivered.*

The plaintiff, in an action commenced in 1861, for damages for an infringement of his patent, granted in 1841, applied to be allowed to administer interrogatories to the defendant before delivery of declaration, asking, *inter alia*, for particulars of the number of machines manufactured, altered or sold by the defendant between the years 1841 and 1855, when the patent expired. The application was made on affidavits by the plaintiff's agent, that he had ascertained and believed that many machines, containing infringements of the plaintiff's patent, had been made and sold, without the leave of the plaintiff, by the defendant, between the said years, and that answers to the interrogatories would disclose many more breaches of the plaintiff's patent than had as yet been discovered, and that the discovery sought by the interrogatories was essential for the drawing the declaration in the action. The Court refused to allow the interrogatories to be delivered before declaration, but intimated that the plaintiff might probably be entitled to deliver them after issue joined, and that he would then be at liberty to amend the particulars of the breaches he would be bound to deliver with his declaration, in accordance with the answers the defendant might give. *Jones* v. *Platt* or *Pratt*, 31 Law J. Rep. (N.S.) Exch. 365; 6 Hurls. & N. 697.

The Court will not allow interrogatories before declaration, unless the plaintiff shews in his affidavit what his cause of action is. *Anonymous* v. *Parr*, 34 Law J. Rep. (N.S.) Q.B. 95.

*(b) When allowed in general.*

It is no objection to interrogatories under the Common Law Procedure Act, 1854, s. 51, that they tend to charge the person to whom they are delivered with an indictable offence. This is an objection which the person interrogated must take on oath when he comes to answer the interrogatories. S. 51. does not assimilate the practice of the Courts of common law with respect to interrogatories to that of Courts of equity with respect to bills of discovery. Remarks on the case of *Tupling* v. *Ward*. *Bartlett* v. *Lewis*, 31 Law J. Rep. (N.S.) C.P. 230; 12 Com. B. Rep. N.S. 249.

Where interrogatories are delivered, under the 51st section of 17 & 18 Vict. c. 125, which relate to the case of the party interrogating as well as that of the party interrogated, the latter is bound to answer them, although the answers may discover his case.

*Bayley* v. *Griffiths*, 31 Law J. Rep. (N.S.) Exch. 477; 1 Hurls. & C. 429.

When interrogatories appear to a Judge to be framed carelessly, and with too much latitude, so as in reality to throw upon him the trouble of settling them, he is not bound to select the one or two, which he may think proper, and to reject the others only; but in sending the whole of them back to be reformed, he exercises a reasonable discretion with which the Court will not interfere. *Phillips* v. *Lewin*, 34 Law J. Rep. (N.S.) Exch. 37.

Interrogatories may be put to a plaintiff to ascertain the true measure of the damages he has sustained, and so guide the defendant as to the amount he may fairly pay into court. *Wright* v. *Goodlake*, 34 Law J. Rep. (N.S.) Exch. 82; 3 Hurls. & C. 540.

The Court will allow any interrogatories to be administered under the Common Law Procedure Act, 1854, s. 51, which are relevant to the matter in issue, and which the party interrogated would be bound to answer if in the witness box. *Zychlinski* v. *Maltby*, 10 Com. B. Rep. N.S. 838.

It is no objection to interrogatories under the Common Law Procedure Act, 1854, s. 51, that they seek to obtain from the plaintiffs admissions of conversations relating to the subject-matter of the action with a servant or agent of the defendants. *Rew* v. *Hutchins*, 10 Com. B. Rep. N.S. 829.

Interrogatories cross-examining the plaintiff upon the terms and conditions of various prior transactions between the same parties, and not connected directly with the contract sued upon, will not be allowed. Nor as to the terms of any contract between the plaintiff and other persons. Nor, in cross-examination of the plaintiff, to disprove a custom on which the defendant supposes the plaintiff will rely. Ibid.

Interrogatories asking whether the plaintiff has had a correspondence relating to the subjects in dispute, and asking for the dates and names of the places and the correspondents, will be allowed. Ibid.

The affidavit in support of an application for leave to deliver interrogatories must state that the party will derive benefit *in the cause* from the discovery which he seeks. But, where the party sues or defends in person, the affidavit of an attorney or agent will be dispensed with. *Oxlade* v. *the North-Eastern Rail. Co.*, 12 Com. B. Rep. N.S. 350.

It is no objection to interrogatories, under the 51st section of the Common Law Procedure Act, 1854, that the answers, if given in the affirmative, will shew that the execution of a deed upon which the defence is founded was obtained by fraud. *Goodman* v. *Holroyd*, 15 Com. B. Rep. N.S. 839.

### (c) *In what Actions.*

The Court has a discretion, under the Common Law Procedure Act, 1854, in the matter of allowing interrogatories to be delivered. *Tupling* v. *Ward*, 30 Law J. Rep. (N.S.) Exch. 222; 6 Hurls. & N. 749.

In an action for a libel imputing a grave offence to the plaintiff, the Court refused to allow the plaintiff to deliver interrogatories to the defendants, some of which the defendants were not bound to answer. Ibid.

In ejectment the defendant will not be allowed to deliver interrogatories inquiring into the title upon which the plaintiff relies, unless it be made to appear that the defendant is ignorant of the nature of the claim which the plaintiff intends to set up, and is unable otherwise to prepare his defence. *Stoate* v. *Rew*, 32 Law J. Rep. (N.S.) C.P. 160; 14 Com. B. Rep. N.S. 209.

The Court, in the exercise of the discretion it possesses under the Common Law Procedure Act, 1864, section 51, refused to allow the plaintiff, in an action for slander, where the alleged slander consisted of various and wide imputations, to deliver interrogatories interrogating the defendant as to whether he had spoken the words laid in the declaration, or any and what other words conveying similar imputations, and when, where, and to whom he had spoken them. *Stern* v. *Sevastopulo*, 32 Law J. Rep. (N.S.) C.P. 268; 14 Com. B. Rep. N.S. 737.

*Semble*—Interrogatories will not be allowed in an action for slander, unless from the peculiar circumstances of the case a party would otherwise be without redress. Ibid.

Interrogatories will not be allowed in an action of libel if they tend to charge the defendant with an indictable offence. *Baker* v. *Lane*, 34 Law J. Rep. (N.S.) Exch. 57; 3 Hurls. & C. 544.

Under s. 51. of the Common Law Procedure Act, 1854, interrogatories may be delivered by the plaintiff to the defendant in an interpleader issue directed under the 1 & 2 Will. 4. c. 58. *White* v. *Watts*, 31 Law J. Rep. (N.S.) C.P. 381; 12 Com. B. Rep. N.S. 267.

In an action for injuries sustained by reason of the defendant's alleged negligence, the defendant is not entitled to administer interrogatories to the plaintiff as to how or to the circumstances under which the accident happened, the time, or persons present, the extent of the personal injury, the amount and nature of the medical attendance, or the sums paid for such attendance. *Peppiatt* v. *Smith*, 33 Law J. Rep. (N.S.) Exch. 239; 3 Hurls. & C. 129.

Interrogatories were allowed under the 51st section of the Common Law Procedure Act, 1854, in an action for a false and fraudulent representation on the sale of a business. *Blight* v. *Goodliffe*, 18 Com. B. Rep. N.S. 757.

## (G) DISCOVERY.

An order for discovery under s. 50. of the Common Law Procedure Act, 1854, can only be made upon an affidavit of the party himself to the cause, and a Judge or Court has no power to dispense with such affidavit. *Christophersen* v. *Lotinga*, 33 Law J. Rep. (N.S.) C.P. 121; 15 Com. B. Rep. N.S. 809.

A corporation aggregate, party to a cause, may obtain an order under section 50. of the Common Law Procedure Act, 1854, for the discovery of documents, on an affidavit made by the attorney of such corporation: it being the intention of the legislature to give to all suitors the power of discovery; and as such corporation (being incapable of personally making an affidavit) would otherwise be deprived of the benefit of that section. *Kingsford* v. *the Great Western Rail. Co.*, 33 Law J. Rep. (N.S.) C.P. 307; 16 Com. B. Rep. N.S. 761.

A defendant in an action of breach of promise of marriage will be allowed to inspect letters in the plaintiff's possession, written by the defendant to the

plaintiff. *Stone* v. *Strange*, 34 Law J. Rep. (N.S.) Exch. 72.

## (H) TRIAL.

### (*a*) *Notice of Trial.*

A cause stood for trial at the Sittings after Trinity Term. The defendant obtained a Judge's order for a commission to examine witnesses abroad; the commission to be returnable on the 30th of November, and the trial being postponed until the Sittings after Michaelmas Term. No fresh notice of trial was given, and the cause was taken as an undefended cause. The Court set aside the trial. *Cawley* v. *Knowles*, 16 Com. B. Rep. N.S. 107.

Where the defendant obtains a rule for a special jury in a town cause, but omits to give notice to the sheriff, under the 112th section of the Common Law Procedure Act, 1852, the cause may, under the 113th section, be tried by a common jury. Ibid.

### (*b*) *Substituting Defendant.*

The Judge having at the trial substituted for the defendant on the record the name of the person really intended to be sued, and directed a verdict to be entered for the plaintiff against that person "sued as &c.," the Court refused to order a verdict to be entered for the defendant named originally on the record, for the purpose of enabling him to get costs, there being suspicion of collusion. *Podmore* v. *Schmidt*, 17 Com. B. Rep. N.S. 725.

### (*c*) *Nonsuit.*

Where on the trial of an action it appears that the case involves a charge of felony against the defendant, which has not been prosecuted, it is competent for the Judge to direct a verdict for the defendant. *Wellock* v. *Constantine*, 32 Law J. Rep. (N.S.) Exch. 285; 2 Hurls. & C. 146.

In an action by a woman for assault, it appeared from her evidence that the assault complained of amounted to a rape. The Judge stated that he should direct a verdict for the defendant, on the ground either that a rape had been committed, for which the defendant had not been prosecuted, or that if the plaintiff had consented, no assault had been committed by the defendant. The plaintiff's counsel thereupon elected to be nonsuited:—Held *(Martin, B. dissentiente)*, that the nonsuit was right. Ibid.

## (I) JUDGMENT BY DEFAULT.

The Common Law Procedure Act, 1852, has not abolished the necessity of appointing a guardian to an infant defendant before the plaintiff can sign judgment by default. *Jarman* v. *Lucas*, 33 Law J. Rep. (N.S.) C.P. 108; 15 Com. B. Rep. N.S. 474.

## (K) BILL OF EXCEPTIONS.

A Judge, having signed a bill of exceptions at the trial of a cause, subsequently made an order amending the bill so signed. The Court refused to interfere on motion, and referred the party objecting to the amendment to the Judge who made the order. *Penhallow* v. *Mersey Docks Trustees*, 30 Law J. Rep. (N.S.) Exch. 272.

## (L) SUGGESTION ON THE ROLL.

The Common Law Procedure Act, 1852, gives a right to the personal representative of a deceased sole plaintiff, to enter a suggestion of the death of the plaintiff and to continue the action only in those cases where the cause of action would before that act have survived to the representative and he could have commenced an action in his representative character. *Flinn* v. *Perkins*, 32 Law J. Rep. (N.S.) Q.B. 10.

## (M) NEW TRIAL.

In an action by a clerk against his employer, the declaration contained a special count for a wrongful dismissal, and the common count for work and labour. At the first trial the plaintiff had a verdict on the special count, no claim being made on the count for work and labour. A new trial was then ordered, "the costs of the first trial to abide the event." On the second trial the defendant obtained the verdict on the special count; but the plaintiff now set up a claim on the count for work and labour, on which he had a verdict for 4*l.* 19*s.*:—Held, that the plaintiff was not entitled to the costs of the first trial, "the event" referred to in the rule meaning the event of the dispute then before the Court, namely, that on the special count. *Dawson* v. *Harrison*, 31 Law J. Rep. (N.S.) C.P. 168; 11 Com. B. Rep. N.S. 801.

To an action claiming special damages for the non-delivery of goods within a reasonable time, the defendants, admitting their negligence to have been the cause of the non-delivery, paid 10*l.* into court. The Judge at Nisi Prius left it to the jury to say whether the 10*l.* paid into court was a sufficient compensation for the pecuniary loss the plaintiff had sustained, pointing out that the law did not entitle the plaintiff to recover under some of the heads of his claim, and that on the evidence there was no pretence for saying that he had sustained any substantial loss. The jury having given a verdict for 5*l.* beyond the 10*l.* paid into court,—Held, that the amount of damages was a question for the jury, and had been properly left to them, and although the Court might think the verdict wrong, and 10*l.* enough, yet the damages recovered being less than 20*l.*, the verdict could only be disturbed on the ground of its being perverse; and as the jury had not disobeyed any directions of the Judge, the verdict could not be said to be perverse, and the Court could not interfere to disturb it. *Adams* v. *the Midland Rail. Co.*, 31 Law J. Rep. (N.S.) Exch. 35.

The plaintiff, in an action for loss of and damage to his goods, caused by the alleged negligence of the defendant, had a verdict with one farthing damages. The Judge reported, that as to goods to the value of 2*l.* the evidence in the plaintiff's favour was all one way; but that he could not say a verdict either way would have been wrong. The plaintiff obtained a rule for a new trial, on the ground that the verdict as to the damages was against evidence, and the verdict itself irrational and absurd:—Held, that the verdict was not necessarily irrational, and that considering the smallness of the damages, the Court ought not to interfere. *Mostyn* v. *Coles*, 31 Law J. Rep. (N.S.) Exch. 151; 7 Hurls. & N. 872.

Where a country cause was tried at Westminster on the last day but one of Hilary Term, the Court held that an application by the defendant for a new trial, made on the 4th day of the ensuing Easter Term was too late, notwithstanding that the defen-

dant's attorney resided at Sandwich in Kent, and that his London agent lost no time either in obtaining the necessary instructions from him or in acting upon the instructions when received. *Pain* v. *Terry*, 34 Law J. Rep. (N.S.) Exch. 224.

On motion for a rule *nisi* for a new trial in a case tried before the sheriff, under a writ of trial, the sheriff's notes must be produced, unless good cause be shewn to the contrary; and it is not a sufficient excuse for their non-production that the motion is made by the counsel who was engaged at the trial, and is prepared to state what occurred. *Kelligrew* v. *Peters*, 6 Hurls. & N. 688.

The Court will not grant a new trial (before the sheriff) where the sum sought to be recovered is less than 5*l.*, merely because the question involved is one of importance to the plaintiff. *Lee* v. *Evans*, 12 Com. B. Rep. N.S. 368.

A suggestion of perjury on the part of the defendant and his witnesses, and that fresh evidence has been discovered by the plaintiff since the expiration of the time for moving for a new trial, affords no ground for asking the Court to dispense with the 50th rule of Hilary Term, 1853. *Gambart* v. *Mayne*, 14 Com. B. Rep. N.S. 320.

A plaintiff is entitled to the same time for proceeding to trial after a rule made absolute for a new trial as he had for proceeding to trial originally. Consequently, where a rule had been made absolute for a new trial, and the plaintiff had gone down to try at the sittings after Michaelmas Term, but the jury, being unable to agree, were discharged from giving a verdict,—Held, that it was not competent to the defendant to take down the record for trial by proviso at the sittings after Hilary Term, the plaintiff not being in default. *Oakeley* v. *Ooddeen*, 11 Com. B. Rep. N.S. 805.

The plaintiff having been asked while under cross-examination whether he was the author of a certain pamphlet which contained expressions of opinion on religious subjects altogether at variance with those generally received amongst Christians, and having declined to answer on the ground that his answer in the affirmative might subject him to a criminal prosecution, the counsel for the defendant was permitted for a considerable time (obviously with a view to prejudice the plaintiff with the jury) to read various passages of a similar tendency from other printed documents, each time repeating the inquiry whether the plaintiff was the author or whether the passage read expressed his notions on the subject.—This was held to be no ground for a new trial, the jury being entitled to have before them all the facts and circumstances from which they might be enabled to judge of the degree of credit due to the party as a witness. Nor is it a ground for a new trial, in an action for assault and false imprisonment, that the plaintiff had incurred an expense of 7*l.* 14*s.* in procuring his discharge from custody, and the jury awarded him a farthing only. *Bradlaugh* v. *Edwards*, 11 Com. B. Rep. N.S. 377.

It is not necessary to have a copy of the Judge's notes *at the time of moving* for a new trial in a case tried, under a Judge's order, before a County Court. *Morrison* v. *Wookey*, 15 Com. B. Rep. N.S. 457.

### (N) STAYING AND SETTING ASIDE PROCEEDINGS.

The plaintiff, having brought an action for libel against the defendant in the Court of Common Pleas, to which a justification was pleaded, after the case had been fully tried out elected to be nonsuited. The plaintiff then commenced an action against the defendant in the Court of Queen's Bench for the same libel, and delivered a declaration on the 13th of January. On the 14th the defendant's costs in the previous action were taxed; on the 21st the defendant obtained further time to plead on the usual terms; on the 22nd he took out a summons to stay further proceedings until the costs in the former action had been paid; on the 24th the Judge at chambers made "no order, without prejudice to any application to the Court"; on the 30th the defendant obtained a rule *nisi* in the same terms as the summons; and the rule was served on the plaintiff in the evening of the 31st of January. In the mean time the defendant had pleaded, and the plaintiff had given notice of trial for the first sittings in London after Hilary Term, and had delivered briefs before service of the rule:—Held, that the second action was vexatious and oppressive, that there had been no unreasonable delay on the part of the defendant, and that the rule must be made absolute for staying proceedings, but discharged so far as it related to security for costs. *Prowse* v. *Loxdale*, 32 Law J. Rep. (N.S.) Q.B. 227; 3 Best & S. 896.

The defendant, having been arrested on a *ca. sa.* after the plaintiff had proved his debt under a fiat against him, applied by summons for his discharge and to set aside the *ca. sa.* The Judge made the order, imposing as a term that the defendant should bring no action:—Held, that the defendant, having availed himself of the order so as to obtain his discharge, could not afterwards move to set aside so much of it as restrained him from bringing an action. *Hayward* v. *Duff*, 12 Com. B. Rep. N.S. 364.

The defendant's goods having been taken under a *fi. fa.* after the debt and costs had been paid by another party liable upon the same instrument, he applied to a Judge to set aside the execution. The Judge made the order, but imposed as a term that the defendant should bring no action. Having availed himself of the order so as to get the sheriff to withdraw from possession,—Held, that the defendant could not afterwards move to set aside so much of it as restrained him from bringing an action. *Wilcox* v. *Odden*, 15 Com. B. Rep. N.S. 837.

### (O) ENLARGING TIME.

The Court will not enlarge the time for returning a special commission for taking the acknowledgment of a married woman abroad, where it has been executed after the return day named therein. *In re Carter*, 9 Com. B. Rep. N.S. 791.

The Court will enlarge the time for returning a special commission for taking the acknowledgment of a married woman abroad, where it has been duly executed, but its return has been unavoidably delayed until after the return day therein named. The Court allowed a commission, with the certificate of acknowledgment and affidavit of verification, to be received and filed, notwithstanding the omission of the month in the jurat of the affidavit. *In re Van Ufford*, 9 Com. B. Rep. N.S. 789.

### (P) CONSOLIDATION OF ACTIONS.

The Court refused to interfere with an order made

by a Judge (under the 40th section of the Common Law Procedure Act, 1852), for consolidating two actions, in one of which the husband claimed damages for injury done to his house and trade, while in the other both the husband and wife claimed for injury to the wife, and the husband also claimed for consequential damage to himself. *Hemstead* v. *the Phœnix Gas Co.*, 34 Law J. Rep. (N.S.) Exch. 108; 3 Hurls. & C. 745.

(Q) SET-OFF OF JUDGMENTS.

A having obtained a verdict against B & Co., his bankers, for the amount of his cash balance and nominal damages for dishonouring his cheque, and B & Co. having brought actions against A upon bills of exchange to a larger amount, which they had discounted for him, the Judge stayed the execution in A's action until the fifth day of the following term. B & Co.'s actions in the mean time ripened into judgments. The Court allowed the judgments to be set off against each other (subject to the lien, if any, of A's attorney), notwithstanding A had in the mean time become bankrupt, and thus the interests of third parties had intervened. *Alliance Bank* v. *Holford*, 16 Com. B. Rep. N.S. 460.

(R) JUDGE'S ORDER.

If it be intended to ask as part of a Judge's order that costs be paid by the plaintiff's attorney, on the ground of alleged misconduct on his part, it is necessary to give distinct notice in the summons of the intention to make such application; and if a Judge at chambers, without any such notice to the attorney, orders the attorney to pay costs, that part of the order will be set aside. *Rouch* v. *Alberty*, 33 Law J. Rep. (N.S.) Q.B. 127.

(S) APPEALS.

(*a*) *To the House of Lords.*

Where an appellant does not appear to support his appeal it may be dismissed, with costs, on the application of the respondent. *Smith* v. *Durrant* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 383; 9 H.L. Cas. 192.

(*b*) *From Decision of Judge at Chambers.*

On an appeal from the decision of a Judge at chambers, it is sufficient to bring before the Court such only of the affidavits used at chambers as are relevant to the matter in question. *Bennett* v. *Benham*, 33 Law J. Rep. (N.S.) C.P. 153; 15 Com. B. Rep. N.S. 616.

Applications in the nature of appeal from the decision of a Judge at chambers may be made at any time within the ensuing term. *The Oldham Building and Manufacturing Co. (Lim.)* v. *Heald*, 3 Hurls. & C. 132.

(*c*) *Delivery of Appeal Cases to the Judges.*

The proper place for delivering copies of appeal cases to the Judges before the day appointed for argument, pursuant to rule 16. of the Practice Rules of Hilary Term, 1853, is the Judges' Chambers, at Rolls Gardens, Chancery Lane, and not the Judges' clerks' room at Westminster. *Howells* v. *Wynne*, 32 Law J. Rep. (N.S.) M.C. 241; 15 Com. B. Rep. N.S. 3.

(T) ERROR.

Error will lie on a special case stated in proceedings on an interpleader issue. *Gumm* v. *Tyrie* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 124; 6 Best & S. 298.

Upon a judgment for the defendant, the plaintiff assigned as errors in fact, that the defendant obtained a rule for a special jury, whereupon twenty-four special jurymen were duly struck, pursuant to the statute 6 Geo. 4. c. 50, as the jurors to be returned for the trial of the issue; that eight of this special jury so struck were not summoned, and the names of the special jurors not having been called over in court, at or after ten o'clock, the hour named in the summons, only ten of the special jurors appeared and were sworn on the said jury:—Held, that the errors so assigned were invalid, as they contradicted the record, which must be considered as containing a statement that all the requisites for having a sufficient jury had been observed, and that the Court sat at a time when, and was otherwise constituted so that it could properly exercise jurisdiction. Held, also, that these and like objections are not, for all purposes, admitted by demurring to the assignment of errors, but only so when properly assigned and lawfully assignable as ground of error. *Irwin* v. *Grey*, 34 Law J. Rep. (N.S.) C.P. 313; 19 Com. B. Rep. N.S. 585—affirmed in House of Lords, 36 Law J. Rep. (N.S.) C.P. 148.

*Semble*—If the plaintiff had sustained any real injustice by the errors complained of, his remedy was to have applied by motion to the Court, when the Court, in the exercise of its equitable jurisdiction, would have interfered, if necessary. Ibid.

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## PRACTICE, IN EQUITY.

[The procedure in the High Court of Chancery and the Court of Chancery of the County Palatine of Lancaster regulated by 25 & 26 Vict. c. 62.—Provision made for the more efficient despatch of business in the High Court of Chancery by 27 Vict. c. 15.]

(A) BILL.
- (*a*) *In general.*
- (*b*) *Supplemental Bill.*
- (*c*) *Bill of Review.*
- (*d*) *Amending Bills.*
- (*e*) *Taking Bill pro Confesso.*
- (*f*) *Dismissing Bill by Plaintiff.*

(B) SERVICE.
- (*a*) *Substituted Service.*
- (*b*) *Service out of the Jurisdiction.*

(C) ENTERING APPEARANCE FOR AND PROCESS AGAINST DEFENDANT.

(D) INTERROGATORIES.

(E) DEMURRER.

(F) ANSWER.

(G) PETITIONS.

(H) MOTIONS.
- (*a*) *In general.*
- (*b*) *To dismiss for want of Prosecution.*

(I) PRODUCTION OF DOCUMENTS.
- (*a*) *General Points.*
- (*b*) *Privileged Documents.*

(K) DISCOVERY.

## (A) BILL.

### (a) *In general.*

The plaintiff relieved from the necessity of filing a printed bill, in an injunction case, where the matters of the suit had been arranged under an order made prior to the expiration of fourteen days from filing the written bill. *Garland* v. *Riordan*, 33 Beav. 448.

A written bill having been filed on the usual undertaking to file a printed bill, the fourteen days prescribed by the 4th rule of the 9th Consolidated Order elapsed without a printed bill being filed, by reason of the clerk, whose business it was to file it, being called into the country on business of his employer, and not informing him of his omission; and the written bill was taken off the file. Subsequently an injunction was moved for and obtained. Upon proceeding to file interrogatories the omission was discovered, and a motion made for leave to file a printed bill, notwithstanding that the fourteen days had elapsed:—Held, on the authority of the case of *Ferrand* v. *the Corporation of Bradford* (21 Beav. 422; 8 De Gex, M. & G. 93; 25 Law J. Rep. (N.S.) Chanc. 389), that the omission must be regarded as a venial slip, and that the written bill should be restored to the file, and a printed bill received; the plaintiff paying the costs of the application. *Moss* v. *Syers*, 32 Law J. Rep. (N.S.) Chanc. 713.

Where a plaintiff omits to file a printed bill within the fourteen days, the application to the Court for leave to rectify the omission should not be made *ex parte*, but upon notice; and, as a rule, the defendants are entitled to appear upon the application, and the plaintiff must pay their costs. Ibid.

A bill in the name of a company was ordered to be taken off the file, it having been disapproved by a majority of the members of the company, although its object was to set aside an alleged fraudulent acquisition of shares by a member whose votes in respect of those very shares were necessary to be counted in order to obtain a majority against the bill. *East Pant Du United Lead Mining Co.* v. *Merryweather*, 2 Hem. & M. 254.

If counsel discovers that a bill has been tampered with after being signed by him, he should apply to have it taken off the file with costs to be paid by the plaintiff. *Troup* v. *Ricardo*, 34 Law J. Rep. (N.S.) Chanc. 91.

### (b) *Supplemental Bill.*

A fund was bequeathed to A for life, with remainder to her surviving children. In a suit, to which no child was a party, the fund was inadvertently ordered to be carried over to the separate account of A, and was afterwards settled, with the approbation of the Court, and paid out to the trustees of the settlement, but no declaration of right was made:—Held, that the matter might be set right by a supplemental bill of the children, and that neither a re-hearing of the orders nor a bill of review was necessary. *Noble* v. *Stow*, 29 Beav. 409.

### (c) *Bill of Review.*

Trustees of a fund to which a lady was entitled for life, with remainder to her children, on her death paid the fund into court under the Trustee Relief Act, and under orders of the Court three-fourths were paid out. One child then claimed the fund as the only legitimate child, and presented a petition for leave to file a bill of review:—Held, that orders under the Trustee Relief Act stood, *pro hac*, on the same footing as a decree in a suit, and a probable case being put forward, founded on facts discovered since the date of the orders, leave was given. *In re Smyth and Arnold's Estates*, 32 Law J. Rep. (N.S.) Chanc. 779.

A grantee of annuity obtained a decree directing accounts and authorizing a receiver to keep down arrears, the costs of the annuitant to be added to his security. Subsequently, the grantor filed a bill to have the annuity deed treated only as security for the money advanced and interest, on the ground that the purchase was from a reversioner at under-value:—Held, that this could not be done without a bill of review. *Tynte* v. *Hodge*; *Tynte* v. *Beavan*, 2 Hem. & M. 287.

A petition for leave to file a bill of review on newly-discovered evidence, cannot be sustained if supported merely by an affidavit of the petitioner upon his information and belief. *Thomas* v. *Rawlings* (No. 2), 34 Beav. 50.

Liberty given to file a bill of review, after a former petition for the same object had been refused upon the ground of deficiency of evidence. Ibid.

Upon an application for leave to file a bill of review, upon the discovery of new evidence, the question is, whether the new evidence would have induced the Court to make a different decree; and, secondly, whether the application is made with due diligence after the discovery. Ibid.

*(d) Amending Bills.*

A bill sought to charge two trustees severally with trust moneys retained with their several privity by third parties. After the evidence had closed, the plaintiffs sought to withdraw the replication, and amend the bill, so as to charge the defendants for moneys which they had jointly allowed the third parties to retain. The application refused, with costs. *Horton* v. *Brocklehurst*, 29 Beav. 503.

As to amending bills after replication. *Price* v. *Salusbury*, 32 Law J. Rep. (N.S.) Chanc. 441; 32 Beav. 446.

On a demurrer allowed, leave was given to amend, without prejudice to a notice of motion, on the amendment being made within a week. *Rawlings* v. *Lambert*, 1 Jo. & H. 458.

Where a substantial point is taken at the bar upon the evidence but is not sufficiently raised by the pleadings, the Court may either give leave to amend or dismiss the bill without prejudice; but the practice of allowing a cause to stand over for amendment should be very sparingly resorted to, and only upon special grounds. *Gossip* v. *Wright*, 32 Law J. Rep. (N.S.) Chanc. 648.

An administrator who has become such since bill filed, may be made a party by amendment, notwithstanding the general rule that a person who acquires a new right after the institution of a suit can be brought before the Court only by a new bill. *Beardmore* v. *Gregory*, 34 Law J. Rep. (N.S.) Chanc. 392; 2 Hem. & M. 491.

A bill was filed by A, a married woman, by her next friend, her husband joining as co-plaintiff, against an executor *de son tort* in respect of a legacy given to A for her separate use. After the bill was filed, letters of administration were granted to S, and S by amendment was made a defendant:—Held, that S was properly made a party to the suit by amendment, the case of an administrator standing on a different footing from that of other persons who gain new rights after the institution of a suit. Ibid.

Held also, that the husband (he not setting up any claim adverse to his wife) might properly be joined as a co-plaintiff. Ibid.

A co-plaintiff in a suit applied by summons in chambers for leave to amend the bill by striking out his name as a plaintiff, expressing his willingness to give security for costs up to the date of the summons, and producing an affidavit that he was not in collusion with the defendants:—Held, both by *Wood, V.C.* and on appeal, that upon his procuring a sufficient person to enter into a bond to the clerk of records and writs to answer the costs of the defendants up to the date of the order made upon the summons, he was entitled to the order applied for. *Drake* v. *Symes*, 30 Law J. Rep. (N.S.) Chanc. 358; 3 De Gex, J. & S. 491.

*(e) Taking Bill pro Confesso.*

A bill ordered to be taken *pro confesso* against a defendant who had absconded, where interrogatories had been filed, but could not be delivered. *Wilkins* v. *Hogg*, 30 Law J. Rep. (N.S.) Chanc. 492.

A bill was ordered to be taken *pro confesso* against an absconding defendant without an advertisement of the interrogatories which had been filed but could not be delivered. *Anthony* v. *Cowper*, 34 Law J. Rep. (N.S.) Chanc. 261; 34 Beav. 77.

A decree for foreclosure was made against a *cestui que trust*, and the bill was taken *pro confesso* against his trustees. The decree was served on the trustee, but without the necessary notice. After the expiration of three years the Court dispensed with service of decree on the trustee altogether, and made it absolute against him. *Thurgood* v. *Cane*, 32 Beav. 156.

*(f) Dismissing Bill by Plaintiff.*

A plaintiff may, notwithstanding the pendency of a motion for an injunction, obtain an order, dismissing his bill with costs. *Markwick* v. *Pawson*, 33 Law J. Rep. (N.S.) Chanc. 703.

Whether in such a case the defendant would be entitled to the costs of the pending motion as costs in the cause—*quære*. Ibid.

(B) SERVICE.

*(a) Substituted Service.*

An affidavit by the clerk of the plaintiff's solicitor, stating that one of the defendants had told him that he held a power of attorney from two other defendants, who were out of the jurisdiction, to enable him to sell the property, the subject of the suit,—Held, not sufficient for the purpose of obtaining an order for substituted service on such defendant. *Brooker* v. *Smith*, 30 Law J. Rep. (N.S.) Chanc. 670.

The old practice as to substituting service on a partner may still be resorted to, notwithstanding the partner to be served by substitution be abroad, and by the recent decisions could not have been there served. *Henderson* v. *Campbell*, 34 Law J. Rep. (N.S.) Chanc. 666.

A notice of motion for a decree cannot be given by substituted service. *Lechmere* v. *Clamp*, 30 Law J. Rep. (N.S.) Chanc. 651; 29 Beav. 259.

After a plaintiff has entered an appearance for a defendant, the Court will permit him to file a replication, and advertise it in the *Gazette*. Ibid.

*(b) Service out of the Jurisdiction.*

Although the Court has power under the 7th rule of the 10th Consolidated Orders to order service on a defendant out of the jurisdiction with copy bill, it cannot order service upon such defendant of notice of any proceedings in the suit. It is in the discretion of the Court to make an order for service of copy bill on a defendant out of jurisdiction, and the Court in the exercise of such discretion will look into the nature of the cause, and upon a motion to discharge an order for service abroad obtained *ex parte*, the Court will exercise such discretion *de novo*. *Hawarden* v. *Dunlop*, 2 Dr. & S. 155.

Where a domiciled Scotchman died in England, and a question was raised, upon application for pro-

bate in this country, by the executor, resident in Scotland, and an agreement for compromise had been entered into establishing the validity of the will, and part of the assets were in Scotland, and part in England, but the majority of the creditors were English, and a suit had been instituted for the administration of the testator's estate, one of the questions in which suit was as to the construction of the agreement for compromise, the Court, upon a motion to discharge an order which the plaintiff had obtained to serve the defendant, the executor in Scotland, with a copy of bill and notice of motion for injunction and receiver, refused to discharge the order to serve the defendant with copy bill, but discharged that part of it which related to the notice of motion for injunction and appointment of receiver. Ibid.

On an application to serve a bill out of the jurisdiction, the Court does not require the allegations of the bill to be stated, the plaintiff must take the order at his own risk. *Brooke* v. *Morison*, 32 Beav. 652.

An order for service on defendants in Scotland was made in a suit where the only tenable ground of jurisdiction in the English Courts suggested at the bar was, that the subject-matter of the suit was in this country, and the bill contained no distinct allegation of that circumstance. The Court in the exercise of its discretion discharged the order. *Steele* v. *Stuart*, 33 Law J. Rep. (N.S.) Chanc. 190; 1 Hem. & M. 793.

The Court has no authority under the 7th rule of the 10th Consolidated Order to order the service abroad of an administration summons. *Lester* v. *Bond*, 1 Dr. & S. 392.

### (C) ENTERING APPEARANCE FOR AND PROCESS AGAINST DEFENDANT.

If a defendant does not appear, and the plaintiff enters an appearance for him, he will be permitted to advertise the replication, and finally the subpœna to hear judgment. *Lechmere* v. *Clamp*, 30 Law J. Rep. (N.S.) Chanc. 651; 29 Beav. 260; 30 Beav. 218.

If a defendant absconds, the Court, upon appearance entered, and on proof of the advertisement of process, and of the facts stated in the bill, will make a decree in accordance with the prayer. Ibid.

An order was also made, under 13 & 14 Vict. c. 60. ss. 34, 43, vesting the mortgaged premises in the plaintiff on non-payment of the principal, interest and costs. Ibid.

A defendant being out of the jurisdiction, an order for substituted service was obtained, and the order served on a person who was in communication with him. A motion was then made to enter an appearance for him under the 4th rule of the 10th Consolidated Order. Motion refused. *Dicker* v. *Clark*, 33 Law J. Rep. (N.S.) Chanc. 350.

### (D) INTERROGATORIES.

The plaintiff having amended his bill on the 25th of April by the simple addition to the prayer of an offer to redeem, filed interrogatories on the 11th of May:—Held, upon motion by the defendant, that the pendency of the demurrer was no excuse for not filing the interrogatories within the time prescribed by the General Orders, and that they must be taken off the file for irregularity, without prejudice to any special application to the Court for further time. *Harding* v. *Tingey*, 34 Law J. Rep. (N.S.) Chanc. 13.

A demurrer to a bill having been allowed, with liberty to amend, no fresh appearance to the amended bill is necessary, and service of the amended bill, without indorsement, is good. Therefore, where a plaintiff, having served an unindorsed copy of an amended bill, afterwards for the purpose of serving interrogatories served an indorsed copy, such second service was held to be a nullity, and the service of interrogatories was set aside for irregularity. *Barry* v. *Croskey*, 31 Law J. Rep. (N.S.) Chanc. 121; 2 Jo. & H. 130, 136.

A demurrer to a bill by one of several defendants having been allowed absolutely, the bill being retained against the other defendants, the former is entitled, upon motion, to an order directing the record and writs clerk to strike his name out of the record of the bill. Ibid.

### (E) DEMURRER.

A demurrer to a bill having been filed, the plaintiff, before the demurrer came on for argument, obtained the common order to amend, but not having amended within the time prescribed, the Court held that the bill was gone. *Hoflick* v. *Reynolds*, 30 Law J. Rep. (N.S.) Chanc. 407.

By an order giving leave to serve a bill upon a defendant in France, he was to have six weeks after service of the interrogatories to plead answer or demur, or to obtain time to make his defence to the suit:—Held, that this did not deprive the defendant of his right to demur alone to the bill within twelve days after his appearance, under the 37th Consolidated Order. *Gruning* v. *Prioleau*, 33 Beav. 221.

As a general rule the question whether leave to amend should be given or refused at the hearing of a cause, depends on the question whether that which is to be introduced by the amendments is connected with that already in issue, or is new matter unconnected therewith. Per *Turner, L.J.*—In the latter case the proper course is to dismiss the bill, without prejudice to any question or future suit. *The Earl of Darnley* v. *the London, Chatham and Dover Rail. Co.*, 33 Law J. Rep. (N.S.) Chanc. 9; 1 De Gex, J. & S. 204.

The plaintiff, before demurrer filed, had given notice of motion for an injunction:—Held, that the bill having stated a clear ground of equity, and the demurrer being allowed on a technical ground only, leave must be given to amend, without prejudice to the motion for an injunction; but it was ordered that if the bill was not amended within ten days, the plaintiff should pay the costs of the suit and of the motion; and if, after amendment, the motion was not brought on within a time limited, then the costs of the motion. *Harding* v. *Tingey*, 34 Law J. Rep. (N.S.) Chanc. 13.

### (F) ANSWER.

The defendant's solicitor in an administration suit, having inadvertently attached to his answer a printed schedule containing all the accounts of the administration, which the clerk of records and writs refused to file, on the ground that the Suitors' Fee Fund would so lose the profits of copying it, the Court allowed the printed answer and schedule to be filed, a printed copy of the answer to be issued with

a written office copy of the schedule; counsel undertaking for his professional client that, as between him and the real client, the latter should not bear the cost of printing the schedule. *Watt* v. *Watt*, 31 Law J. Rep. (N.S.) Chanc. 519.

No answer written or printed upon paper other than that required by Order 1. of the 6th of March, 1860, can be filed by the records and writs clerks, unless leave is obtained upon a special application to the Court. *Harvey* v. *Bradley*, 31 Law J. Rep. (N.S.) Chanc. 775.

A bill being dismissed with costs, a new bill was filed, neither seeking discovery nor an answer; but a voluntary answer was put in, alleging that the new bill was the same in substance as the original bill, and as evidence thereof a print of such original bill was appended to the answer. On a motion being made to take such answer off the file for irregularity, as being a schedule of documents within the terms of the Orders of March, 1860,—Held, that the case was neither within the language nor the spirit of the Orders, and the motion was refused with costs. *Wright* v. *Wilkin*, 32 Law J. Rep. (N.S.) Chanc. 227.

A defendant, who had been attached for want of answer, filed a written answer and, upon the usual certificate of answer filed, obtained his discharge from custody, but did not leave a printed copy with the clerks of records and writs, as required by the Orders of March 6, 1860. The plaintiff moved *ex parte* that the clerk of records and writs might be directed to certify that the cause was in a fit state to enable the plaintiff to serve notice of motion for a decree, and to set down such motion, and that the plaintiff might be at liberty to read the defendant's written answer as an affidavit at the hearing. The motion, having been refused by the Master of the Rolls, was also on appeal refused by the Lords Justices *(dubitante Knight Bruce, L.J.)*, on the ground that having regard to the 3rd Order of March 6, 1860, the written answer must be treated as no longer in existence, and that the only course open to the plaintiff was to attach the defendant again. *Bloxsome* v. *Chichester*, 34 Law J. Rep. (N.S.) Chanc. 79; 2 De Gex, J. & S. 444; 34 Beav. 76.

On a bill to perpetuate testimony, as in other suits, the plaintiff is entitled to such discovery only as is material to the relief asked or the order required, and as the only relief which can be prayed is the perpetuation of testimony, and as the answer put in by the defendant cannot be used against him in any further proceedings, the plaintiff can only require the defendant to answer such facts as will entitle the plaintiff to file a replication, and examine witnesses on the issues stated in the bill. *Ellice* v. *Roupell*, 34 Law J. Rep. (N.S.) Chanc. 624; 32 Beav. 308.

Consequently, where a plaintiff had already obtained from the defendant an answer entitling him to proceed to examine witnesses, exceptions for insufficiency were overruled with costs. Ibid.

The rule that the defendant who elects to answer, must answer fully, though subject to certain specified exceptions, applies to a case where the defence consists of a pleadable point not pleaded, and where the discovery, assuming the case made by the bill and denied by the answer to be substantiated, would or might be material to the relief to be obtained at the hearing. *Swabey* v. *Sutton*, 1 Hem. & M. 514.

The plaintiff, being second mortgagee of certain premises, filed a bill to redeem against the first mortgagees, a firm of bankers, and alleging that one partner had died and another had retired, and asking that the defendants might set forth a short statement of all deeds, transactions, &c., whereby the mortgage had become vested in the remaining partners. The defendants admitted the death and retirement of the two partners, and that by certain deeds, &c. the mortgage had become vested in them, but refused to set forth the particular statements required. An exception to this answer was overruled. *Bridgwater* v. *De Winton*, 33 Law J. Rep. (N.S.) Chanc. 238.

The mortgage stated a settled account between the parties shewing 5,000*l.* to be due; but the bill alleged that there was no settled account, and that no such amount was due, and asked how the defendants made out the amount. The defendants answered, that the account was not made out in writing, but was stated orally to the mortgagor, and was admitted by him to be correct, and that they believed 5,000*l.* was due from the mortgagor to the defendants, who were bankers, upon the balance of account current, at the date of the mortgage, and in respect of bills held by the defendants' firm, upon which they had made advances; and they refused to state further particulars. An exception to this answer was allowed. Ibid.

A bill was filed by the next-of-kin against A B the administratrix, and C D, who was the partner and executor *de son tort* of the intestate, for the administration of the estate, and to take the partnership accounts:—Held, that C D, who had not demurred, was bound to set out the partnership accounts. *Leigh* v. *Birch*, 32 Beav. 399.

Exceptions to answer, in which the defendant alleged, as a reason for not answering fully, that part of the interrogatories were unsupported by corresponding statements in the bill, and were copied from interrogatories in an action at law which the defendant had answered, and to which he craved leave to refer,—allowed with costs. *Hudson* v. *Grenfell*, 3 Giff. 388.

Instead of answering as to documents, the defendant alleged that he was ready to make a complete answer on a summons at chambers, to which the plaintiff excepted. Exceptions allowed, with costs. Ibid.

Where, by an error in the instructions to counsel, a party has been caused unintentionally to make an admission contrary to the fact, the Court allowed the defendants to file a supplemental answer on payment of costs. *Cooper* v. *the Uttoxeter Burial Board*, 1 Hem. & M. 680.

Leave given to file a supplemental answer, after the cause had been set down for hearing, in order to put in issue a codicil and two receipts for legacies which had been discovered after the original answer had been filed. *Chadwick* v. *Turner*, 34 Law J. Rep. (N.S.) Chanc. 62.

A married woman is subject to an attachment on an *ex parte* application, if, upon an order obtained by herself, she omit to put in her separate answer. *Home* v. *Patrick*, 31 Law J. Rep. (N.S.) Chanc. 424; 30 Beav. 405.

Where a married woman had upon her own application obtained an order to answer separately

from her husband, and made default in answering, an attachment was issued against her. *Bull* v. *Withey*, 32 Law J. Rep. (N.S.) Chanc. 633.

The original bill asked separate relief against one of the defendants, who therefore put in a separate defence. The bill was afterwards amended, and that relief was struck out; but the Court held, that the defendant was justified in continuing a separate defence, and was entitled to his costs on that footing. *Shaw* v. *Johnson*, 30 Law J. Rep. (N.S.) Chanc. 646; 1 Dr. & S. 412.

An answer to which exceptions have been taken, and ordered to stand over till the hearing of the cause, is not a sufficient answer within the meaning of the 19th section of 15 & 16 Vict. c. 86; and it is irregular for a defendant, before the exceptions have been disposed of, to file a concise statement and interrogatories under that section. *Mertens* v. *Haigh*, 30 Law J. Rep, (N.S.) Chanc. 33; 1 Jo. & H. 231.

No notice is necessary to enable a plaintiff on motion for decree to read a defendant's answer against that defendant. *Dawkins* v. *Mortan*, 1 Jo. & H. 339.

On a motion for decree, neither the plaintiff nor defendant gave notice of using the answer, nor was it in fact read:—Held, that it ought to be entered as read in the decree. *Bright* v. *Legerton* (No. 2,) 29 Beav. 69.

## (G) PETITIONS.

The petitioner having refused to file the original petition, it was ordered that the respondent be at liberty to file a copy, and that the petitioner do pay the respondent his costs of the application. *In re Devonshire*, 32 Beav. 241.

The four days within which the affidavit in support of a petition to wind up must be sworn and filed extended by the Court. *In re the Patent Screwed Boot and Shoe Co.*, 32 Beav. 142.

A plaintiff obtained an order of course to revive a suit, upon a petition stating an order as having been made in the suit, but which in fact had only been made in another suit. It was discharged with costs for the irregularity. *Brignall* v. *Whitehead*, 30 Beav. 229.

The amendment of a petition, by adding the name of a next friend, does not render it necessary that the petition should be re-answered. *In re Medow's Trust*, 33 Law J. Rep. (N.S.) Chanc. 742.

An order was made upon petition for the appointment of new trustees of a charity,—Held, that it was not necessary that all future applications for the appointment of new trustees of the same charity should be taken before the same Judge under the 6th Consolidated Order, Rule 6. *In re Watt's and other Charities*, 30 Beav. 404.

The Court will not, upon a petition presented by a trustee or executor under the 30th section of 22 & 23 Vict. c. 35, for the opinion, advice, or discretion of the Court, construe an instrument or make any order affecting the rights of parties to property. Such petitions should relate only to the management and investment of trust property. *In re Lorenz's Settlement*, 1 Dr. & S. 401.

The Court declined, upon a petition for its opinion under 22 & 23 Vict. c. 35. s. 30, to decide whether an intestate's estate was liable upon a covenant to be implied in his marriage settlement. *In re Evans*, 30 Beav. 232.

Under 25 & 26 Vict. c. 108. s. 2. the Court will make an order (on petition) authorizing the sale of land with a reservation of the minerals, or of the minerals apart from the land, in general terms without reference to any particular sale. *In re Willway's Trust*, 32 Law J. Rep. (N.S.) Chanc. 226.

Upon all applications to the Court under s. 2. of the act to confirm sales, &c., by trustees with an exception or reservation of minerals (25 & 26 Vict. c. 108), the beneficiaries must appear and consent thereto. *In re Brown's Trust Estates*, 32 Law J. Rep. (N.S.) Chanc. 275.

## (H) MOTIONS.

### (*a*) *In general.*

Motion by a defendant before decree, to restrain a co-defendant from prosecuting an action, or to stay all proceedings in the suit, on an affidavit that the relief sought by the bill and the action was identical,—refused with costs. *Russell* v. *the London, Chatham and Dover Rail. Co.*, 4 Giff. 403.

Although the prayer of process is no longer part of a bill, the rule of the Court still continues, that an injunction granted on motion must be such an injunction as is prayed by the bill. *Burdett* v. *Hay*, 33 Law J. Rep. (N.S.) Chanc. 41.

On a motion to dissolve an *ex parte* injunction, granted in the terms of the prayer of the bill, it is not competent to the Court to grant a new injunction in terms not prayed by the bill. Ibid.

A second motion for the same object as one which had previously been refused with costs, cannot be made until those costs have either been paid or secured by a payment into court. *Burdett* v. *Hay*, 33 Beav. 189.

Where an interim order has been obtained and simultaneous applications are made on the part of the plaintiffs for an injunction in terms of the order, and on the part of the defendants to discharge the order, the plaintiffs have the right to begin. *Fraser* v. *Whalley*, 2 Hem. & M. 10.

### (*b*) *To dismiss for Want of Prosecution.*

The Court will not dismiss a bill for want of prosecution where, on the application of the defendant, the proceedings in the suit have been stayed by reason of the plaintiff being in contempt for non-payment of the costs of an interlocutory application or for not giving security for the same. *Futvoye* v. *Kennard*, 30 Law J. Rep. (N.S.) Chanc. 262.

Under the 1st rule of the 21st Consolidated Order a defendant may move to dismiss a bill for want of prosecution four weeks from the closing of the evidence. The time is not to be computed from the end of the extra month allowed for cross-examination. *Hart* v. *Roberts*, 30 Law J. Rep. (N.S.) Chanc. 614.

In order to defeat a motion to dismiss for want of prosecution, on the ground that the defendant has not produced documents, which the plaintiff requires to inspect before amendment, an application for the production of the documents must have been made immediately upon the filing of the answer which admits them. *Franco* v. *Meyer*, 2 Hem. & M. 42.

By the General Orders evidence in a cause is to

close within eight weeks after issue joined, but a witness who has made an affidavit may be cross-examined within one month after such eight weeks. A defendant may move to dismiss, if the plaintiff does not set down the cause "within four weeks after the evidence closed":—Held, in a case where there was no cross-examination, that the evidence closed at the end of eight weeks, and not of twelve weeks. *Hart* v. *Roberts*, 32 Beav. 231.

A notice of motion to dismiss for want of prosecution is irregular, if served prior to the plaintiff's being in default, although at the time when the motion is heard the plaintiff is in default. *Ponsardin* v. *Stear*, 32 Beav. 666.

Through the negligence of the managing clerk of the plaintiffs' solicitor, the time for closing evidence was allowed to expire without going into evidence; and, the defendants becoming entitled to dismiss the bill for want of prosecution, *Romilly, M.R.* made an order to that effect. On appeal, it appearing that the plaintiffs required to read only the affidavits previously used upon interlocutory applications in the cause, the Lords Justices discharged the order, and enlarged the time for giving notice to read affidavits and cross-examine, the plaintiffs paying all the costs. *Southampton, Isle of Wight and Portsmouth Improved Steamboat Co. (Lim.)* v. *Rawlins*, 34 Law J. Rep. (N.S.) Chanc. 287.

Where a plaintiff's bill is retained in order that his right may be tried at law, he is bound to proceed at law with all reasonable diligence, and is not entitled to wait till the forms of common law procedure compel him to go on. *Arnold* v. *Thomson*, 32 Law J. Rep. (N.S.) Chanc. 40.

### (I) PRODUCTION OF DOCUMENTS.

#### (*a*) *General Points.*

The same practice applies as to the production of books whether abroad or in England. *Hooper* v. *Gum*, 2 Jo. & H. 603.

It is not sufficient in order to avoid production in London to state that books are in constant use, without stating that they cannot be removed without inconvenience. Ibid.

*Stuart, V.C.*, holding that a professional accountant is an agent within the meaning of the common order to inspect documents, made an order for the commitment of the defendant for contempt in having refused to permit the professional accountant to inspect, and ordered him to pay the plaintiff 10*l.* for his costs of the motion to commit. On appeal, the Lords Justices (declining to decide whether an accountant was or was not an "agent" within the meaning of the order), discharged the order for commitment, on the ground that the particular accountant in question was not a proper person to be employed. *Draper* v. *the Manchester, Sheffield and Lincolnshire Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 236; 3 De Gex, F. & J. 23.

General observations by *Turner, L.J.* upon the questions raised by the order. Ibid.

Under the common order for production of documents the Court will, upon a proper case being made out, direct inspection by an agent other than a solicitor. In the present case the Court directed books of account to be inspected by an accountant. *Bonnardet* v. *Taylor*, 30 Law J. Rep. (N.S.) Chanc. 523; 1 Jo. & H. 383.

A defendant taken under an attachment for the non-production of documents, which he had deposited as security for money before the order to produce, will be discharged from custody. *North* v. *Huber*, 30 Law J. Rep. (N.S.) Chanc. 666; 29 Beav. 437.

In an administration suit, after a decree for taking the accounts, one defendant may obtain from a co-defendant a production and inspection of documents, &c., which relate to the matters in question in the suit. *Hart* v. *Montefiore*, 31 Law J. Rep. (N.S.) Chanc. 333; 30 Beav. 280.

Production of deeds and documents will not be ordered where a defendant and another person, who is not a party to the suit, are severally interested in the estate and title-deeds. *Edmonds* v. *Lord Foley*, 31 Law J. Rep. (N.S.) Chanc. 384; 30 Beav. 283.

An estate was sold under a decree. Upon a summons to produce the deeds for inspection, the Court refused to make the order, as the deeds were held by the agents of two tenants in common, one of whom was not a party to the suit. Ibid.

Held, by the Lords Justices, overruling a decision of *Stuart, V.C.* that a creditor of a testator, although not either a plaintiff or a defendant, may, after decree in an administration suit, with a view to establish his debt in equity against the testator's estate, obtain an order that the testator's executor may make an affidavit stating the documents in his possession relating to the claim of the creditor. *In re M'Veagh; M'Veagh* v. *Croall*, 32 Law J. Rep. (N.S.) Chanc. 521; 1 De Gex, J. & S. 309.

Where an answer had been put in by a defendant to an interrogatory as to documents, and it had not been excepted to, *Stuart, V.C.* decided that after decree the Court would not make an order for an affidavit by the defendant as to documents, unless a special case were made out; but the Lords Justices, on appeal, held that the defendant, notwithstanding he had answered and the answer had been taken as sufficient, must file the usual affidavit as to documents. *Hanslip* v. *Kitton*, 32 Law J. Rep. (N.S.) Chanc. 662; 1 De Gex, J. & S. 440.

Where a defendant holds a covenant for the production of deeds for the maintenance and manifestation of his title, he is not bound, in answer to interrogatories, to set out such deeds in a suit, the object of which is to shew that a disputed piece of land is not comprised in the defendant's title. *Bethell* v. *Casson*, 1 Hem. & M. 806.

*Semble* also, that it would be a fraud on the covenant, as against the covenantor, to claim the production of the deeds and then use them for any such purpose. Ibid.

*Semble* also, that a defendant is not bound to incur costs in obtaining production of deeds for the purpose of giving discovery to the plaintiff. Ibid.

The practice of raising questions as to the production of documents on a summons to consider the sufficiency of the affidavit is too firmly established to be disturbed, though, *semble*, not to be commended. *Nicholl* v. *Jones*, 2 Hem. & M. 588.

As to requiring a defendant to make a further affidavit as to documents, see *Warden* v. *Peddington*, 32 Beav. 639.

Where, after a defendant has made a sufficient

affidavit as to documents, the plaintiff amends his bill, introducing new matters, he is entitled to have from the defendant a further affidavit of documents as to the amendments. Ibid.

A defendant, in compliance with an order, made the usual affidavit as to documents. After the affidavit had been filed, he put in his answer, and the plaintiff having from the contents of the answer made out a special case as to the possession by the defendant of particular documents, the Court ordered the defendant to make a further affidavit stating whether he had those documents in his possession. *Noel* v. *Noel*, 32 Law J. Rep. (N.S.) Chanc. 676; 1 De Gex, J. & S. 468.

A defendant who had filed an affidavit as to documents was ordered to file a further affidavit. After this order had been made, but before any further affidavit had been filed, the defendant applied for an affidavit as to documents in the possession of the plaintiff, the time for excepting to his answer having expired. An order was made upon such application. Ibid.

*(b) Privileged Documents.*

The Court held, that the plaintiff could not enforce against the defendant, his trustee, discovery of the private books kept by the defendant's agent containing accounts relating to the plaintiff's property. *Colyer* v. *Colyer*, 30 Law J. Rep. (N.S.) Chanc. 408.

The usual order having been made in chambers to answer and produce documents, one of the defendants objected to produce documents, on the ground that they had been obtained by him for the defence of himself and the other defendant since the institution of the suit, and did not relate to or evidence the title of the plaintiff or his predecessors:—Held, that the word "title" might refer to the property, the subject of the suit, the relief asked, or the designation of the plaintiff's character, and that the defendant was bound to produce the documents. *Felkin* v. *Lord Herbert*, 30 Law J. Rep. (N.S.) Chanc. 798.

A bill averred that the defendant procured the execution of a jointure-deed under a power, by pressure, in fraud of the power; but there was no allegation that the solicitor who prepared the deed was a party to the fraud:—Held, that the alleged fraud was not such as to exclude from privilege the instructions given by the defendant to her solicitor for the preparation of the deed. *Mornington* v. *Mornington*, 2 Jo. & H. 697.

The bill was framed for the purpose of setting aside this deed; and among the communications as to which privilege was claimed were letters, dated a considerable time before the transaction, which the bill sought to set aside, but which the defendant, in her answer, described as having been written for the purpose of obtaining professional assistance as to and with a view to her defence against any claim that the plaintiff might make against her. It appeared, however, on the face of the bill and answer, that a contest had previously existed as to matters intimately mixed up with the transaction which the bill ought to set aside:—Held, that under these circumstances, the dates were not sufficient to rebut the privilege claimed. Ibid.

The defendant was interrogated as to the instructions given to her solicitor for the above-mentioned deed, and also as to communications with reference thereto, between herself or any persons on her behalf, and any persons acting on behalf of the grantor of this jointure. In her answer she ignored "save as herein and in the schedule hereto appears." By a subsequent clause as to documents, generally, she claimed privilege for letters written by and to her solicitor; but, in other parts of the schedule as to which privilege was not claimed were some documents which might satisfy the description of communications with third parties:—Held, that the form of the answer was no bar to the privilege claimed. And, *semble*, that even if there had been no documents mentioned in the schedule free from the claim of privilege to answer the description of the communications with third parties inquired after, this would be only a ground for exceptions, and not for production of the documents as to which privilege was claimed. Ibid.

The plaintiff, who had been the foreman of the defendant, filed a bill claiming one-sixth of the profits of the defendant's business, and asking for an account. The defendant, while denying the plaintiff's right to one-sixth of the profits, admitted an agreement by him to give the plaintiff by way of addition to his salary as foreman, a sum equal to one-twelfth of the profits, the amount, however, to be ascertained by the defendant himself, and the plaintiff to have no right of inspecting the books of the concern. Upon an application asking that the defendant might produce the books relating to the business,—it was decided, by *Romilly, M.R.*, that the plaintiff was entitled to production; but, on appeal, the Lords Justices discharged the order; and *(semble)* on the ground that the question whether the plaintiff had or not by contract deprived himself of his right to production was one for determination at the hearing of the cause. *Turney* v. *Bayley*, 33 Law J. Rep. (N.S.) Chanc. 499.

In the same case it was held, by *Romilly, M.R.* at the hearing, that the defendant must produce the books in order to settle the point in dispute. The Court also directed an inquiry as to the proportion, and an account of the profits to be taken. *Turner* v. *Bayley*, 34 Beav. 105.

Confidential letters, which, after the matters in the suit arose, and with reference thereto, were sent by a plaintiff, resident abroad, to his agents in England to be communicated to his solicitor, were held to be privileged. *Hooper* v. *Gum*, 2 Jo. & H. 603.

In order to establish privilege as to letters sent by the agent to the plaintiff,—*Semble*, that they must appear to have been sent in consequence of communications from the solicitor. Ibid.

The reports of the accountant employed by defendant's solicitor to investigate books are privileged from production, so also are defendants of pleadings and observations made upon briefs themselves are not privileged when they consist of matter *publici juris*. *Walsham* v. *Stainton*, 2 Hem. & M. 1.

Counsel's indorsement of an order of the Court is *publici juris*, and must be produced; but all notes made by counsel, and all instructions given to him whether by indorsement on his brief, or by notes or observations within, are privileged and may be sealed up. *Nicholl* v. *Jones*, 2 Hem. & M. 588.

Notes made by a shorthand writer employed by

one of the parties were ordered to be produced, so far as they merely described what took place in open court, but with liberty to seal up all notes or observations thereon, and all such parts thereof (if any) as did not relate to the proceedings in court. Ibid.

The plaintiff had in her possession or power letters which had passed between her solicitor and a third party referring to the subject-matter in dispute, some of which had been written in anticipation of, and the rest pending, the proceedings in the suit:—Held that, she was not bound to produce them. *Simpson* v. *Brown*, 33 Beav. 482.

### (K) DISCOVERY.

By the interrogatories of a bill, filed by a foreign merchant against his London agents, the defendants were asked what were the powers and authorities given to them, and by what documents they made out the same. The defendants stated that the powers and authorities appeared from written correspondence, and that various letters had passed between the parties to which they referred:—Held, that the answer was insufficient, and that the defendants were bound to specify the documents containing their powers and authorities. *Inglessi* v. *Spartali*, 29 Beav. 564.

The plaintiff complained that the defendant had sold, under the plaintiff's name, sewing-machines, which had not been manufactured by him, and sought a discovery of all the machines sold by the defendant, the price, the profit, the names of the purchasers, and other particulars. The defendant refused to answer, saying that he would thereby disclose the names of his customers and the secrets of his trade:—Held, that he was bound to answer. *Howe* v. *M'Kernan*, 30 Beav. 547.

Where relief is sought in respect of a fraud, there must, in order to take the case out of the rule of privilege, be at least a specific allegation in the bill connecting with the fraud the solicitor of the person who was a party thereto, although such person be now deceased. *Charlton* v. *Coombes*, 32 Law J. Rep. (N.S.) Chanc. 284; 4 Giff. 372.

Where therefore a bill alleged that a person now deceased had been party to a fraud and prayed relief in respect thereof, and the solicitor of such person, being called as a witness, demurred to certain questions put to him before the examiner upon the ground of privilege, the Court allowed the demurrer, there being no specific allegation in the bill connecting the solicitor with the fraud complained of. Ibid.

*Semble*—A mere allegation in the bill connecting the solicitor with the fraud, where he is not made a co-defendant, and the issue of a privilege is not distinctly raised, is insufficient. Ibid.

Whether communications made by a client to his solicitor in relation to business transacted for the former by the latter are privileged after the death of the client—*quære*. Ibid.

Where a decree has been made, directing the defendant to account for all goods sold by him, with a particular stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods, and, if he be unable to give such information precisely, he may then (but not otherwise) be required to disclose the names of all persons to whom he has sold any goods, which he will not swear positively were unstamped. *The Leather Cloth Co.* v. *Hirschfield*, 1 Hem. & M. 295.

A plaintiff in a patent case, where the novelty of the invention is denied by the answer, has no right to a discovery of the particulars on which the defendant relies as shewing a user of the thing patented prior to the date of the patent. *Daw* v. *Eley*, 2 Hem. & M. 725.

### (L) EVIDENCE.

Upon a motion to vary the chief clerk's certificate, an affidavit filed after such certificate is filed cannot be read. *In re Hooper, Bayliss* v. *Watkins*, 32 Law J. Rep. (N.S.) Chanc. 106.

Injunction obtained *ex parte* dissolved, with costs, it appearing that when the order for it was made the office-copy of the affidavits in support of it had not been delivered out of the office of the clerk of records and writs. *Elsey* v. *Adams*, 32 Law J. Rep. (N.S.) Chanc. 616; 4 Giff. 398.

An examination in bankruptcy of a bankrupt was referred to in the evidence of the plaintiff (the official assignee):—Held, that the defendant was entitled to have the examination produced in cross-examining the plaintiff's witnesses. *Bell* v. *Johnson*, 1 Jo. & H. 682.

An examination of the defendant which had not been referred to was held not to be producible. Ibid.

The affidavit of a witness, who dies before he can be cross-examined, is admissible, unless the witness has been kept out of the way to avoid cross-examination. *Davies* v. *Otty*, 34 Law J. Rep. (N.S.) Chanc. 252.

Liberty given under the 19th General Order of February, 1861, to use the affidavits of persons who, by death and lunacy, could not be cross-examined, saving just exceptions. *Ridley* v. *Ridley*, 34 Beav. 329.

Depositions taken in a foreign country may be filed in this court if taken before persons duly authorized by the law of the country to administer oaths and take similar depositions in the courts there. *Levitt* v. *Levitt*, 2 Hem. & M. 627.

In the case of a deposition taken in the United States of America a certificate by the clerk of the Supreme Court sealed with the seal of the Court is sufficient evidence that such a deposition has been taken before a proper officer. Ibid.

Where the Court refuses an interlocutory application with costs, without hearing the other side, affidavits which have actually been briefed for the purpose of opposing the motion are to be entered as read, though not in fact read. *The Catholic Printing and Publishing Co. (Lim.)* v. *Wyman*, 32 Law J. Rep. (N.S.) Chanc. 53.

The rule that no new evidence can be adduced on a motion after it has been opened extends to the case of documents which it is proposed to verify *viva voce* by the attesting witness. *Bird* v. *Lake*, 1 Hem. & M. 111.

### (M) CROSS-EXAMINATION OF WITNESSES.

Where a plaintiff on motion for decree gives notice to read against one defendant the answer of a co-defendant, the defendant is entitled to cross-examine on the answer; but where plaintiff had given notice to read all the answers, and where the sole contest was between co-defendants on a point which could

not be determined until after the hearing, upon the plaintiff undertaking not to read the answer in question as an affidavit, leave to cross-examine was refused. *Dawkins* v. *Mortan*, 1 Jo. & H. 339.

The forty-eight hours' notice required by the 22nd General Order of the 5th of February, 1861, applies to "the opposite party," and not to a witness who is bound to attend to be examined after reasonable notice. *In re North Wheal Exmouth Mining Co.*, 31 Beav. 628.

The non-production of a witness for cross-examination is no ground for a postponement of the hearing, if the affidavit of the witness is withdrawn. *In re Sykes's Trust*, 2 Jo. & H. 415.

Where a suit is brought on by motion for decree, and issue is joined in a cross-suit, and an order is obtained by the plaintiff in the original suit for him to use in the cross-suit affidavits filed in his own suit, it is at the option of the plaintiff in the cross-suit either to treat these affidavits as filed in the original suit and so cross-examine the witnesses before an examiner, or to consider them as evidence to be used in his own suit and give notice of cross-examination in open court at the hearing. *Neve* v. *Pennell; Hunt* v. *Neve*, 1 Hem. & M. 252.

### (N) EXPERT.

The report of an expert under 15 & 16 Vict. c. 80. s. 42. is not to be looked at in the light of an award, but only as furnishing materials for the information of the Court. *Ford* v. *Tynte*, 2 De Gex, J. & S. 127.

### (O) ISSUE AND TRIAL OF FACT AND LAW.

By 25 & 26 Vict. c. 42 (commonly called Rolt's Act), it is obligatory on the Court of Chancery to decide all questions of law or fact on the determination of which the title to relief or remedy in equity depends. *In re Hooper*, 32 Law J. Rep. (N.S.) Chanc. 55.

Since the passing of the Chancery Regulation Act, 1862, the rule is, that where in a suit in equity there are mixed questions of law and fact, the Court of Chancery will itself determine the questions of fact, and will only direct an issue in exceptional cases where it is satisfied that the facts can be more conveniently tried in that way. *Young* v. *Fernie*, 33 Law J. Rep. (N.S.) Chanc. 192; 1 De Gex, J. & S. 353.

In a case where a difficult mixed question of law and fact arose as to whether the stipulations of a bond had been infringed or not, which question *Romilly, M.R.* considered could only be conveniently tried by action at law and not by an issue, the Court, having regard to Mr. Rolt's Act (25 & 26 Vict. c. 42), dismissed the bill, without prejudice to any action at law which the plaintiff might bring upon the bond. *Clarkson* v. *Edge*, 33 Law J. Rep. (N.S.) Chanc. 443; 33 Beav. 227.

Particulars of breaches, delivered with a view to a jury trial of a patent case in the Court of Chancery, are sufficient if, taken together with the pleadings, they give the defendant full and fair notice of the case to be made against him. *Needham* v. *Oxley*, 1 Hem. & M. 248.

On a bill by an heir, praying an issue *devisavit vel non*, for the purpose of obtaining incidental relief, the Court is bound, under Mr. Rolt's Act, to determine the question without remitting the parties to an action at law. But, by analogy to the old practice, the Court will in general in such cases direct a trial by jury, and (with a view to the contingency of a motion for a new trial) will direct the trial to be before itself. *Egmont* v. *Darell*, 1 Hem. & M. 563.

A bill to restrain a nuisance is within the provisions of Mr. Rolt's Act (25 & 26 Vict. c. 42), and the Court has no longer the power to require the plaintiff to establish his right at law. *Eaden* v. *Firth*, 1 Hem. & M. 573.

But this does not affect the defendant's right to have the question of nuisance or no nuisance decided by a jury. Ibid.

*Semble*—This Court will not, ordinarily, try a question of nuisance before itself unless the acts complained of have been done in London or Middlesex, but will direct an issue. Ibid.

### (P) DAMAGES.

The jurisdiction conferred by the Chancery Amendment Act, 1858, of awarding damages in suits to restrain the commission of wrongful acts, applies to the case of suits to restrain the infringement of patents; and the circumstance that the Court was in the habit, before the act, of affording a partial remedy in such suits by directing an account of profits, constitutes no ground for excluding the jurisdiction newly conferred. *Betts* v. *De Vitre*, 34 Law J. Rep. (N.S.) Chanc. 289.

A suit had been instituted by a patentee to restrain the defendants from infringing his patent, and asking for an account of profits made by the defendants by sale or manufacture of the material which formed the subject of the patent. The validity of the patent and the fact of infringement by the defendants had been decided in the plaintiff's favour by the Court without a jury. The plaintiff asked, at bar, for damages or for an account of the profits of which he had been deprived by reason of such infringement. The Court directed an account of profits made by the defendants by the infringement, and an inquiry what sum ought to be paid by the defendants in respect of the damage sustained by the plaintiff. Ibid.

Observations as to the relative convenience of ascertaining damages by inquiry at chambers and by a jury. Ibid.

### (Q) CONSOLIDATION OF SUITS.

A patentee filed separate bills against 134 alleged infringers. Seventy-seven of the defendants applied that the plaintiff might be directed to proceed with one suit, either to try all the questions or to try separately the validity of the patent, and that in the mean time the proceedings in the other suits should be stayed, or the time for answering should be enlarged, till further order:—Held, that at this stage of the proceedings the defendants could not be absolved from giving discovery by answer, but without prejudice to any application for consolidating the suits after answer. *Foxwell* v. *Webster*, 2 Dr. & S. 250.

Where a bill was filed for administration by a daughter against a widow as administratrix and only son, and the widow filed a second bill for the same object against the son, but did not make the daughter a party, the Court on application of the daughter (the plaintiff in first suit) gave the conduct of the

proceedings in the second suit to her. *Belcher* v. *Belcher*, 2 Dr. & S. 444.

Where there are two suits for administration of the same estate, and a decree has been taken in one only, but the relief which can be obtained in that one is not so comprehensive as that which can be had in the other, the second suit will not be stayed, but both suits will be consolidated on such terms as the Court shall think just. *Hoskins* v. *Campbell; Gibbon* v. *Campbell*, 2 Hem. & M. 43.

(R) CONDUCT OF THE PROCEEDINGS.

When one of two co-plaintiffs refused to concur in the appointment of a solicitor, there being no solicitor on the record, the proper course is for the remaining plaintiff to apply in chambers for the sole conduct of the cause, on a summons taken out in person against the refusing plaintiff only; and a motion to strike out the name of the refusing party as plaintiff and make him a defendant will be refused. *Butlin* v. *Arnold*, 1 Hem. & M. 715.

Two suits for the administration of one estate being instituted within five days of each other, and there being no evidence of unfitness on the part of either plaintiff, the Court made a decree in both suits, leaving the question as to which should have the control of the proceedings to be decided with reference to the manner in which each party should conduct the inquiries in chambers. *Nowall* v. *Pascoe; Thompson* v. *Pascoe*, 31 Law J. Rep. (N.S.) Chanc. 456.

(S) LEAVE TO INTERVENE.

Leave given to a person, who was not a party to the cause, to intervene and present a petition of re-hearing of an order in which he was materially interested, and which had been made upon petition in the cause. *Jopp* v. *Wood* (No. 2), 33 Beav. 372.

(T) SECURITY FOR COSTS.

A sole plaintiff, resident in Ireland, died; his representative, who also resided in Ireland, obtained an order to revive the suit:—Held, that she must give security for costs, though no such security had been asked for against the plaintiff in the original suit. *Jackson* v. *Davenport*, 30 Law J. Rep. (N.S.) Chanc. 272; 29 Beav. 212.

Plaintiffs, resident abroad, being ordered to give security for costs, afterwards came to reside within the jurisdiction. The order was thereupon discharged, the plaintiffs paying the costs of the application. *Matthews* v. *Chichester*, 30 Beav. 135.

A decree was made in several mortgagees' and annuitants' suits, directing accounts and inquiries, and appointing a receiver and authorizing him, as the Judge should direct, to keep down the interest on the incumbrances and pay the annuities, the costs of the several plaintiffs to be added to their securities. The defendant, the mortgagor, filed a bill to impeach the annuity deed on which one of these suits was founded, or, in the alternative, to avoid certain clauses as to interest on arrears:—Held, that the relief prayed being inconsistent with the decree already made, and the suit not being a proceeding by way of defence, the plaintiff (who was out of the jurisdiction) was bound to give security for costs. *Tynte* v. *Hodge*, 2 Jo. & H. 692.

Applications, as to security for costs, may properly be made in chambers. Ibid.

A plaintiff, resident abroad, is not compelled to give security for costs, where the bill is filed by way of defence to an action at law, although it seeks other relief. *Wilkinson* v. *Lewis*, 3 Giff. 394.

The plaintiff could not be found at the residence described in his amended bill. An application by a defendant (made a party to the suit by the amended bill), that the plaintiff might be ordered to give security for costs, was refused with costs, the misdescription having arisen by mistake, and no inquiry as to the plaintiff's residence having been made of his solicitor. *Knight* v. *Cory*, 32 Law J. Rep. (N.S.) Chanc. 127.

The rule that the next friend of a married woman must either be a person of substance or give security for costs, applies to a case where the husband of a married woman (not having any substantial interest) is a co-plaintiff. And the rule that when you have one co-plaintiff personally liable to costs, you have no right to security as against any other co-plaintiff, does not apply to such a case. *Smith* v. *Etches*, 1 Hem. & M. 711.

A plaintiff, who had no fixed residence, inserted in the bill, as his place of residence, a house where he had never lived, but where letters, &c., were left for him, and whence they were forwarded to him immediately. He was ordered either to give security for costs or to amend his bill by inserting a proper address. *Dick* v. *Munden*, 34 Law J. Rep. (N.S.) Chanc. 669.

(U) CONTEMPT.

Upon the report of the solicitor to the Suitors' Fee Fund upon the poverty of a defendant, who had been committed to a country prison for want of answer, a solicitor and counsel will be assigned to such prisoner without an application being made to the Court. *Layton* v. *Mortimore*, 30 Law J. Rep. (N.S.) Chanc. 34.

A seizure of partnership assets in the possession of a receiver appointed by the Court, of which the execution creditor had notice, held to be contempt on the part of the execution creditor and of the sheriff; and the Court ordered both respondents to pay the costs of the seizure and of a motion to commit for such contempt. *Lane* v. *Sterne*, 3 Giff. 629.

After the institution of a suit seeking dissolution of a partnership and appointment of a receiver, an action was brought against the partnership firm and a judgment recovered. Before the receiver was actually appointed, but after he had been nominated, a writ of *fi. fa.* was issued upon the judgment, under which the sheriff took possession of certain partnership property, and refused to give up possession thereof after the appointment of the receiver. Upon motion to commit the sheriff for contempt of Court, —Held, that there was no contempt. *Defries* v. *Creed*, 34 Law J. Rep. (N.S.) Chanc. 607.

(W) ABATEMENT.

Where one of three residuary legatees, co-plaintiffs in an administration suit, dies before decree, the suit is not thereby abated, and a revivor order is not necessary. *Hinde* v. *Morton*, 2 Hem. & M. 369.

On a motion to dismiss for want of prosecution under the above circumstances,—Held, that the

proper order was, not that the plaintiffs should revive or the bill be dismissed, but that the plaintiffs should proceed or the bill be dismissed with costs. Ibid.

## (X) REVIVOR.

If a defendant, having an interest in the estate of a testator, which is being administered in this court, dies abroad, and his executors prove the will at the place of his death, but refuse to prove it in England, this Court, under 15 & 16 Vict. c. 86, will order a representative to be appointed, that the suit may be revived. *Bliss* v. *Putnam*, 30 Law J. Rep. (N.S.) Chanc. 38; 29 Beav. 20.

If a suit abates and becomes defective after a decree, and the plaintiffs, with notice of these facts, omit to obtain an order to revive, it may be revived by a defendant, though he have neglected to give notice of the application to the trustees of a settlement made with the sanction of the Court, to whom the interest of the plaintiffs had been transferred. *Noble* v. *Stow*, 31 Law J. Rep. (N.S.) Chanc. 385; 30 Beav. 512.

A defendant cannot however revive, unless with the consent of the plaintiff, or on notice to him and his neglect to do so. Ibid.

A tenant for life filed a bill against trustees for the execution of the trust. A decree was made, and afterwards the plaintiff died, and the executors of his will refused to revive the suit. Another tenant for life had been served with the decree, and had obtained an order for liberty to attend the proceedings:—Held, that this tenant for life was entitled to revive the suit, and carry on the proceedings without filing a supplemental bill. *Dobson* v. *Faithwaite*, 31 Law J. Rep. (N.S.) Chanc. 215; 30 Beav. 228.

A sole plaintiff died, having devised the estate which was the subject of the suit:—Held, that the devisee was not entitled to the common order to revive under 15 & 16 Vict. c. 86. s. 52. *Laurie* v. *Crush*, 32 Beav. 117.

Common order to revive was granted to administrator of sole plaintiff by whose death the suit had abated. *Ward* v. *Shakeshaft*, 1 Dr. & S. 607.

The devisee of a sole plaintiff who dies before decree is entitled to the common order of revivor and supplement, under 15 & 16 Vict. c. 86. s. 52. *Eyre* v. *Brett*, 34 Law J. Rep. (N.S.) Chanc. 400.

The words of the enactment respecting orders of revivor and supplement ought to receive a liberal construction. Ibid.

A plaintiff in a suit was convicted by a foreign Court of felony, and a curator had been appointed of his estate, who, in accordance with the law of such foreign country, by virtue of his office fully represented him:—Held, upon motion for a supplemental order, that there was no such transmission of interest as would come within the 52nd section of the Chancery Amendment Act, and that it was necessary to file a supplemental bill. *Guillon* v. *Rotch*, 1 Dr. & S. 621.

Order to revive a creditors' suit made on motion *ex parte* after decree at the instance of creditors whose debts had been allowed by the chief clerk, who however had not yet made his certificate. *Bell* v. *Bell*, 33 Law J. Rep. (N.S.) Chanc. 384.

An order of revivor may be made under 15 & 16 Vict. c. 86. s. 52. at the instance of a plaintiff against a co-plaintiff on whom a new interest has devolved. *Foster* v. *Bonner*, 33 Law J. Rep. (N.S.) Chanc. 384.

One of three plaintiffs, claiming as next-of-kin, in a suit for the administration of personal estate, having died since the institution of the suit without any legal personal representative, it was ordered that the suit should stand revived, and should be prosecuted by the surviving plaintiffs against the present defendants. *Ure* v. *Lord*, 34 Law J. Rep. (N.S.) Chanc. 225; 2 Dr. & S. 263.

Whether there was in fact any abatement—*quære*. Ibid.

When a party to a bill has disclaimed and died, the plaintiff has no right to revive the suit against his personal representatives, although there was at the time of his death a disputed question of costs. *Ridgway* v. *Kymnersley*, 2 Hem. & M. 565.

A special case becoming abated may be revived by order of course under the 52nd section of 15 & 16 Vict. c. 86. *Wilson* v. *Whateley*, 30 Law J. Rep. (N.S.) Chanc. 673; 1 Jo. & H. 331.

The rule that there can be no revivor for costs, applies though costs are expressly prayed by the bill. *Umpleby* v. *Waveney Valley Rail. Co.*, 1 Jo. & H. 255.

It is not necessary in any case to have an appearance entered to a revivor order. *Hall* v. *Radcliffe*, 2 Jo. & H. 765.

A supplemental order, under the 52nd section of 15 & 16 Vict. c. 86, is only intended as a substitute for a simple bill of revivor and supplement, and does not apply in a case where it is necessary to have an original bill, in the nature of a bill of revivor and supplement. *Williams* v. *Williams*, 30 Law J. Rep. (N.S.) Chanc. 407.

After a decree a mortgage of the property the subject-matter of the suit was created, and an order was made upon further consideration, the mortgagees not being made parties:—Held, that the 52nd section of 15 & 16 Vict. c. 86. applied, and that a supplemental bill was not necessary. *Freeman* v. *Pennington*, 31 Law J. Rep. (N.S.) Chanc. 216; 3 De Gex, F. & J. 295.

After the hearing, and before judgment had been delivered, the plaintiff became bankrupt:—Held, that it was not necessary that the suit should be revived before decree. *Boucicault* v. *Delafield*, 33 Law J. Rep. (N.S.) Chanc. 38; 1 Hem. & M. 597.

An order to revive under 15 & 16 Vict. c. 86. s. 52, made in order to bring before the Court the devisee of a defendant who had died before decree. *Earl Durham* v. *Legard*, 34 Beav. 442.

## (Y) ORDERS AND DECREES.

### (*a*) *General Points.*

For a form of decree declaring that it is fit and proper that an application should be made to Parliament to extend the leasing powers affecting a settled estate, see *Savile* v. *Bruce*, 29 Beav. 557.

Where, by arrangement, any order which is not according to the course of the Court is inserted in a decree, such order must in the decree be stated to be by consent. *Bartlett* v. *Wood*, 30 Law J. Rep. (N.S.) Chanc. 614.

A bill was filed to restrain injury to a farm by smoke from copper-works, an action having been brought and damages recovered, for the injury

arising from the same. Before trial in a second action the plaintiff moved for an injunction, and an order by consent was made that the defendant should buy the plaintiff's interest in the farm at a price to be ascertained by a surveyor. Damages were recovered by the plaintiff in the second action. Before the valuer the plaintiff contended that the valuation should be made according to the state of the farm before it had been injured by the defendant's works,—the defendant insisting, on the other hand, that the farm should be valued in its then present state; and on the parties refusing to come to an agreement, the surveyor intimated that he should decide for himself. The defendant then applied to the Court to interpret the order for the surveyor's assistance, and *Wood, V.C.* acceded to the application, declaring that the surveyor ought to take the present state of the property as the basis of his valuation:—Held on appeal, that the declaration should not have been made. *Houghton* v. *Bankart*, 30 Law J. Rep. (N.S.) Chanc. 182; 3 De Gex, F. & J. 16.

The practice as to inserting directions with respect to settled accounts in a decree for an account is as follows: (1) If the defendant sets up, by his answer, a settled account, and proves it at the hearing, the decree should direct the accounts to be taken on the footing of the account so proved. (2) If, however, the plaintiff charges by amendment, and proves, one or more errors in the account as stated, the decree should direct the accounts to be taken on the footing of the settled account as alleged and proved, with liberty to the plaintiff to surcharge and falsify. (3) If the defendant has not, by his answer, stated any settled account, still if the Court, at the hearing of the cause, has reason to think that there was one, the decree should direct the accounts to be taken, not disturbing settled accounts, if any such should appear, but with liberty to the plaintiff to surcharge and falsify. *Buckeridge* v. *Whalley*, 33 Law J. Rep. (N.S.) Chanc. 649.

A direction not to disturb settled accounts was, after more than five years from the hearing of a cause, inserted in the decree, on a petition of rehearing obtained by a defendant; such rehearing being a matter of indulgence only, and not of right. Ibid.

In a suit against A, an incumbrancer, and B, a sub-incumbrancer, to redeem the securities,—Held, that the proper form of decree was that upon the amount due from the plaintiff to A being paid into court, both A and B should re-convey the estate, and deliver the deeds to the plaintiff, and that the plaintiff was not bound to wait until the accounts had been taken and the equities settled as between A and B. *Lysaght* v. *Westmacott*, 33 Beav. 417.

A clerical error in the enrolment of a decree corrected by the Master of the Rolls. *The Attorney General* v. *Greenhill* (No. 2), 34 Beav. 174.

### (b) *Enrolment.*

An application to vacate the enrolment of a decree may be made either to the Lord Chancellor or the Lords Justices. *Hill* v. *the South Staffordshire Rail. Co.*, 2 De Gex, J. & S. 230.

A decree was passed by the Registrar on the 7th of April: according to the usual course at least one clear day elapses before the decree is given out to the parties as passed and entered, but in cases of urgency it may be bespoken for the following day; the plaintiff's solicitor, having notice that the defendants intended to appeal, bespoke the decree for the following day, and at once enrolled it. On the 9th of April, a petition of appeal was presented:—*Semble*, that the deviation from the ordinary course of proceeding in obtaining the decree before the usual time would alone have been a sufficient ground for vacating the enrolment. Ibid.

An intending appellant who has entered a caveat against the enrolment of a decree, is bound to prosecute it with effect in accordance with the 27th rule of the 23rd Consolidated Order, and the illness of the appellant preventing compliance with the rule affords no sufficient ground for vacating the enrolment, and depriving the opposite party of his strict right. *Fray* v. *Drew*, 34 Law J. Rep. (N.S.) Chanc. 602.

### (Z) STAYING PROCEEDINGS.

A bankrupt was refused his certificate on the ground of fraudulent concealment of property. Subsequently a consent order for annulling the bankruptcy was obtained in consideration of a friend of the bankrupt's paying a sum to his creditors. After this, the assignees discovered that other property to a large extent had been concealed by the bankrupt, and they presented a petition to discharge the annulling order as having been obtained by fraud, and, before this petition had been heard, filed a bill to restrain the bankrupt from getting in the concealed property. The petition was ultimately dismissed by the Lord Chancellor on the ground that the assignees having, when they consented to the annulling order, been aware of the previous fraudulent concealment, could not be held to have consented to the order on the faith of the bankrupt's having made a full disclosure of his property:—Held, that the proceedings in the cause ought to be stayed without costs. *Elsey* v. *Adams*, 2 De Gex, J. & S. 147.

*Wood, V.C.*, had ordered a fund in court to be paid to R; and upon the reversal of that decree R moved that the part of the decree of the Appeal Court which ordered the fund in court to be paid to B should be suspended pending the appeal of R to the House of Lords; but the Lords Justices declined, B not objecting to give security to abide by any order of the House of Lords on the hearing of the appeal. *Ralli* v. *the Universal Marine Insur. Co.*, 31 Law J. Rep. (N.S.) Chanc. 313; 2 Jo. & H. 159.

Time for the performance of a decree extended, pending an appeal to the House of Lords, on the appellant submitting to indemnify the respondent against any loss. *Taylor* v. *the Midland Rail. Co.* (No. 2), 30 Beav. 219.

In this suit two of the defendants appealed to the House of Lords upon the whole case, including a decision of the Scotch Court upon a case sent for their opinion. The plaintiff was entitled to certain accumulations according to the decision of the Scotch Court, amounting to 53,000*l.*, and having obtained an order for payment out of that sum to him, the appealing defendants moved to stay all proceedings pending the appeal:—Held, that it must be assumed *prima facie* that decision appealed from is wrong, particularly where the application is made to the Court whose decision is questioned: if, however, the Court considers the appeal hopeless, it will

refuse the motion. *Lord* v. *Colvin*, 30 Law J. Rep. (N.S.) Chanc. 787; 1 Dr. & S. 475.

Held also, that where there is an appeal from the decision of a Scotch Court, acted upon by this Court, it must be assumed that such appeal will be successful, where part of such proceedings sought to be stayed is the payment out of court of a large sum of money. The Court will consider the amount, and direct that it shall not be paid out until the plaintiff has given satisfactory security for its repayment. Ibid.

Where, after a decree against a purchaser for specific performance, he made default in payment of the purchase-money, the Court, upon the application of the vendor, rescinded the contract and stayed all further proceedings in the cause, except as to any application which might be made by the vendor to assess the damages incurred by him in consequence of the breach of the contract. *Sweet* v. *Meredith*, 32 Law J. Rep. (N.S.) Chanc. 147; 4 Giff. 207.

The costs of a motion to stay proceedings under a decree, pending an appeal to the House of Lords, must be paid by the party applying, whether successful or unsuccessful on the appeal. *Lady Mary Elizabeth Topham* v. *the Duke of Portland*, 32 Law J. Rep. (N.S.) Chanc. 606; 1 De Gex, J. & S. 603.

A motion to stay further proceedings in a bill to perpetuate testimony, on the ground that a suit had been instituted in another Court in which the questions in difference might be determined, was refused with costs. *Ellice* v. *Roupell*, 32 Law J. Rep. (N.S.) Chanc. 778; 32 Beav. 318.

Application by vendors in a suit for specific performance to suspend the execution of the conveyance pending an appeal to the House of Lords refused, the purchaser consenting that notice of the appeal should be indorsed on the conveyance. *Wilson* v. *the West Hartlepool, &c., Rail. Co.* (No. 2), 34 Beav. 414.

## (AA) APPEAL AND RE-HEARING.

### (*a*) *In what Cases.*

The Court of Chancery has an inherent power, quite independent of statutory authority, to make orders regulating its own procedure. Such orders will be valid, though they may indirectly limit the time for appealing from a decree of the Court to the House of Lords. A General Order made in 1852 forbidding decrees to be enrolled beyond five years from the time when they were pronounced, except by special leave of the Court, was therefore held to be valid. *Beavan* v. *Mornington* (House of Lords), 30 Law J. Rep. (N.S.) Chanc. 663; 8 H.L. Cas. 525.

*Semble*, per *Westbury, L.C.*, that a person brought before the Court by service of notice of the decree under 15 & 16 Vict. c. 86. s. 42. is entitled to present a petition of re-hearing. *Ellison* v. *Thomas*, 32 Law J. Rep. (N.S.) Chanc. 2; 1 De Gex, F. & J. 18.

A suit was instituted for a declaration of right as to the interests of tenants for life in the share of a deceased co-tenant for life. The decree made at the hearing after declaring the immediate rights of the tenants for life proceeded to declare that there were cross-remainders between them. The Lords Justices, although the usual time for re-hearing had elapsed, ordered a re-hearing of the case, at the instance of children of a tenant for life who had recently died, those children being prejudiced by the declaration as to cross-remainders, and the declaration being unnecessary for the determination of the question originally submitted to the Court. *Walmesley* v. *Foxhall*, 32 Law J. Rep. (N.S.) Chanc. 672; 1 De Gex, J. & S. 451.

In an administration suit the Judge having heard personally and refused in chambers an application of a creditor for an order on the executors to produce papers, would not allow the matter to be argued in court:—Held, not to be a proper case for appeal. *In re M'Veagh; M'Veagh* v. *Croall*, 32 Law J. Rep. (N.S.) Chanc. 521; 1 De Gex, J. & S. 309.

An appeal lies from an order of the Judge in chambers as to production of documents before the decree is made, where the Judge makes the order in person, and declines to adjourn the matter into court. *Snowdon* v. *the Metropolitan Rail. Co.*, 1 De Gex, J. & S. 400.

The 33rd section of 12 & 13 Vict. c. 108. which provides that no notice of motion for a re-hearing shall be given "after the expiration of three weeks after the order complained of shall have been made," held to apply to the time at which the order was pronounced by the Judge, and not at the time at which the order was drawn up. *In re the Risca Coal and Iron Co.*, 31 Law J. Rep. (N.S.) Chanc. 429.

### (*b*) *The Petition.*

A certificate on petition for re-hearing allowed to be signed by one counsel only. *Knowles* v. *Greenhill; Heath* v. *Greenhill*, 30 Law J. Rep. (N.S.) Chanc. 670.

Leave given to a pauper plaintiff to appeal, although the petition of re-hearing was signed by one counsel only. *Jones* v. *Gregory*, 33 Law J. Rep. (N.S.) Chanc. 679; 2 De Gex, J. & S. 83.

The Court will not allow the presentation of a petition of re-hearing without the signature of counsel. *Buckeridge* v. *Whalley*, 31 Law J. Rep. (N.S.) Chanc. 416.

Notwithstanding Consolidated Order 31, Rule 3, a petition of re-hearing of a decree may, in a complicated case, contain a full statement of the facts requisite to explain the facts and working of the decree appealed from. *Lambe* v. *Orton*, 33 Law J. Rep. (N.S.) Chanc. 81.

Affidavits relating to matters which have occurred since decree cannot be used on a re-hearing of the decree. Ibid.

### (*c*) *Evidence on Appeal.*

An appeal against the order on further consideration of a cause instituted by claim must be by petition, accompanied by the usual deposit, and must not be by motion. The chief clerk in his certificate stated certain facts, but reserved the point to which they referred for the consideration of the Court:—Held, that the evidence used in chambers was admissible before the Court, who would consider it as the chief clerk himself had done. *Stott* v. *Meanock*, 31 Law J. Rep. (N.S.) Chanc. 746.

Although the Court may in special cases permit new evidence to be given upon an appeal (*e. g.* where the evidence sought to be introduced is documentary and cannot have been tampered with), it will not

allow fresh affidavits made by persons who have given evidence at the original hearing to be read on a re-hearing. *Glover* v. *Daubney*, 32 Law J. Rep. (N.S.) Chanc. 547.

*(d) The Deposit.*

A defendant appealed from a decree ordering him to pay the plaintiff's costs. The appeal was dismissed without costs, and the deposit ordered to be returned. The plaintiff who had issued a *fi. fa.* for the costs of suit, applied for an order staying the repayment of the deposit to the defendant, but the application was refused. *Martyr* v. *Laurence*, 2 De Gex, J. & S. 317.

(BB) CHANGE OF SOLICITOR.

When the plaintiff in a creditors' suit sells his debt after decree, the purchaser has no right to an order of course to change solicitors. *Topping* v. *Searson*, 2 Hem. & M. 205.

The proper course in such a case is for the purchaser to bring all the facts before the Court on a motion to obtain the conduct of the cause. Ibid.

*Semble*—The Court would not entertain such a motion where the plaintiff's debt was insignificant if it was opposed by the principal creditors. Ibid.

(CC) STOP-ORDER.

A stop-order upon a fund in court, however general it may be in its terms, must, so far as respects any operation equivalent to that of notice to the trustee of the fund, be limited to the assignment or incumbrance in respect of which it was obtained. *Macleod* v. *Buchanan*, 33 Law J. Rep. (N.S.) Chanc. 306; 33 Beav. 234.

Where therefore, A purchased and took an assignment of the shares of three parties in a fund in court, and obtained a general stop-order upon the whole fund, and afterwards purchased another share, and took an assignment thereof without obtaining a stop-order in respect of that assignment,—Held, at the Rolls, and on appeal by the Lords Justices, that a subsequent assignee of the last-mentioned share, who had obtained a stop-order in respect of that share, was to be preferred to A. Ibid.

A stop-order ought to shew on the face of it the person by whom the assignment in respect of which it was obtained was made. Ibid.

(DD) PAYMENT OUT OF COURT.

A fund in court produced by a portion of land taken by a railway company, will be paid to the tenant in tail, without his being required to execute a disentailing deed. *In re South-Eastern Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 602; 30 Beav. 215.

A fund in court was, in 1847, transferred to the separate account of F B, a sailor. Nothing had been heard of F B since 1844, nor had any claim been made for the fund or dividends. In 1857 the fund was transferred to the Commissioners for the Reduction of the National Debt, and in 1860 administration to the estate of F B was granted by the Probate Court. On a petition by the administrator for the payment of the fund to him, *Stuart, V.C.*, ordered the petition to stand over, with liberty to apply, the evidence being insufficient to prove the death of F B; and that decision was affirmed. Subsequently, the order was made on the administrator giving an undertaking. *Lord Woodhouselee* v. *Dalrymple*, 30 Law J. Rep. (N.S.) Chanc. 607.

A fund which represented the interest of a tenant in tail in remainder in land taken by a railway company, was ordered to be paid out of court to the tenant in tail in remainder, with the consent of the tenant for life, without requiring a disentailing deed. *In re Holden; In re the London and North-Western Rail. Co.*, 1 Hem. & M. 445.

Moneys are never paid out of court to an administrator *ad litem*. *Williams* v. *Allen*, 32 Beav. 650.

Where a legatee of a share of residue less than 20*l.* has died, and has no legal personal representative, the Court will distribute such sum amongst the next-of-kin of such residuary legatee without requiring administration to be taken out. *Hinings* v. *Hinings*, 2 Hem. & M. 32.

When a fund in court has not been dealt with for a considerable time, payment to the bare legal representative of the person who became absolutely entitled, will not be made in the absence of the parties beneficially interested. *Edwards* v. *Harvey*, 32 Law J. Rep. (N.S.) Chanc. 482.

Where a petition is presented for payment of money out of court merely, and similar successive applications will have to be made, leave will be granted to make such future applications to the Judge in chambers. *Winkworth* v. *Winkworth*, 32 Law J. Rep. (N.S.) Chanc. 40; 32 Beav. 233.

Notwithstanding the 138th Order, payment of a sum of money exceeding 500*l.*, may, where the person beneficially entitled is abroad, be ordered to be made to his attorney. *In re Stidolph*, 34 Law J. Rep. (N.S.) Bankr. 44.

Stock in court settled absolutely to the separate use of a married woman, ordered upon her petition to be transferred into the joint names of herself and her husband, her separate examination and consent being dispensed with. *In re Crump*, 34 Beav. 570.

(EE) PAYMENT INTO COURT.

Trustees, who had a sum of money standing in their names at their bankers', signed an order directing the bankers to honour the cheques of any two of them, or of Messrs. G & Co., their solicitors. W, who was one of the trustees, and also a member of the firm of G & Co., drew out the money and applied it to his own use. Upon a bill against the trustees, these facts being admitted by them, they were ordered upon an interlocutory application to pay the money into court. *Ingle* v. *Partridge*, 32 Law J. Rep. (N.S.) Chanc. 813; 32 Beav. 661.

(FF) GUARDIAN AD LITEM.

Upon an application for the appointment of a guardian *ad litem* to an infant defendant who was resident abroad, and was not substantially interested in the suit, the Court dispensed with service of notice as directed by the 3rd rule of the 7th Consolidated Orders. *Lambert* v. *Turner*, 31 Law J. Rep. (N.S.) Chanc. 494.

Guardian *ad litem* to infant defendant resident abroad, and not materially interested in the suit, appointed without service of notice of application required by 3rd rule of the 7th Consolidated Orders. *Turner* v. *Snowdon*, 2 Dr. & S. 265.

If a defendant in the progress of a suit becomes insane, it is the practice to appoint the solicitor to the Suitors' Fund guardian *ad litem*, when the application for the appointment of guardian is made by the plaintiff; but if that application is made by the family of the defendant, the Court will appoint any one the family may select, on being satisfied of his fitness for the office. *Charlton* v. *West*, 30 Law J. Rep. (N.S.) Chanc. 815; 3 De Gex, F. & J. 156.

(GG) REPRESENTATION TO DECEASED PARTY.

Pending the taking of partnership accounts under a decree, one of the partners died. His will, by which he gave his estate to his widow and appointed her sole executrix, was in litigation in the Probate Court. This Court declined, under 15 & 16 Vict. c. 86. s. 44, to appoint the widow to represent the estate in the suit pending the litigation. *Rowland* v. *Evans*, 33 Beav. 202.

(HH) SCANDAL.

Upon a cross-bill by a father and his two daughters to be relieved from a mortgage which the mortgagee sought to foreclose, it is not irrelevant or scandalous to state that the money was lent to the father under professions of friendship spontaneously, that the mortgagee might, in the position of creditor, continue his visits to the family and maintain his influence, and effect his object, that being the seduction of one of the daughters; and exceptions for scandal were overruled. *W*—— v. *B*——; *B*—— v. *W*——, 31 Law J. Rep. (N.S.) Chanc. 755; 31 Beav. 342.

(II) LONG VACATION.

The long vacation will be considered to have commenced when all the Courts have risen, and, consequently, the functions of the vacation Judge will then come into operation. *Francis* v. *Brown*, 31 Law J. Rep. (N.S.) Chanc. 560.

(KK) CHARGING ORDER AND ORDER OF COURT.

The jurisdiction of the Court of Chancery under the above-named statutes, to make a charging order, is not confined to the particular Judge in whose branch of the Court the fund sought to be charged is standing, but may be exercised by any Judge of the Court. The title of the application and order may be in the matter of the acts which confer the jurisdiction, and need not be in the matter to the credit of which the fund sought to be charged may be standing. *The Marquis of Hastings* v. *Beavan, and in re the Acts* 1 & 2 *Vict. c.* 110. *and* 3 & 4 *Vict. c.* 82, 31 Law J. Rep. (N.S.) Chanc. 546.

An appeal from an order of the Master of the Rolls dismissing the plaintiff's bill having been dismissed by the House of Lords, with costs to be taxed by the Clerk of the Parliaments, the order of the House was, after the prorogation of Parliament, made an order of the Court of Chancery upon the *ex parte* application of the defendants, with a view to enable them to enforce payment of the taxed costs. *Wentworth* v. *Lloyd*, 34 Law J. Rep. (N.S.) Chanc. 81.

(LL) RECEIVER.

A party to whom a sum of money was payable by a receiver under an order in a cause demanded payment from the receiver, notwithstanding that proceedings had been commenced by other persons, and were still pending, to discharge the order and impound the money in the receiver's hands; and payment being refused, his solicitor sued out and executed a writ of *fi. fa.* against the receiver. Under these circumstances, the Court, although it expressed an opinion that the *fi. fa.* had been improperly issued, yet refused to direct an inquiry as to the damages sustained by the receiver, but gave him leave to bring an action at law against the party and his solicitor, they insisting on their right to have the question tried at law. *Whitehead* v. *Lynes*, 34 Law J. Rep. (N.S.) Chanc. 201; 34 Beav. 161.

A four-day order and not a writ of *fi. fa.* is the proper mode of compelling a receiver to pay in his balances under an order of the Court. Ibid.

The Court of appeal will not, except in an extreme case, disturb the selection of a receiver by a Judge, unless there be some objection in point of principle to the person appointed. How objections in point of principle are to be treated where the order gives the person objected to liberty to propose himself as receiver. *Cookes* v. *Cookes*, 2 De Gex, J. & S. 526.

(MM) SHORT CAUSE.

A plaintiff setting down his cause as short, without the consent of the defendant, is bound to give notice to the defendant that he has done so; and in the absence of proof of such notice a decree cannot be made in a short cause against a defendant who does not appear. *Molesworth* v. *Snead*, 32 Law J. Rep. (N.S.) Chanc. 709.

(NN) IN CHAMBERS.

Every suitor of the Court has an unqualified right to have his case heard before the Judge in person, whether under the ordinary proceedings of the Court, or under the Winding-up Acts. *In re the Agriculturist Cattle Insur. Co., and in re the Joint-Stock Companies' Winding-up Acts*, 1848, 1849, 1856, *ex parte Lowe; in re the same Company, and in re the same Acts, ex parte Findlater*, 30 Law J. Rep. (N.S.) Chanc. 619; 3 De Gex, F. & J. 194.

The chief clerk of the Judge is by no means in the position which the Masters occupied before the passing of 15 & 16 Vict. c. 80. (Masters in Chancery Abolition Act). Ibid.

Where an inquiry as to personal estate was directed in a suit commenced by administration summons, and a question arose in the course of such inquiry as to whether there was a binding agreement for a settlement, which it became necessary to determine in order to ascertain what the personal estate consisted of, and the chief clerk determined that question, and this finding was objected to as being *ultra vires*,—Held, that the chief clerk had power to decide the question, it being necessary to do so to carry out the inquiry. *Wadham* v. *Rigg*, 2 Dr. & S. 78.

Settled accounts between parties will not be disturbed when accounts are taken in chambers. *Newen* v. *Wellen*, 31 Law J. Rep. (N.S.) Chanc. 793.

It is the right of every party to have the opinion of the Judge as of course; and if a matter is adjourned into court with a view to obtain the Judge's opinion, the costs of the proceedings in court must, as a general rule, be borne in the same way as the costs in chambers would have been. *In re Mitchell*, 33 Law J. Rep. (N.S.) Chanc. 187.

Therefore where a matter was, without opposition,

adjourned into court in order to obtain the opinion of the Judge on a question of domicil, and on the matter coming on in court the counsel for the party opposing the view taken by the chief clerk considered the question not arguable on the part of his client,—Held, that this was no sufficient ground for fixing this party with the costs of the proceedings in court. Ibid.

(OO) WRIT OF NE EXEAT.

A & Co. filed a bill, and obtained *ex parte* a writ of *ne exeat* against S. No interrogatories were filed. S put in a voluntary answer denying in substance the allegations in the bill:—Held, on motion to discharge the writ, that S was in the same position as a defendant who had answered fully would have been under the old practice, and the writ was discharged. *Anderson* v. *Stamp*, 34 Law J. Rep. (N.S.) Chanc. 230; 2 Hem. & M. 576.

A plaintiff applying for a writ of *ne exeat* must state his claims as definitely as possible. Ibid.

A writ of *ne exeat* will not be granted upon the mere affidavit of the plaintiff of his belief that a certain sum will be found due to him from the defendant upon taking an unsettled account. *Thompson* v. *Smith*, 34 Law J. Rep. (N.S.) Chanc. 412.

(PP) WRIT OF AUDITA QUERELA.

The Court declined to direct a writ of *audita querela* to issue upon an *ex parte* motion, saying that if it was a matter of right, it would issue as of course; but that if the Court's judgment must be exercised, the other side must be present. *Troup* v. *Ricardo*, 33 Beav. 122.

(QQ) WRIT OF SEQUESTRATION.

Where a contributory under a winding-up was in France, the Court ordered that a writ of sequestration might issue without a prior writ of attachment. *The East of England Bank, in re Hall*, 2 Dr. & S. 284.

(RR) SALES AND PURCHASES UNDER THE DIRECTION OF THE COURT.

The Court will not grant an application by a subpurchaser to be substituted as the purchaser of an estate sold by auction under an order of the Court, where neither the original purchaser nor the vendor consents to the application. *In re Goodwin's Settled Estates*, 32 Law J. Rep. (N.S.) Chanc. 70.

Where money in court is subject to a trust for investment in land, and the tenant for life enters into a provisional contract for the purchase of an estate, subject to conditions of sale, the Court makes a general reference as to the title, and not whether a good title can be made subject to the conditions of sale. *Meyrick* v. *Laws*, 34 Beav. 58.

(SS) CERTIFICATE OF CHIEF CLERK.

In a suit between a contractor and a railway company, praying a settlement of accounts between them, a decree was made directing an inquiry whether anything, and what, was due to the contractor in respect of the works executed and materials supplied under the contracts. That decree was not appealed from. The chief clerk, by his certificate, found that a lump sum was due, and that in a schedule he had set forth the particulars of such sum, and that the evidence adduced on the inquiry was that set forth in another schedule. On an objection to the form of the certificate, the Lords Justices, overruling *Stuart, V.C.*, held, that the certificate must be discharged; for that the chief clerk ought, in finding the lump sum to be due, to have stated how that amount was arrived at, so as to enable the Court to judge whether he had come to a right conclusion. *M'Intosh* v. *the Great Western Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 412; 1 De Gex, J. & S. 443.

(TT) INFANT SUITS.

A suit was instituted on the 16th of October on behalf of infants by their great-uncle as their next friend, for the administration of the estates of their father and mother. On the 18th of November a second suit was instituted on behalf of the same infants by a stranger as their next friend, and a decree was obtained on the 21st, the solicitors for the plaintiffs in the second suit being the London agents of the solicitors of the defendant:—Held, that in these circumstances the institution of the second suit was improper, and that the conduct of it ought to be given to the next friend in the first suit. *Frost* v. *Ward*, 2 De Gex, J. & S. 70.

After decree in a suit instituted by several infants, one came of age and objected to remain co-plaintiff. His name was struck out as co-plaintiff and he was made a defendant. *Bicknell* v. *Bicknell*, 32 Beav. 381.

The next friend of an infant had been also appointed guardian and receiver in the cause, and a motion was made on behalf of the infant to remove him from all those offices, and restrain him from dealing with the property the subject of the suit; the notice of motion being signed by a solicitor as solicitor for the infant, but without any next friend being named.—Motion refused, on the ground of irregularity, with leave to amend by adding a next friend for the purposes of the motion. *Cox* v. *Wright*, 32 Law J. Rep. (N.S.) Chanc. 770.

A suit to administer the estate of a testator is instituted by a stranger on behalf of infants, without communication with the family, and contrary, as alleged, to their wishes, and no explanatory affidavit is filed, the next friend being the son and articled clerk of the solicitor in the suit and having the same address. On motion to restrain the next friend from proceeding with the suit, or for an inquiry,—Held, that an inquiry must be directed whether the suit is for the benefit of the infants, and if so whether the next friend shall be continued. *Towsey* v. *Groves*, 32 Law J. Rep. (N.S.) Chanc. 225.

(UU) PAUPER.

An order will be made *ex parte* for a person carrying in a claim under a winding-up to sue *in forma pauperis*. *In re Irish Lands Improvement Soc.*, 1 Dr. & S. 318.

Leave given to a married woman to sue *in forma pauperis* without the intervention of a next friend. *In re Barnes*, 31 Law J. Rep. (N.S.) Chanc. 455.

(WW) TIME.

When the time for doing an act or taking a proceeding is expressly fixed by act of parliament, the 12th rule of Order 37. of the Consolidated General Orders (providing for cases where the time for doing an act or taking a proceeding expires on a day on

which the offices are closed) does not enable such an act or proceeding to be done or taken after the expiration of the time so fixed. *Flower* v. *Bright*, 2 Jo. & H. 590.

Accordingly, where the thirty days limited by the act, 11 Geo. 4. & 1 Will. 4. c. 36. s. 15. rule 5,—as the period within which a defendant in custody under process of contempt ought to have been brought by *habeas corpus* to the bar of the Court,—expired on a day in term time, but on which the courts were closed by special order of the Lord Chancellor:—Held, that the above-mentioned rule did not enable the plaintiff to bring the defendant to the bar of the Court on the day on which the offices next opened. And upon motion on such last-mentioned day that the defendant might be turned over to the custody of the keeper of the Queen's prison, the Court refused to make any order. Ibid.

## PREROGATIVE.

By 6 Geo. 4. c. cxvi. certain wharfage duties were authorized to be taken in respect of certain specified goods, including stones, which should be imported into the harbour of W, and the same were to be vested in the mayor, &c., for the purpose of repairing, improving, and maintaining the harbour, wharfs, &c., within the borough and town of W. There were no words in the act binding the Crown to pay such duties, but there were provisions exempting the Crown from liability in respect of coals imported into the port, for the use of His Majesty's steam-packets, and actually used on board the same, and also from the tolls to be taken for passing over a bridge connected with the harbour. Certain stones were brought from P by a barge, into the harbour of W for the purpose of being used upon government works which were being carried on there, and which, if they had been brought by any private individual, would have been liable to the duties given by the act of parliament:—Held, that the Crown was not liable to be called upon to pay such duties. *The Mayor of Weymouth* v. *Nugent*, 34 Law J. Rep. (N.S.) M.C. 81; 6 Best & S. 22.

## PRESCRIPTION.

The period of twenty years' enjoyment, which confers a right to the access of light under the 2 & 3 Will. 4. c. 71. s. 3, is by s. 4. the period of twenty years next before any suit or action wherein the claim to the right was brought into question, and is not limited to the period of twenty years next before the pending suit or action.—By *Erle, C.J.*, *Willes, J.* and *Byles, J.* (*Williams, J.* dissenting). *Cooper* v. *Hubbuck*, 31 Law J. Rep. (N.S.) C.P. 323; 12 Com. B. Rep. N.S. 456.

Where a defendant sets up an enjoyment of a right of way, or other easement, under the 2nd section of 2 & 3 Will. 4. c. 71, and it appears that there has been an interruption of such enjoyment, the question whether such interruption has been acquiesced in or not for one year, as specified in section 4, is one to be left to the jury and settled by them. It is not necessary to bring an action or to commence a suit in order to prove that the interruption has not been acquiesced in. *Bennison* v. *Cartwright*, 33 Law J. Rep. (N.S.) Q.B. 137; 5 Best & S. 1.

## PRESUMPTION.

In 1586, property was, in consideration of 273*l.*, demised for 2,000 years at a small rent, and the lessor covenanted, if required by the lessees, within seven years to convey the fee to the lessees without further payment. In documents, dated in 1664, 1681 and 1690, the property was treated by the persons claiming under the lessees as held in fee simple. But in documents dated in 1715 and 1758, it was considered doubtful whether it was freehold or leasehold; and in 1777 and 1778 it was treated as leasehold:—Held, that the presumption, up to 1715, was that it was fee simple, that such presumption was not destroyed by the subsequent doubts, and a purchaser in 1859 of the fee was held bound to take the title. *Jeffreys* v. *Machu*, 29 Beav. 344.

Interest and an annuity payable by a brother to a sister presumed, after a long interval, to have been satisfied, she having lived with and been maintained and clothed by her brother. *Shadbolt* v. *Vanderplank*, 29 Beav. 405.

A young sailor was last seen in the summer of 1840, going to Portsmouth to embark. His grandmother died in March, 1841. It was presumed that he was the survivor. *In re Tindall's Trust*, 30 Beav. 151.

A legatee under a will who had not been heard of since the year 1848 was presumed to be dead at the expiration of seven years, but there being no evidence to fix the death at any particular period, it was held that he had died subsequently to the death of the testator in 1851, and that his representatives were entitled to the legacy. *Dunn* v. *Snowden*, 32 Law J. Rep. (N.S.) Chanc. 104; 2 Dr. & S. 201.

A purchased and transferred 1,000*l.* stock in the name of her niece, and wrote her a letter, stating she had done so, and that she intended it for the niece's benefit. In the letter A inclosed a bank power, which she stated was to enable her to receive the dividends for her life, which power she requested the niece to execute and return to her, and also to destroy the letter; both of which the niece accordingly did. It afterwards turned out that the bank power authorized A to sell out the stock as well as receive the dividends. It appeared that A had always been very kind to her niece, and by her will, made before the transfer, had given her an annuity of 30*l.*; the contents of the letter were proved by the niece, and by a third person to whom she had shewn it:—Held, that the destruction of the letter being satisfactorily accounted for, the Court would receive secondary evidence of its contents, and that the intention to benefit the niece was sufficiently clearly shewn to rebut the general presumption that the stock still belonged to A, although the case could not be regarded as one of an adopted child, that there was no ademption, and, therefore, that the niece was entitled both to the 1,000*l.* stock and the annuity of 30*l.* *Beecher* v. *Major*, 2 Dr. & S. 431.

A sailor left his ship at the end of the year 1849, or very early in 1850, and had not since been heard of:—Held, that if he was shewn to have intended

to desert, it could not be presumed that he was dead in May, 1850, but that if he intended to return to his ship, then the Court would assume that he had met with an accident by which he perished a very short time after leaving the vessel, and before May, 1850. *Lakin* v. *Lakin*, 34 Beav. 443.

The application of the rule, that an instrument more than thirty years old produced from the proper custody is admissible in evidence without further proof, is not affected by circumstances which may lead to an inference that the instrument had been cancelled; the only question being, whether the custody of the instrument is proper. *Andrews* v. *Motley*, 32 Law J. Rep. (N.S.) C.P. 128; 12 Com. B. Rep. N.S. 514.

Therefore, where a will more than thirty years old, which disposed of realty and personalty, was found in a box belonging to a deceased person, who took an estate for life under the will; which box also contained other papers relating to the property, and it was proved that this person had treated the will as part of his title-deeds; but there was a second will in existence which had been proved in the Ecclesiastical Court, and there were other circumstances which might lead to the inference that the first will had been cancelled,—Held, on a question of title to the land disposed of by the will, that the custody was proper, and the will admissible. Ibid.

*Semble*, also, per *Williams, J.*, that where the attestation clause of a will recites a compliance with the requisite ceremonies in respect of all the witnesses, it is enough, in order to make a *prima facie* case, to prove the death of all the witnesses, and the handwriting of one of them; and that this rule also is not affected by the existence of circumstances which may lead to an inference that the will had been cancelled. Ibid.

## PRINCIPAL AND AGENT.

[See CONTRACT—MASTER AND SERVANT—SALE OF GOODS—SHIP AND SHIPPING.]

(A) OF THE AGENCY IN GENERAL.
(B) RIGHTS AND LIABILITIES OF THE PRINCIPAL.
  (*a*) *In general.*
  (*b*) *By Contracts of the Agent.*
(C) RIGHTS AND LIABILITIES OF THE AGENT.
  (*a*) *As regards his Principal.*
    (1) *In general.*
    (2) *Account.*
    (3) *Lien.*
    (4) *Commission.*
  (*b*) *As regards Third Persons.*
(D) POWER AND AUTHORITY OF THE AGENT.

### (A) OF THE AGENCY IN GENERAL.

The employment of a solicitor to do a mere ministerial act, such as the procuring the execution of a deed, does not so constitute him an agent as to affect his client with constructive notice of matters within the knowledge of the solicitor. *Wyllie* v. *Pollen*, 32 Law J. Rep. (N.S.) Chanc. 782.

Bankers advanced to customers 300*l.* to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently, the customers, in a letter to the bankers, stated that they had been requested by their "principal" to extend the term of the loan on the stock. The stock actually belonged to a third party, A B:—Held, that after the receipt of this letter the bankers had constructive notice of A B's right to the stock, and that no subsequent advances made by the bankers to the customers could affect the stock. *Locke* v. *Prescott*, 32 Beav. 261.

A B was appointed collector of rates by overseers, and entered into the usual bond to account with them and their successors in office. He accounted (whether satisfactorily or not was a question in dispute), and retired from the collectorship. Subsequent to his retirement, the plaintiffs were appointed overseers, and filed a bill praying an account against A B:—Held, although no statutory enactment existed, transferring the benefit of the bond to the plaintiffs, that A B was, upon general principle, accountable to the plaintiffs; and a decree was made for an account accordingly, with a direction not to disturb any settled account, and with liberty for the plaintiffs to surcharge and falsify; and as the defendant resisted the account, he was ordered to pay the costs up to the hearing. *Sellar* v. *Griffin*, 33 Law J. Rep. (N.S.) Chanc. 6.

An executor, by the testator's direction, having negotiated for the purchase of a site for schools in connexion with a new church, to which the testator had largely contributed, but there being no binding contract at the death, subsequently completed and took a conveyance to himself:—Held, not entitled to charge the purchase-money against the estate. *Inskip's case* (No. 2), 3 Giff. 359.

The servant of a private owner, entrusted on one particular occasion, not at a fair or other public mart, to sell and deliver a horse, is not, therefore, by law authorized to bind his master by a warranty; but the buyer who takes a warranty in such a case takes it at the risk of being able to prove that the servant had his master's authority to give it. *Brady* v. *Tod*, 30 Law J. Rep. (N.S.) C.P. 223; 9 Com. B. Rep. N.S. 592.

A F, a broker in London, having some rum for sale, made a contract with L, and gave him a sale-note in these terms:—"Mr. L, London, Jan. 15, 1861.—I have this day bought in my own name for your account of A K T 259 puncheons of Cuba rum, sold at 1*s.* 9*d.* per gallon. Landing charges 5*s.* per puncheon, to be paid by the buyer; landing gauge; prompt 23rd March; brokerage ½ per cent.; money on delivery or 5*l.* per cent.; I am your obedient servant, A F, broker." A portion of the price of the rum was afterwards paid to A K T, and received by him:—Held, that A F could not maintain an action for goods sold and delivered against L for the residue of the price of the rum, but that the action should be brought by A K T, the principal. Held, further, that evidence was not admissible to shew that A F and L at the time of the bargain had agreed by word of mouth that a deduction of two months' warehouse rent should be made from the price of the rum, and that the custom of the trade as to allowing only one month's warehouse rent should not attach. *Fawkes* v. *Lamb*, 31 Law J. Rep. (N.S.) Q.B. 98.

## (B) RIGHTS AND LIABILITIES OF THE PRINCIPAL.

### (*a*) *In general.*

Plaintiff placed goods in the hands of H to sell in his own name, and defendants bought them of H through C, their broker. The defendants did not know that the goods belonged to the plaintiff, but C did, from having been previously in the employ of H, but not from anything which was communicated to him while acting as defendant's broker in the transaction:—Held, reversing the judgment of the Court of Common Pleas (32 Law J. Rep. (N.S.) C.P. 201; 14 Com. B. Rep. N.S. 574), that the defendants were affected by such knowledge of their broker, and were therefore not entitled to set off a debt due to them from H against the plaintiff's claim for the price of the goods. *Dresser* v. *Norwood* (Ex. Ch.), 34 Law J. Rep. (N.S.) C.P. 48; 17 Com. B. Rep. N.S. 466.

The defendant employed S, his attorney, to obtain a loan of 100*l.* for him on mortgage, and placed his title-deeds in the hands of S for that purpose. S forged the defendant's signature to a mortgage-deed to the plaintiffs for 420*l.*, received the money, and concealed the transaction from the defendant, to whom he afterwards advanced 198*l.*, in various sums, and subsequently took from him a mortgage to a third person, to cover that advance:—Held, that the plaintiffs had no cause of action against the defendant, even to the extent of 100*l.* *Painter* v. *Abil*, 33 Law J. Rep. (N.S.) Exch. 60; 2 Hurls. & C. 113.

In an action brought by the plaintiffs on the mortgage-deed, the plaintiffs gave in evidence a deposition of the defendant before magistrates on a charge against S of forging other deeds, and which deposition was supposed to contain an admission by the defendant of the genuineness of the plaintiffs' deed. Letters written by S to the defendant were produced before the magistrates, and referred to in the depositions. In these letters, written after the payment of the 420*l.*, S alleged that he had been unable to obtain the money, and made various excuses for the delay:—Held, that the letters were admissible in evidence for the defendant. Ibid.

The mere employment of an architect to prepare plans and specifications for a house, and to procure a builder to erect it, does not render the employer responsible for the accuracy of the quantities furnished by such architect to the builder. *Scrivener* v. *Parke*, 18 Com. B. Rep. N.S. 785.

### (*b*) *By Contracts of the Agent.*

An ordinary local agent of an insurance company is not, without special authority, authorized to bind the company by a contract to grant a policy. *Linford* v. *the Provincial Horse and Cattle Insur. Co.*, 34 Beav. 291.

The London agent of a county insurance company received the plaintiff's proposal for an insurance. The plaintiff paid the annual premium to the agent, who promised that he should have the policy. The agent retained and misapplied the money, and never forwarded the proposal to the company:—Held, in the absence of proof of special authority to the agent, that the company were not bound to grant the policy. Liberty was, however, reserved to the plaintiff to bring an action against the company if so advised. Ibid.

A person giving a voluntary bond to an agent, in order that money may be raised upon it, is bound by his agent's acts, although he may receive no part of the money raised; but an assignee of the bond can only hold it as security for the actual amount advanced by him upon it. *Tottenham* v. *Green*, 32 Law J. Rep. (N.S.) Chanc. 201.

A timber-merchant's traveller, with full knowledge of certain defects in a log of mahogany, induced the plaintiff to purchase and pay for it by representing it to be sound. The timber-merchant was neither aware of the defect, nor did he authorize his traveller to make such misrepresentation. In an action of deceit by the purchaser against the timber-merchant,—Held, per *Pollock, C.B.* and *Wilde, B.*, that the principal was responsible for the fraud of his agent. Per *Martin, B.* and *Bramwell, B.*, that the principal was not responsible. *Udell* v. *Atherton*, 30 Law J. Rep. (N.S.) Exch. 337; 7 Hurls. & N. 172.

T, a solicitor, acting for the promoters of an intended company, with an understanding that he should be its solicitor when formed, entered into an arrangement with R, who had purchased property suitable for the company as a speculation, that such purchase should be on their joint account, and that all negotiations relating to the property should be in the name of R alone, and that the name of T should not appear. The company, whilst T's interest in the property was concealed from them, and under the advice of the firm in which he was a partner, purchased from R a portion of the property at a sum larger than the price paid by R and T for the whole, and the profit was divided between them. The company afterwards discovered the circumstances under which the sale had been made to them:—Held (varying the decree of the Master of the Rolls), that the company were entitled as against T to the benefit of his contract with R, so far as related to the premises sold to them; and that T was entitled to receive from the company only the difference between the sum paid by him for his share of the property and the value of the portion of the property retained by him, and that the surplus which had been paid by the company to him must be repaid with interest at the rate of 5*l.* per cent. *Tyrrell* v. *the Bank of London* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 369; 10 H.L. Cas. 26.

C, the cashier of the plaintiff, a banker, being indebted to the defendant, the latter applied to C at the bank, for payment. C handed him the amount in money of the plaintiff's, and obtained the defendant's signature to a cheque, the defendant receiving the money, believing it to be in payment of the debt due to him from C, and signing the cheque, believing it to be a receipt to C. The transaction was entered in the bank books as a loan from the plaintiff to the defendant upon the cheque:—Held, that although the defendant had received the plaintiff's money the plaintiff could not recover it back from the defendant. *Foster* v. *Green*, 31 Law J. Rep. (N.S.) Exch. 158; 7 Hurls. & N. 881.

At an auction of W's farming stock, some hay was bid for by B, and knocked down by the auctioneer to him. The auctioneer immediately asked him for his name; he replied "B," and the auctioneer believing that B was buying for himself, wrote the name "B" in his book as the buyer, and sent the account to B, charging him with the price.

B, before and at the time of the auction, was in the service of S as foreman, and intended to make the purchase for S; the hay was taken away in S's carts a few days after the auction and consumed by S's horses. W was present at the auction, heard what passed, and knew that B was S's foreman, and knew or might have known that he was bidding for S and not for himself, but did not interfere in the transaction. The auctioneer knew nothing of B or S, or of their relation to each other. In an action for goods sold and delivered by W against B, the Judge left to the jury to say whether the defendant had given authority to the auctioneer to put down his name as purchaser, and told them that if he had not done so, he would not be liable; but if they should think he had done so, still if they believed the goods to have been delivered to S, the action for goods sold and delivered could not be maintained against the defendant. The jury found a verdict for the defendant: — Held, per *Pollock, C.B.* and *Bramwell, B.*, that the verdict ought not to be disturbed. Per *Channell, B.* and *Wilde, B.*, that there ought to be a new trial. Per *Pollock, C.B.*, that there was evidence for the jury from which they might infer that there had been, in fact, no contract entered into between the plaintiff and the defendant. Per *Bramwell, B.*, that although the defendant did not say in words that he was buying for a principal, there was evidence for the jury which they might hold equivalent to his having done so; that the question whether the auctioneer had authority to write down the defendant's name as purchaser, was properly left to the jury. That under the conditions of sale, after what took place at the auction, the seller, by delivering the goods to the principal, discharged the agent, if ever he was bound. That it was for the plaintiff to prove the delivery of the goods to the defendant; and the question whether he had proved it was properly left to the jury. Per *Channell, B.* and *Wilde, B.*, that even if the evidence warranted the jury in finding that the plaintiff actually knew that the defendant was purchasing as agent, the question would remain whether the defendant by his conduct made himself personally liable; that his whole conduct at the auction was that of a man buying for himself and not for another person; and that the jury ought to have been told that if they believed the plaintiff's evidence, though they equally believed the defendant's, that the defendant had made himself a contracting party, and that having done so, he was liable, though, in fact, he was only agent. That a party bidding at an auction and giving his own name simply to the auctioneer, must be understood to be the contracting party, and ought to be held liable as such; if he is bidding only as agent, and wishes to protect himself from being treated as the contracting party, he ought to say so. *Williamson* v. *Barton*, 31 Law J. Rep. (N.S.) Exch. 170; 7 Hurls. & N. 899.

L, a broker, was introduced to P & Co. by A, and was at the interview directed by P & Co. to make purchases under the superintendence of A. Thereupon L made large purchases under the sole order and direction of A, sending him the bought and sold notes and contracts, and receiving from him the necessary moneys for payments, and generally treating him as principal, no direct communication taking place between L and P & Co., and such course of dealing was admitted by P & Co. to have been according to their intentions up to a certain period, and no notice was given by them to L of any determination of the authority of A:—Held, affirming the decision of the Master of the Rolls (per the *Lord Chancellor* and *Lord Kingsdown*, *Lord Cranworth* dissenting), that L had a right from what took place at the interview, and the uniform course of action on the part of A, to consider him as the authorized agent, or a partner of P & Co., until expressly informed of the determination of his authority or the partnership. *Pole* v. *Leask* (House of Lords), 33 Law J. Rep. (N.S.) Chanc. 155.

The burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must shew that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it (per *Lord Cranworth*). Ibid.

If a person buys goods of another whom he knows to be acting as agent, though he does not know who the principal is, he cannot set off a debt due to him from such agent in an action by the principal for the price of the goods. *Semenza* v. *Brinsley*, 34 Law J. Rep. (N.S.) C.P. 161; 18 Com. B. Rep. N.S. 467.

To a count for goods sold and delivered, the defendants pleaded that the goods were sold and delivered by M, then being the agent of the plaintiffs in that behalf, and entrusted by the plaintiffs with the possession of the said goods as apparent owner thereof, and that M, having possession of the said goods, sold and delivered the same to the defendants in his own name, and as his own goods, with the consent of the plaintiffs; and that at the time of the said sale the defendants did not know, and had not the means of knowing, that the plaintiffs were the owners of the said goods, or were interested therein, or that M was the agent of the plaintiffs in that behalf; and that at the time of the said sale, and before the defendants knew that the plaintiffs were the owners of the said goods or interested therein, or that M was the agent of the plaintiffs in the sale thereof, the said M became and was indebted to the defendants in an amount equal to the plaintiffs' claim, which amount the defendants were willing to set off against the plaintiffs' claim:—Held, on demurrer, a bad plea, as it was consistent with what was therein averred that the defendants bought the goods knowing that M was a mere agent, though not knowing who was his principal. Ibid.

A dispute having arisen between the plaintiff and the defendants as to whether or not certain granite which had been prepared by the former for the latter was according to contract, the plaintiff wrote to the defendants: "I have seen Mr. E, and he has kindly consented to see you on the subject of the granite for Merthyr Tydvil, and I have authorized him to do so, and, if possible, to come to some amicable arrangement in the matter." E having agreed with the defendants that he should have the granite for 50*l.*, the contract price being 121*l.* 16*s.* 11*d.*, —Held, that it was not competent to the plaintiff afterwards to repudiate the act of E, on the ground that he had given him secret instructions not to settle for less than 100*l.* *Trickett* v. *Tomlinson*, 13 Com. B. Rep. N.S. 663.

(C) RIGHTS AND LIABILITIES OF THE AGENT.

*(a) As regards his Principal.*

(1) *In general.*

E T, carrying on business on his own account in America, and being also a partner in the firm of T & Co. in England, drew bills on T & Co., which he employed T & B, another American firm, to sell for him, undertaking to provide T & Co. with remittances to meet them at maturity. T & B, in accordance with their usual course of dealing with E T, indorsed the bills and sold them, giving to E T bills on their agent in England for the amount. E T, being on the eve of insolvency, sent the bills so received from T & B to the English firm of T & Co., with instructions to accept the bills drawn by himself and to hold the remittance for the purpose of meeting the payment thereof. On receipt of the remittance T & Co. accepted the bills drawn by E T, and, disregarding the instructions, handed the bills of T & B to L, in accordance with a previous promise made to him, in order to enable him to meet some liabilities incurred by him on behalf of T & Co.:—Held, that these bills were specifically appropriated by E T to meeting the bills drawn by him; that T & Co. had received the remittances as agents of E T, who had remitted them in a character distinct from his partnership in the firm of T & Co.; consequently T & Co. had no authority to apply the remittances to any other purpose than that directed; and L, who was held on the evidence to have had notice of the specific appropriation, was bound to account to T & B for the proceeds. *Thayer* v. *Lister*, 30 Law J. Rep. (N.S.) Chanc. 427.

Held, also, that the above transaction did not amount to a voluntary preference by E T in favour of T & B. Ibid.

Where a house agent is employed to let a house and charges 5 per cent. commission on letting it, it is a question for the jury whether he undertakes to use reasonable care to ascertain that the person to whom he lets it is in solvent circumstances. *Heys* v. *Tindall*, 30 Law J. Rep. (N.S.) Q.B. 362; 1 Best & S. 296.

The defendant, as agent for a firm, after having received a letter from the captain of a vessel belonging to the firm, stating that the vessel had been injured by taking the ground, effected an insurance on the vessel against future sea risks for a year without communicating the letter to the insurers. He did not conceal the letter fraudulently, but because he *bona fide* believed it to be immaterial. The vessel was afterwards totally lost. Thereupon the plaintiff, an underwriter on the policy, paid the defendant the amount for which he was liable, and the defendant settled the amount in account with his principals. Some time afterwards, a Court of law having decided that the keeping back of the letter by the defendant gave the underwriters a right to avoid the policy, the plaintiff demanded to have his money repaid to him by the defendant:—Held (affirming the judgment below, 30 Law J. Rep. (N.S.) Q.B. 308; s. c. 1 Best & S. 424), that the defendant, under the circumstances, was not liable to pay it back. *Holland* v. *Russell* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 297; 4 Best & S. 14.

If a broker be employed to make wagering contracts, such as are illegal under 8 & 9 Vict. c. 109. s. 18, and at the request of his principal pays the amount due under such contract, he can recover the amount so paid for his principal; and the illegal nature of the contract with reference to which the money is paid is no defence to an action founded on such a claim. *Rosewarne* v. *Billing*, 33 Law J. Rep. (N.S.) C.P. 55; 15 Com. B. Rep. N.S. 316.

The defendants, merchants at B, who had before acted as brokers for the plaintiffs at L, proposed to the latter to purchase a quantity of iron, belonging to one O, for whom they were also acting as brokers. The plaintiffs inquired the description of the iron and the cost of freight to R. The defendants wrote in answer, describing the iron, and mentioning its price; they stated, also, their inability to specify the freight to R at the moment, but expressed their belief that they should soon find a ship. The plaintiffs accepted the purchase, and the defendants, as agents for buyers and sellers, executed the contract of sale. They afterwards engaged a vessel, and shipped the iron on board, which, on arriving at its destination, turned out to be of a very inferior description, and the plaintiffs sustained a serious loss in consequence. In an action against the defendants for not seeing that the iron delivered was according to the contract, it was held, that in the absence of any usage or agreement that they should inspect the iron and see to its quality, they were not bound to do so. *Zuilchenbart* v. *Alexander* (Ex. Ch.), 30 Law J. Rep. (N.S.) Q.B. 254; 1 Best & S. 234.

(2) *Account.*

An agent, who managed the money matters and investments of his principal, rendered accounts charging interest on the mortgages as received, and representing that there were no arrears. He also paid over the balances appearing due on such accounts:—Held, that the agent could not, on the death of the principal, charge his estate with the interest, on the plea that it had not been actually received from the mortgagors, but had been advanced by the agent to the principal for his accommodation. He was, however, allowed to use the name of the representatives of the principal to recover what might be due from the mortgagors on giving an indemnity. *Owens* v. *Kirby*, 30 Beav. 31.

The defendant, in a suit instituted against him as agent for an account, moved that certain accounts, alleged in the bill to contain false entries, might be produced, on an affidavit that the vouchers were lost, and that he could not otherwise put in a sufficient answer. The motion was refused with costs. *Taylor* v. *Hemming*, 4 Beav. 235, considered. *Turner* v. *Burkinshaw*, 4 Giff. 399.

(3) *Lien.*

A firm of merchants at Hamburgh, in June, 1857, directed their correspondents, a firm of merchants in London, to purchase Mexican bonds, which passed by delivery, upon certain terms, the bonds, when purchased, to be held at the disposal of the Hamburgh firm. On the 2nd of July, the London firm wrote to announce that the bonds had been purchased, and inclosing the account of the transaction, the amount of which they would reimburse themselves on the following day; and, on the 3rd of July, they wrote to apprise the Hamburgh firm of bills drawn upon them for the amount, by which they

"balanced the transaction." On the 4th of July, the Hamburgh firm wrote to state that they would honour the drafts, advice of which they expected, and requesting the London firm, in the meanwhile, to keep the bonds in safe custody, and to give them the numbers of the same. On the 6th of July, the London firm wrote to state that, until further order, they would retain, for safe custody, the bonds, and giving the numbers of the bonds. The bills were accepted by the Hamburgh firm, and, at maturity, were paid. On the 19th of November, the Hamburgh firm wrote to request that the bonds might be sent to them by post; but, on the same day, the London firm wrote to announce that they had stopped payment, but that the Mexican bonds lying with them were unjeopardized. The Hamburgh firm afterwards stopped payment, and, in a suit by the representatives of the Hamburgh firm, for the delivery of the bonds, it was held, reversing the decision of the Master of the Rolls, that the bonds were not subject to a lien for the general balance of account between the two firms. *Bock* v. *Gorrissen*, 30 Law J. Rep. (N.S.) Chanc. 39.

In a case where goods were consigned by merchants in India to merchants in England, and the bills of lading were accompanied by bills of exchange in favour of a third firm of merchants, the Master of the Rolls decided that the cargo was subject to the general lien which the merchants in England might have for any balance they had against the merchants in India, and that the realization of the cargo by the consignees did not make them liable to pay the bills of exchange annexed to the bills of lading, unless by some act of their own they had made themselves liable. On appeal, however, the Lords Justices held that, the general lien of a consignee upon goods consigned to him, could not be set up by him against positive directions given to him by the consignor; and if he accepted a consignment accompanied by such directions he was bound to apply it accordingly. *Frith* v. *Forbes*, 32 Law J. Rep. (N.S.) Chanc. 10.

(4) *Commission.*

A, a contractor for works on a railway, employed B as his agent to get a sub-contractor to do a portion of the works. B, as agent, accordingly entered into a contract with C. An allowance of *5l.* per cent. was made by C to B. After the work had been finished, A filed a bill against B and C to recover the commission:—Held, that the bill could not be sustained as against C, and it was also dismissed against B without costs, on the ground that such an allowance was usual, and that the plaintiff was proved to have acted on it, and must have known what had occurred. *Holden* v. *Webber*, 29 Beav. 117.

The plaintiffs, shipbrokers, were employed by the defendants, shipowners, to procure charterers for certain ships. The plaintiffs introduced the defendants to another firm of brokers, and negotiations were commenced at the office of the last-named firm with L for the chartering of these ships. The negotiations with L came to nothing, but L, from the knowledge thus acquired, informed M that the defendants had a ship in want of a charterer, and M became the charterer of this ship of the defendants. In an action by the plaintiffs to recover broker's commission from the defendants on the charter of this ship,—Held, that the plaintiffs' services in the transaction were too remote; and, *semble*, that any custom which would entitle them to claim commission under such circumstances would be an unreasonable custom and bad. *Gibson* v. *Crick*, 31 Law J. Rep. (N.S.) Exch. 303.

In order to prove such custom, it was proposed to ask a broker "What is the custom with regard to the payment of brokers' commissions when the broker introduces another broker to a shipowner, which shipowner subsequently negotiates with one of the brokers introduced?"—Held, that this question was rightly disallowed. Ibid.

An agent who is entrusted to sell land for his principal at a commission, if he become the purchaser, is not entitled to any remuneration. *Salomons* v. *Pender*, 34 Law J. Rep. (N.S.) Exch. 94; 3 Hurls. & C. 639.

The plaintiff, an auctioneer, was employed by the defendant to sell an estate for him, upon the terms that the plaintiff should be paid a commission on the amount of such sale. The plaintiff advertised the property and put it up for sale by auction, but without being able then to obtain a purchaser for it. The estate was, however, shortly afterwards sold by the defendant himself by private contract to a person who had attended the sale by auction, and had first learned of the estate being for sale by seeing the plaintiff's advertisement of it. During the negotiations with the purchaser, and before completing the sale to him, the defendant withdrew the plaintiff's authority to sell the estate:—Held, that the plaintiff was, nevertheless, entitled to the commission agreed to be paid on the sale, the relation of buyer and seller between the defendant and the purchaser of the estate having been brought about by what the plaintiff had done. *Green* v. *Bartlett*, 32 Law J. Rep. (N.S.) C.P. 261; 14 Com. B. Rep. N.S. 681.

(*b*) *As regards Third Persons.*

A wharfinger received notice that certain goods deposited at his wharf were marked with a fraudulent imitation of a trade-mark, and that the owner of the trade-mark was about to apply to the Court of Chancery for an injunction to prevent the sale of the goods; after the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the holder of the dock-warrants:—Held, by the Master of the Rolls, and, on appeal, by the Lords Justices, that he was justified in equity in such refusal, and that the owner of the goods would be restrained from suing him at law for a wrongful conversion of the goods. *Hunt* v. *Maniere*, 34 Law J. Rep. (N.S.) Chanc. 142; 34 Beav. 157.

A charter-party, dated London, commenced as follows: "It is this day agreed between G D and Son, owners of the ship D, now lying in the port of London, of the one part, and Messrs. Gregory Brothers, as agents of S F, of Anamaboo, merchants and charterers, of the other part, &c." The voyage was to be to Africa and back, and the words "merchants and charterers" were printed in the plural throughout the charter-party. The instrument concluded: "For G D & Son, of Jersey, owners, H G as agent: for S F, of Anamaboo, Gregory Brothers as agents":—Held, that Gregory Brothers were not liable on the charter-party as principals. *Deslandes*

v. *Gregory* (Ex. Ch.), 30 Law J. Rep. (N.S.) Q.B. 36; 2 E. & E. 610.

The defendant, a corn-broker at Liverpool, sold the plaintiffs two cargoes of maize, and signed the following memorandum, addressed to the plaintiffs: "I have this day sold to you two cargoes of French maize, from the port of Bordeaux, at 33s. 3*d.* per 480 lb. cost and freight, payment in London, less sixty days' interest and 1*l.* per cent. brokerage. J W, London, will send contracts." J W sent contracts, omitting the stipulation for brokerage, and describing the maize as sold on behalf of T, of Bordeaux, who was the real owner and shipper. The maize was subsequently shipped, and the plaintiffs, in order to get possession of it, were obliged to pay the full amount, without deducting the brokerage:—Held, that the defendant was personally liable on the memorandum signed by him, and the plaintiffs were entitled to maintain an action for breach of his agreement that J W should send contracts in the terms of the memorandum. *Reid* v. *Dreaper*, 30 Law J. Rep. (N.S.) Exch. 268; 6 Hurls. & N. 813.

An auctioneer was instructed by the owner of premises to offer them for peremptory sale, by public auction, at a named day and place. He issued handbills, in which it was represented that the premises would be offered for sale by himself in manner above stated. It was also represented in the handbills, that the premises would be offered for sale by direction of the mortgagee, but not disclosing his name; and there was a notice at the bottom of the handbills, "For further particulars apply to H, solicitor, or the auctioneer." H was the solicitor of the vendor. The plaintiff attended the auction, and made the highest bid, except that H bid a larger sum and bought in the premises; whereupon the plaintiff brought an action against the auctioneer:—Held, that upon these facts there was no contract upon which the auctioneer was personally liable. *Mainprice* v. *Westley*, 34 Law J. Rep. (N.S.) Q.B. 229; 6 Best & S. 420.

(D) POWER AND AUTHORITY OF THE AGENT.

The defendant, *bona fide* believing he had authority, verbally agreed, on behalf of the owners, to let the plaintiff a house for seven years; and the plaintiff was let into possession by the defendant, and began repairing the premises. The owners had not given the defendant authority, and they informed the plaintiff of this, and brought ejectment against him; the plaintiff consulted the defendant, who persisted that he had authority, and advised the plaintiff to defend the action; and a verdict passed against him. The plaintiff having brought an action against the defendant for his breach of warranty of authority,—Held, that the plaintiff could not recover the costs of defending the ejectment, as they were not the consequence of the defendant's breach of warranty, inasmuch as, if the defendant had had authority, the plaintiff could not have succeeded in the ejectment, by reason of the agreement being verbal only, and consequently creating no more than a tenancy at will. *Pow* v. *Davis*, 30 Law J. Rep. (N.S.) Q.B. 257; 1 Best & S. 220.

By the deed securing an annuity which A had granted to B, who resided abroad, power was given to A to redeem the annuity upon paying a certain sum of money, and giving B six months' notice in writing. C, who was B's general agent in this country, received the redemption money from A, and delivered up to him the annuity deed without the notice required by the deed, and B, in fact, had no notice whatever that the money was about to be paid. C had a general authority to invest and also to receive principal moneys as well as interest for B:—Held, that C had, therefore, authority to waive the stipulation as to notice, and to receive the redemption money as he did for B. *Webber* v. *Granville*, 30 Law J. Rep. (N.S.) C.P. 92.

The plaintiff employed W, an insurance broker at Lloyd's Coffee House, to effect an insurance on his vessel. The policy was made out in W's name, and remained in W's hands. The ship was lost, and after the loss the plaintiff gave W the ship's papers to enable him to adjust the loss with the underwriter. Instead of receiving payment in money for the amount of the loss, W set it off in account between himself and the underwriter, against a debt for premiums which he owed to the underwriter. This mode of settlement was in accordance with a usage prevalent at Lloyd's, which was found to be generally known to merchants. The plaintiff, however, was ignorant of the usage, and never intended W to receive the money due on the policy, having left the policy in W's hands for safe custody only:—Held, that the plaintiff was not bound by the usage of Lloyd's as to set-off, of which he was not aware, and that he was entitled to recover from the underwriter the amount due on the policy. *Sweeting* v. *Pearce*, 30 Law J. Rep. (N.S.) C.P. 109; 9 Com. B. Rep. N.S. 534.

A clerk to a wine-merchant, who is authorized by his employer to sign delivery orders per procuration, and who by doing so obtains possession of dock warrants relating to goods belonging to his master, and afterwards obtains an advance of money upon the security of such dock warrants, is not an agent entrusted with the possession of documents of title to goods within the meaning of 5 & 6 Vict. c. 39, so as to give validity to the contract, and his employer may recover possession of such dock warrants from the person with whom they are pledged, though the advance was made *bona fide*. *Lamb* v. *Attenborough*, 31 Law J. Rep. (N.S.) Q.B. 41; 1 Best & S. 831.

The defendant, acting as broker for both buyer and sellers, made a contract for the sale of some wool on certain terms. The sellers afterwards repudiated the contract, alleging (as was the fact) that they had not authorized the defendant to sell on those terms. The wool had been imported from California, and could therefore have been exported to America free of duty; and there was no other wool similarly circumstanced in the market. The defendant persisting that he had authority, the buyer filed a bill in Chancery for specific performance against the sellers, and obtained an interim injunction; the bill was dismissed and the injunction dissolved, with costs, on the ground of the want of authority in the defendant. In an action by the buyer against the defendant for the breach of his promise that he had authority,—Held, that the plaintiff could maintain the action, although the defendant was his agent, as well as of the sellers; that the Chancery suit was a reasonable course to adopt; and that the plaintiff was entitled to recover, as damages, the taxed costs of the Chancery suit and

the plaintiff's own costs taxed as between solicitor and client; and also the difference between the contract price of the wool and the value of that or similar wool, taking into account that it could have been exported duty free to America, and all the mercantile circumstances affecting the value. *Hughes* v. *Graeme*, 33 Law J. Rep. (N.S.) Q.B. 335.

A, in London, authorized B, a broker in Liverpool, to buy goods for him on certain terms. B bought the goods on terms which so far differed from the authority as to omit a stipulation which was contained in the authority, and to express one which was not therein mentioned; but both these were stipulations which would have been by custom annexed to the contract, unless expressly excluded: —Held, that, as the effect was the same as if the contract had been made in the very words of the authority, it was within the scope of the broker's authority to make such a contract, and that it was binding on the principal. *Heyworth* v. *Knight*, 33 Law J. Rep. (N.S.) C.P. 298; 17 Com. B. Rep. N.S. 298.

Written communications passed between two brokers, in which the terms of a sale of goods were proposed and assented to. The letter of the buying broker finally accepting the offer concluded with these words: "Contract, we presume, in due course." The contract was sent, and was accepted by the buying broker, but was repudiated by his principal, as not within the scope of the broker's authority:— Held, that the contract contained in the previous written communications, which was within the scope of the broker's authority, was not the less binding on the principal, by reason of the subsequent sending of the unauthorized contract. Ibid.

*Semble*, per *Byles, J.*, that if a broker has authority to enter into a contract, and he does so according to the usual terms of the business in which he is engaged, the principal is bound, unless the person with whom the broker contracts has notice of the broker's limited authority. Ibid.

In an action for the breach of a warranty on the sale of a horse by the servant of a private owner at a fair,—Held, that a letter from the plaintiff's attorney to the defendant, referring to the alleged warranty and averring a breach of it, and an answer from the defendant simply denying that there had been any breach of warranty, afforded evidence whence the jury were justified in finding that the servant had authority in fact to warrant. *Miller* v. *Lanton*, 15 Com. B. Rep. N.S. 834.

In an action against a railway company for not delivering, within a reasonable time, cattle which had been sent by their railway, the plaintiff gave evidence at the trial of a conversation which had taken place a week after the transaction, between himself and the company's night inspector, who had charge of the night cattle trains at a station through which the trucks containing the plaintiff's cattle would pass, and in which conversation the night inspector, in reply to the plaintiff's question, "How is it you did not send my cattle on?" had said that he had forgotten them,—Held, that such evidence was not admissible. *The Great Western Rail. Co.* v. *Willis*, 34 Law J. Rep. (N.S.) C.P. 195; 18 Com. B. Rep. N.S. 748.

## PRINCIPAL AND SURETY.

(A) Rights of Suretyship.
(B) Indemnity of Surety by Principal.
(C) Discharge of Surety.

### (A) Rights of Suretyship.

C, being in want of money, applied to the plaintiff and the defendant to lend him their names to a bill of exchange, which they agreed to do, and a bill was drawn by the plaintiff, which C accepted, and the defendant indorsed. C got the bill discounted for his sole benefit, and having become bankrupt, the holders applied to the plaintiff and the defendant for payment, and the plaintiff paid the whole:—Held, that the plaintiff could recover, in an action for money paid, contribution from the defendant as co-surety. *Reynolds* v. *Wheeler*, 30 Law J. Rep. (N.S.) C.P. 350; 10 Com. B. Rep. N.S. 561.

A surety is no more justified in placing the whole of his property out of the reach of liability to pay his debt than if he were principal debtor. *Goodricke* v. *Taylor*, 2 De Gex, J. & S. 135.

A B, a married woman, who was entitled, for her separate use, to a reversionary interest in personalty, joined with her husband in assigning the same to trustees for a banking company, upon trust to receive the same, and thereout in the first place to pay costs, and then to retain and pay to the company the moneys due from the husband. The husband also assigned a policy of assurance upon his wife's life, to be held on the same trusts. There was no proviso for redemption or power of sale in the deed; but the husband covenanted to pay the moneys secured. One of the Vice Chancellors, at the instance of the company, made the usual foreclosure decree; but upon appeal, the Lord Chancellor, considering that the wife was in the position of a surety, reversed this, as the company could have no claim against her reversionary interest beyond what the trusts of the deed prescribed, viz., to retain, out of the reversionary interest when it fell in, the moneys secured. *Stamford, Spalding and Boston Banking Co.* v. *Ball*, 31 Law J. Rep. (N.S.) Chanc. 143.

### (B) Indemnity of Surety by Principal.

The defendant, as surety for his son J, executed a bond to an insurance company. The condition of the bond, after reciting that J had been appointed by the company to be an agent of the company at Adelaide, and that it had been agreed the defendant should enter into the said bond for securing the fidelity of J, made void the bond if J, his heirs, &c. should pay all moneys received by him on account of the company, and should honestly conduct himself in his said office of agent to the company. The facts existing at the time of giving the bond were these: F, the company's agent at Adelaide, being about to take the defendant's son J into partnership, requested the company to associate J with him in the agency, and the defendant was asked to execute the bond by a letter which informed him that such bond was necessary if his son was to be associated with F in the agency, but that as it was only insuring the integrity of his son, it was a nominal thing. After the bond was executed, J entered into partnership

with F:—Held, that the defendant was not liable on the bond for moneys of the insurance company received by the firm of F & J as such agents, since even if the surrounding circumstances which existed at the time the bond was executed could be inquired into in construing the bond, the above facts did not shew an intention to make the defendant responsible for the acts of any other person than his son. And *semble*, that the co-existing circumstances might be looked at in putting a construction on the bond. *Montefiore* v. *Lloyd*, 33 Law J. Rep. (N.S.) C.P. 49; 15 Com. B. Rep. N.S. 203.

The executors of a testator, who was surety upon two promissory notes drawn by his son, borrowed 4,000*l.* to take up the notes, and stop proceedings by the creditors to obtain payment:—Held, that the share, to which the son was entitled as one of the residuary legatees under his father's will, was bound, as against subsequent mortgagees, to repay to the trustees, not only the principal due upon the notes, but also the interest upon the amount for which they were originally drawn. *Willes* v. *Greenhill*, 30 Law J. Rep. (N.S.) Chanc. 808; 29 Beav. 376.

D and P, under a covenant in a mortgage-deed, paid the premiums on a life-policy forming part of the security, as sureties. By a contemporaneous instrument, to which they were not parties, the equity of redemption was assigned in trust for the benefit of the creditors of the mortgagor, and D signed the trust-deed as a creditor. The mortgage was paid off, and the policy was sold by the trustee of the creditors' deed, under a power contained therein. A creditors' suit being instituted, it was held, that the creditors were not entitled to take the money produced by the sale of the policy, without making payment in satisfaction of the premiums paid by D and P. *Aylwin* v. *Witty*, 30 Law J. Rep. (N.S.) Chanc. 860.

A was tenant for life of lots 1 and 2, to which B was entitled in remainder. B, and A as his surety, mortgaged lot 2, B alone covenanting to pay. By a contemporaneous deed B conveyed his interest in the other lot on trust to indemnify A as his surety. A paid large sums for interest on the mortgage:—Held, that he was entitled to the benefit of the deed of indemnity only, but not to stand in the place of the mortgagee on lot 1. *Cooper* v. *Jenkins*, 32 Beav. 337.

A surety who pays off a debt for which he became answerable, is entitled to all the equities which the creditor could have enforced, and that, not merely against the principal debtor, but also against all persons claiming under him. *Drew* v. *Lockett*, 32 Beav. 499.

A mortgaged his estate to C, and B became A's surety for the debt. Afterwards A mortgaged the estate to D, who had notice of the first mortgage. The first mortgage was subsequently paid off, partly by B, the surety, but D got a transfer of the legal estate:—Held, that the surety had still priority over D for the amount paid by him under the first mortgage as surety for A. Ibid.

A surety is entitled to the benefit of the securities in the hands of the creditor. Therefore, where a creditor, whose debt was secured by the bond of the debtor, and his surety, as well as by a mortgage of the equitable life interest of the debtor and his wife in certain real estate, and policies of assurance, assigned his debt without notice by himself or the assignee to the trustees of the settlement, who sold under a power,—Held, that the surety was discharged to the amount of the security lost. *Strange* v. *Fooks*, 4 Giff. 408.

Where acquiescence is relied on, it must be shewn that the person acquiescing was aware of the thing in which he acquiesced, and of such acquiescence. Ibid.

A surety having paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, and, if made executor, to retain it out of the assets of the principal against all other creditors of equal degree. *Boyd* v. *Brooks*, 34 Law J. Rep. (N.S.) Chanc. 605; 34 Beav. 7.

### (C) DISCHARGE OF SURETY.

T P & D Price, coal-masters, having stopped payment and having petitioned the Court of Bankruptcy, executed a deed which was assented to by the creditors and the Commissioner in Bankruptcy. The deed contained a proposal, that the business should be carried on under inspection; that the plaintiffs, who were creditors and parties to the deed, should be paid in full the sum of 8,700*l.*, being the amount of bills discounted, but partly by instalments, the first to be made on the 31st of December 1860. The plaintiffs covenanted that they should bind themselves, "subject to the provisions thereinafter contained, not to enforce claims against any parties to the bills in their hands, who as between themselves and the petitioners were not then liable on such bills respectively, but that the right of the plaintiffs against all parties to the bills in their hands (whether liable or not to the petitioners as between the petitioners or any of them and such parties) should in no way be prejudiced in the event of the proposals made to the petitioners not being carried into effect, and also that in such case the plaintiffs should in all respects be entitled to claim the full amount then due to them after deduction of any sum in the mean time paid to them, notwithstanding their acquiescence in the proposals of the petitioners thereby made." The deed provided that the creditors in general should receive a composition of 10*s.* in the pound; that the business was to be carried on and that the proceeds were to be applied in paying the composition agreed upon; that the creditors, except as mentioned in the proposals, who should execute the deed, and who should hold securities upon which any other person should be liable, should not be prejudiced as to their rights against such persons: provided that nothing contained in the deed should prevent the creditors, "other than as provided for in the said proposal," from enforcing their claims against the estate of T P & D Price. At the time of the execution of the deed the plaintiffs were holders of a bill of exchange accepted by the defendant for the accommodation of T P & D Price, and they had no notice that the defendant was not liable to T P & D Price, although they knew that some of the parties whose bills were in their hands were not primarily liable to T P & D Price. The deed remained in full force, and time was given to T P & D Price till the first instalment became due, which they failed to pay:—Held, that the effect of the deed was to give time to T P & D Price, and that equitably the defendant was not liable on the bill so

accepted by him. *Bailey* v. *Edwards*, 34 Law J. Rep. (N.S.) Q.B. 41; 4 Best & S. 761.

The defendant covenanted with the plaintiffs that, in consideration that the plaintiffs would give credit to one Taylor, he would be surety to the extent of 100*l.* for any sum which might from time to time be owing by Taylor. The deed provided that no indulgence, time, credit or forbearance given or shewn to, or security taken from, or composition with Taylor, should be any discharge of any liability under the deed, or should release the defendant from observing the provisions thereof. Taylor entered into a deed of composition with his creditors under the Bankruptcy Act, 1861, which contained an unconditional release, which the plaintiffs executed:—Held, on the authority of *Cowper* v. *Smith*, that the composition-deed was no defence to the plaintiffs' claim for 100*l.*, as by the terms of the guarantie the surety was not discharged by the release of the principal debtor. *The Union Bank of Manchester (Lim.)* v. *Beech*, 34 Law J. Rep. (N.S.) Exch. 133; 1 Hurls. & C. 672.

## PRISON AND PRISONER.

[The discontinuance of the Queen's Prison, and removal of the prisoners to Whitecross Street Prison, provided for by 25 & 26 Vict. c. 104 ("The Queen's Prison Discontinuance Act, 1862").—The law relating to giving aid to discharged prisoners amended by 25 & 26 Vict. c. 44.—The law relating to the religious instruction of prisoners in county and borough prisons in England and Scotland amended by 26 & 27 Vict. c. 79.—The law relating to prisons consolidated and amended by 28 & 29 Vict. c. 126.]

Section 40. of the Mutiny Act of 1857 (20 Vict. c. 13.) enacts, that the keeper of any public prison or gaol in any part of Her Majesty's dominions shall receive and keep in his custody any military offender under a sentence of imprisonment by a court-martial, on the delivery to him of an order, in writing, from the officer commanding the regiment to which the offender belongs; and section 41. enacts, that in case of a prisoner undergoing imprisonment under the sentence of a court-martial in any public prison, other than a military prison set apart under the act, or in any gaol in any part of Her Majesty's dominions, it shall be lawful for the officer who confirmed the proceedings, or who is commanding the district, to direct, by order in writing, the prisoner to be delivered over to military custody, for the purpose of being removed to some other prison or place, there to undergo the remainder of his sentence.—A, a military officer on service in the East Indies, was tried and convicted of manslaughter by a general court-martial, having jurisdiction over the offence by virtue of the above act, and sentenced to four years' imprisonment; in pursuance of section 38. the proceedings were confirmed by the officer commanding the district, and Agra Fort, in the East Indies, was appointed by him as the place of imprisonment. After A had been some months at Agra the same officer directed, by order in writing, that he should be removed, and sent in military custody to England, to undergo the remainder of his sentence, but the order specified no particular place of custody. A arrived in England, and, after being moved to several prisons, was confined in the Queen's Prison under an order, addressed to the keeper of it, from the Commander-in-Chief of the Forces:—Held, that the prisoner was entitled to be discharged: as he could not be detained at common law; and assuming the case to be otherwise within the 41st section of the statute, there had been no order made, under that section or the 40th, to justify his detention by the keeper of the Queen's Prison. *In re Allen*, 30 Law J. Rep. (N.S.) Q.B. 38; 3 E. & E. 338.

The Income Tax Commissioners have no power to commit a defaulting collector of income-tax in the county of Middlesex to the prison of Newgate; the commitment should be made to Whitecross Street Prison, under the statute 52 Geo. 3. c. ccix. *In re Masters*, 33 Law J. Rep. (N.S.) Q.B. 146.

By 4 Geo. 4. c. 64. s. 4. it is provided that the Justices of the Peace assembled at the Michaelmas Quarter Sessions, by orders to be made for that purpose, may ascertain and declare to what class or classes of prisoners every gaol, house or houses of correction, or any part or parts of any of them respectively shall be applicable, &c. By an order made under this section, the house of correction at C, in the county of M, was directed to be applicable to certain specified classes of prisoners. Under a local act, 20 & 21 Vict. c. cxviii., Justices were empowered to issue warrants for the apprehension and commitment of persons making default in the payment of rates and for their committal to the common gaol or house of correction. Under that act R S, a defaulter in payment of rates, was ordered to be taken to the common gaol or house of correction for the county of C, and the keeper of the said house of correction was ordered to receive and imprison the said R S, who had not committed any offence within the classes specified in the order of Quarter Sessions:—Held, that the keeper of the house of correction was justified in refusing to receive R S into his custody, as the order that the house of correction should be applicable only to classes of prisoners in which R S was not included was binding. *R.* v. *Colvill*, 34 Law J. Rep. (N.S.) M.C. 137.

A commitment by Justices for non-payment of poor-rates is in the nature of civil process, and the proper prison for a person so committed by the Justices of Middlesex is the prison in Whitecross Street. *R.* v. *the Governor of the Prison in Whitecross Street*, 34 Law J. Rep. (N.S.) M.C. 193; 6 Best & S. 371.

## PRODUCTION AND INSPECTION.

[See PRACTICE, in EQUITY.]

(A) INSPECTION OF PROPERTY; MINES.
(B) OF DOCUMENTS.

### (A) INSPECTION OF PROPERTY; MINES.

Where the Court or a Judge, under section 58. of the Common Law Procedure Act, 1854, has power to make a rule or order for an inspection of real or personal property, they may also order such things to be done as may be necessary for such inspection. *Bennett* v. *Griffiths*, 30 Law J. Rep. (N.S.) Q.B. 98; 3 E. & E. 467.

The plaintiff and the defendants had mines adjoin-

ing one another, and the plaintiff had reason to suspect that the defendants had encroached upon his mines. He obtained leave from the defendants to go underground and examine their mines, and found that, at the boundary line between the two properties, a wall had been recently erected, which prevented him from seeing whether anything had been done on the other side, which belonged to him. The inspector of mines for the district reported, that an inspection could safely be made by removing a portion of the wall, and that no practical difficulty existed, calculated to endanger the lives of the workmen. An order was then made by a Judge at chambers, that the plaintiff should be at liberty to inspect the mines of the defendants, and, so far as was necessary for the inspection, to make a way through the wall. The plaintiff was ordered to give security to the satisfaction of the Master, or to deposit the sum of 500*l.*, to abide any order the Court might make as to indemnifying the defendants for any loss they might sustain in consequence of the inspection:—Held, upon a motion to set this order aside, that it was good, as the Courts of common law and the Judges thereof have, as ancillary to the power to grant inspection, a power to remove obstructions, with a view to the inspection. Ibid.

(B) Of Documents.

In an action of detinue for title-deeds, the defendants pleaded that the deeds had been deposited as a security, by way of equitable mortgage, to secure the repayment of money advanced by their testator, and that the money remained unpaid. In answer to interrogatories put to them by the plaintiffs, they admitted that they had in their possession a memorandum that the deeds should remain in the possession of the person advancing the money till it was repaid:—Held, that the plaintiffs were entitled to an inspection of the memorandum, and also to have particulars of the lien or mortgage relied upon by the defendants. *Owen* v. *Nickson*, 30 Law J. Rep. (N.S.) Q.B. 125; 3 E. & E. 602.

In an action against a joint-stock company, the Court or Judge may order one of the late directors (the company having ceased to carry on business) to give the plaintiff inspection of documents not denied by such director to be in his possession or under his control. *Lacharme* v. *the Quartz-Rock Mariposa Gold-Mining Co.*, 31 Law J. Rep. (N.S.) Exch. 335; 1 Hurls. & C. 134.

In an action against a joint-stock company, an order was obtained by the plaintiff against J C, a director of the company, that he give inspection of certain documents to the plaintiff; inspection not having been given, a rule *nisi* for an attachment was moved for; on cause being shewn, J C made an affidavit, stating that "he had not at the time the order was made, nor had he any time since, in his possession, custody or power any of the documents mentioned in the order":—Held, that the affidavit was insufficient, as it did not state any facts shewing that J C had no knowledge in whose custody or control the documents were. *Lacharme* v. *the Quartz-Rock Mariposa Gold-Mining Co.*, 31 Law J. Rep. (N.S.) Exch. 508; 1 Hurls. & C. 134.

Upon motion for an inspection of the plaintiffs' books, which the defendant alleged to be necessary for the purpose of establishing a set-off in respect of commission which he claimed on sales effected by the plaintiffs through his introduction,—the Court granted the rule, although the plaintiffs swore that there was no agreement to allow the defendant any commission; but held that the plaintiffs were entitled to seal up all those parts of the books which they pledged their oath that the defendant had no interest in. *Bull* v. *Clarke*, 15 Com. B. Rep. N.S. 851.

In an action by a consignee of goods against shipowners for damage sustained in consequence of the unseaworthiness of the ship, the Court made an order under the 50th section of the Common Law Procedure Act, 1854, for the plaintiff to inspect and take copies of certain surveys made on the ship in a foreign port, a general average statement, the shipwright's bill for the repairs done to the ship, the captain's protest, and the log-book, as being documents proximately connected with the matter in issue. *Semble*, that, since the statute, there is no difference in this respect between the case of an action between the owners and underwriters and any other persons. *Daniel* v. *Bond*, 9 Com. B. Rep. N.S. 716.

The Court will not grant a rule for the inspection of documents which were produced in evidence at the trial, for the mere purpose of furnishing materials to the other side for moving for a new trial. *Pratt* v. *Goswell*, 9 Com. B. Rep. N.S. 706.

Inspection under the 50th section of the Common Law Procedure Act, 1854, will only be allowed where it is reasonably shewn that the documents sought to be inspected really exist, and are relevant to the case of the party seeking the inspection. *Houghton* v. *the London and County Assur. Co.*, 17 Com. B. Rep. N.S. 80.

In an action for an alleged libel, the Court allowed the defendant to inspect and take fac-simile copies, "by photograph or otherwise," of the documents referred to in the declaration. *Davey* v. *Pemberton*, 11 Com. B. Rep. N.S. 628.

Where a corporator makes a claim to be elected to an office in the corporation, and founds it upon a supposed invariable custom to elect the person who at the time of a vacancy fills the position which he then occupies, and the company admit the general practice set up by him, but say that it is not invariable,—the Court, at the instance of the corporator, will grant a mandamus to allow him to inspect the minutes of the corporation as to former elections to assist him in starting his case, even though the Court entertain great doubt whether such alleged custom, if proved, could contradict the charter, which prescribes that there is to be a free election. *In re Burton and the Saddlers' Co.*, 31 Law J. Rep. (N.S.) Q.B. 62.

The Court has no power to grant a rule to inspect documents when no cause or proceeding in court has been commenced. Ibid.

In an action on a policy of insurance on household furniture to recover from the insurance office a loss by fire, in which there were issues imputing fraud to the plaintiff, both as to the fire and the account of the articles lost, the Court made an order for the plaintiff to be at liberty to inspect all communications in writing in the possession of the office relating to the property or value of the property insured which had passed between such office and its agent with whom the insurance had been effected, and also

between such agent or office and another insurance office with which a similar policy on the same furniture had been effected by the plaintiff; but the Court refused to allow the plaintiff inspection of the report made to the office by its surveyor of the salvage recovered from the fire. *Wolley* v. *Pole*, 32 Law J. Rep. (N.S.) C.P. 263; 14 Com. B. Rep. N.S. 538.

It is no ground for refusing, in answer to interrogatories, to produce a correspondence which has taken place upon the subject-matter of the action, that the production of such correspondence would disclose the secrets of the trade of the party interrogated. *The Don Francisco*, 31 Law J. Rep. (N.S.) Prob. M. & A. 205.

In an action by a superintendent against a railway company for improperly dismissing him from their employ, the plaintiff is entitled to have an inspection of all minutes or entries in the company's books having any reference to his employment. *Hill* v. *the Great Western Rail. Co.*, 10 Com. B. Rep. N.S. 148.

When inspection of documents is asked, the Court is not bound by the denial of the party in whose possession they are that they relate to the case of the adversary; but if the Court can collect from the whole of the materials before them that, in fact, the documents, although they may relate to the subject-matter of the suit, are not such as to go to establish the case of the party asking inspection, they will refuse inspection. *The Chartered Bank of India, Australia and China* v. *Rich*, 32 Law J. Rep. (N.S.) Q.B. 300; 4 Best & S. 73.

The plaintiffs, a banking company in London, having dismissed the defendant from his post as manager of the plaintiffs' branch bank in India, contemplated bringing an action against him for breaches of duty while in their employment, and letters were written, both before and after an attorney was employed by the plaintiffs, from their manager in England, to an agent in India, directing him to make inquiries relative to the breaches of duty alleged to have been committed. An action having been afterwards brought for the breaches of duty,—Held, that the defendant was not entitled to the inspection of any of these letters, nor of the replies. Ibid.

The Court will allow a defendant in an action for breach of promise of marriage (as in other cases of contract) to inspect and take copies of letters in the plaintiff's possession written by the defendant to the plaintiff. *Stone* v. *Strange*, 34 Law J. Rep. (N.S.) Exch. 72; 3 Hurls. & C. 541.

## PROHIBITION.

(A) When and in what Cases it will be granted.
(B) To stay Proceedings.
(C) Damages in.

### (A) When and in what Cases it will be granted.

At a vestry held for the parish of P, a resolution was passed authorizing the churchwardens to purchase on behalf of the parish a piece of land for an additional burial-ground. A poll was demanded and refused. Upon the authority of this resolution, the Church Building Commissioners, acting under the 3 Geo. 4. c. 72. s. 26, authorized the parish to purchase the land and to levy rates to defray the expense, which the parish accordingly did. The plaintiff declined to pay the rate, and a suit for subtraction of church-rates was accordingly commenced against him in the ecclesiastical court, which he defended on the ground that a poll having been demanded and refused, the desire of the parish to enlarge their burial-ground had not, as required by the above statute, been legally expressed. The ecclesiastical Court decided in favour of the churchwardens by rejecting this defence; against which decision the present plaintiff appealed:—Held, that a prohibition to the ecclesiastical Court ought to issue. That the 3 Geo. 4. c. 72. s. 26. does not by giving to the parish in these cases the powers conferred by the 59 Geo. 3. c. 134. s. 25. impliedly take away the common law right to a poll, for that, whatever may be the effect of that section in cases where it is applicable, it only applies to the power of a vestry in raising rates, and not to such a proceeding as this. Held, also, that it was no bar to the prohibition issuing that an appeal against the decision of the ecclesiastical Court was pending. Held, also, that as the ecclesiastical Court had rejected a defence which, if true, was a complete and substantial answer to the libel, and as the plaintiff was bound in this Court to establish the truth of this defence, the prohibition ought to be that no further proceedings be taken in the ecclesiastical court, and not merely until that Court should alter its decision on the point of law. *White* v. *Steel*, 31 Law J. Rep. (N.S.) C.P. 265; 12 Com. B. Rep. N.S. 383.

A prohibition *quousque* is only proper when the objection is to the manner and form of proceeding in the inferior court only, and not on the merits. Ibid.

A petition by a husband for dissolution of marriage, and claiming damages against the co-respondent, having been filed in the Court of Divorce and Matrimonial Causes, the jury found the respondent and co-respondent guilty of adultery, and assessed the damages against the co-respondent at 5,000*l*., upon which the Judge made a decree *nisi* for the dissolution of the marriage, and ordered the co-respondent to pay the *whole* costs of the petition. The co-respondent then applied to this Court for a prohibition, on the ground that the Court of Divorce, &c. had no jurisdiction over the marriage, it having been contracted in India, by persons domiciled there:—Held, that the co-respondent had no right to a prohibition, as he was a stranger to that part of the suit relating to the dissolution of the marriage, and that the Court of Divorce and Matrimonial Causes had, at all events, jurisdiction to entertain the suit for damages, and the excess of jurisdiction, if any, was only as to the costs incident to the other part of the petition, which was only matter of practice and appeal. *Forster* v. *Forster and Berridge*, 32 Law J. Rep. (N.S.) Q.B. 312; 4 Best & S. 187.

*Quære*—First, whether the Court of Divorce had jurisdiction over this marriage? Ibid.

Secondly, whether prohibition lies to the Court of Divorce? Ibid.

Thirdly, whether that Court has not jurisdiction to determine absolutely, subject to appeal, whether on the facts a particular case is within its jurisdiction? Ibid.

A plaint having been brought in a county court, at the hearing, on the 11th of September, 1862, the defendants excepted to the jurisdiction, on the ground that the matter was a dispute between members of a friendly society, which, by the rules of the society, was to be settled by a committee of the society, and that the county Court had therefore no jurisdiction by reason of the 18 & 19 Vict. c. 63. s. 40. The Judge overruled the objection, and gave a verdict for the plaintiff. Between the 20th and 24th of September, notices were served on the plaintiff and his attorney, and on the Judge and registrar of the court, of the defendants' intention to apply for a prohibition; on the 8th of October the defendants were served with an order from the Court to pay the amount of debt and costs, and on the 10th of October one of them paid the amount to the registrar to avoid an execution; on the same day a summons was taken out on behalf of the defendants, calling on the plaintiff and the Judge of the county court to shew cause why a prohibition should not issue. This summons was served on the 13th of October, being returnable on the 14th, when it was adjourned to the 24th; on the 16th of October the money was paid out of court by the registrar to the plaintiff's attorney. The matter having been referred to the Court on the 24th of October,—Held, that the application had been delayed too long, and that on that ground, under the circumstances, a writ of prohibition ought not to issue. *In re Denton* v. *Marshall*, 32 Law J. Rep. (N.S.) Exch. 89; 1 Hurls. & C. 654.

*Quære*—Whether prohibition will issue after judgment and execution had or the judgment satisfied without execution, where the want of jurisdiction does not appear on the face of the proceedings. If it will, *quære*, whether a writ of restitution or a rule of Court ordering restitution, can be granted. Ibid.

*Quære*—Whether the 40th section of the 18 & 19 Vict. c. 63. absolutely ousts the jurisdiction of the county Courts, in friendly society cases, where the rules of the society provide a specific tribunal for the settlement of the matter in dispute. Ibid.

Prohibition will not lie to the county Court, however erroneous its decision, where there is jurisdiction. Where cause is shewn against a rule in the first instance, the costs are in all cases in the discretion of the Court, but will rarely be given. *Norris* v. *Carrington*, 16 Com. B. Rep. N.S. 396.

The Salford Hundred Court Act, 9 & 10 Vict. c. cxxvi. s. 1, after recitiog that the "Court has cognizance of pleas of personal actions where the debt or damage is under the sum of 40*s*.," enacts: that the Court shall henceforth be a court of record, "and shall have authority to try all actions at present cognizable by the said Court where the debt or damage is under the sum of 40*s*., and all actions of assumpsit, covenant, detinue and debt, whether the debt be by specialty or on simple contract, and all actions of trespass and trover, provided the sum or damages sought to be recovered shall not exceed 50*l*." The 10th section enacts: "that if the parties in any action whereof the cause shall have arisen within the jurisdiction of the Court (except actions for libel, slander, criminal conversation, or for debauching the plaintiff's daughter or servant) wherein the sum sought to be recovered shall exceed 50*l*.," shall agree in writing, the Judge shall have power to determine such actions:—Held, that the Court has jurisdiction in actions for slander wherein the damage sought to be recovered does not exceed 50*l*. *Farrow* v. *Hague*, 3 Hurls. & C. 101.

Section 42. of the same act enables the Judge to certify for the full costs where the debt or damage recovered is under 40*s*. The Judge granted a certificate in an action for slander, notwithstanding the 21 Jac. 1. c. 16. s. 6:—Held, that although the Judge might have no power to certify, that was not a ground for prohibition. Ibid.

### (B) To stay Proceedings.

Where a person is sued for a debt in the Lord Mayor's Court of London, and no part of the cause of action arises within the jurisdiction of that Court, the defendant cannot, since 20 & 21 Vict. c. clvii. (the Mayor's Court of London Procedure Act, 1857), obtain a prohibition to stay the proceedings, but must raise the objection to the want of jurisdiction by way of plea in that court; and that Court has by the statute jurisdiction to try and decide the issue taken on such plea. *Manning* v. *Farquharson*, 30 Law J. Rep. (N.S.) Q.B. 22.

*Quære*—Whether before applying for the prohibition it was necessary that an appearance should have been entered in the court below? Ibid.

B sued F in the Lord Mayor's Court, London, for a cause of action that arose without the jurisdiction of that Court. At B's instance a process of foreign attachment issued out of that court against C, an alleged debtor to F, to attach the supposed debt due from C to F for B's benefit. C, without appearing in the Lord Mayor's Court or pleading there any plea to the jurisdiction of that Court, applied to the Court of Exchequer for a prohibition:—Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, that as it appeared on the face of the pleadings that the Lord Mayor's Court had no jurisdiction in the original suit, and as that court was going on with the foreign attachment, C was entitled to have the prohibition issued against the Lord Mayor's Court proceeding with the garnishment. *Cox* v. *the Mayor and Aldermen of the City of London* (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 282; 2 Hurls. & C. 401.

No prohibition would have been issued in this case at the suit of the original defendant; as the recent statute 20 & 21 Vict. c. clvii. has provided that the defendant can raise the question of jurisdiction only by plea in the Lord Mayor's Court. Ibid.

The rules of an industrial society provided, that in case of disputes between a member and the society, or of complaint against an officer, the matter should be settled by arbitration. P, a member, was appointed a salesman of the society, and after he had resigned his appointment disputes arose as to his accounts, which the society proceeded to settle by arbitration; and an award having been made against P, the society proceeded to enforce it, under the 18 & 19 Vict. c. 63. s. 41, by issuing a plaint in the county court, on which P, before the case had been brought before the Judge of the county court, applied for a prohibition, on the ground that this was not a matter which could be settled by arbitration:—Held, that the application was premature, as the county Court was the tribunal to decide, in the first instance, whether, on the facts, the matter was such as could be decided by arbitration. *The Skipton Industrial*

*Society* v. *Prince*, 33 Law J. Rep. (N.S.) Q.B. 323.

(C) DAMAGES IN.

A plaintiff for whom a verdict is given by the jury upon a declaration in prohibition, is not entitled to recover the costs of the proceedings in the court below, as damages, under 1 Will. 4. c. 21. s. 1. *White* v. *Steel*, 32 Law J. Rep. (N.S.) C.P. 1; 13 Com. B. Rep. N.S. 231.

## PUBLIC BODIES.

A vestry elected under the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, which requires such vestry to execute the office of surveyor of highways within its parish, is not responsible for an injury occasioned to a passenger by the negligence of workmen employed by the surveyor of such vestry in paving a street in such parish, when the vestry has not given any direction for doing the work. *Holliday* v. *St. Leonard, Shoreditch*, 30 Law J. Rep. (N.S.) C.P. 361; 11 Com. B. Rep. N.S. 192.

In 1862, an act was passed authorizing the corporation of London to make a new street and buy certain lands (including the land of the plaintiff) and sell such parts of them as were not required to form part of the street. Shortly before the passing of this act, the corporation agreed with a railway company, which had no power to take the plaintiff's land, that if the act passed, the corporation would purchase certain lands under the act, and sell for a certain price a specified part of them to the company, such part including the bulk of the plaintiff's land, only a small portion of which was required to be thrown into the new street. The corporation, after the passing of the act, gave the plaintiff notice to take the whole of his land:—Held, that the corporation had, by entering into the above agreement, incapacitated themselves from forming a just judgment, as between them and the plaintiff, concerning the quantity of his land which they should require, and that an injunction ought to be granted to restrain them from proceeding on their notice. *Galloway* v. *the Mayor, Aldermen and Commons of the City of London*, 2 De Gex, J. & S. 213.

Under the Thames Conservancy Act, 1857, the conservators were empowered to erect piers at any convenient place of such form and construction as they should deem advantageous to the public, and causing the least obstruction to the navigation. The plans were to be first approved by the Admiralty:—Held, that the Court had no jurisdiction to interfere by injunction at the suit of the Attorney General, on the ground of the alleged inconvenience of certain proposed piers, or, at most, that it could only interfere in a case where it was shewn that the piers would be entirely useless. *The Attorney General* v. *Conservators of the Thames*, 1 Hem. & M. 1.

The statute directed that, whenever the conservators should remove or obstruct the free use and enjoyment of any public stairs or landing-places marked by the Watermen's Company, they should erect equally convenient stairs or landing-places in substitution for them:—Held, that the substitution of new stairs or landing-places was not a condition precedent to the removal or disturbance, and that where the conservators had prepared plans for piers which would interfere with such old stairs without shewing any adequate provision in substitution for them, the Court would not assume that the duty would be neglected, and would not interfere, at the suit of the Attorney General, to restrain the works until proper substitutes should be provided for the old stairs. Ibid.

The statute contained in section 179. a saving of all rights to which any owners or occupiers of any lands on the banks of the river, including the banks thereof, were by law entitled:—Held, that the right of access to a wharf was a private right within this saving; but that a pier which rendered the approach to a wharf less convenient without rendering access impossible, was an interference, not with the private right of access, but with the public right of navigation, enjoyed by the wharf-owner in common with the rest of the public, and that such right was not among those comprised in the statutory saving. Ibid.

Where a public body are entrusted by act of parliament with a duty of executing certain works, this Court will not in general receive independent evidence to shew that they are not carrying on those works in the best manner. *Crossman* v. *the Bristol and South Wales Union Rail. Co.*, 1 Hem. & M. 531.

On questions as to the extent of the authority of an agent, the same rules of law and equity apply to boards and public companies as to individuals. *Thorn* v. *the Commissioners of Public Works*, 32 Beav. 490.

## PUBLIC FUNDS.

[Further facilities given to the holders of the public stocks by 26 Vict. c. 28.]

## PUBLIC HEALTH AND LOCAL GOVERNMENT ACTS.

[See RATE.]

[The Local Government Act, 1858, amended by 24 & 25 Vict. c. 61.—The Local Government Act, amended by "The Local Government Act Amendment Act, 1863" (26 Vict. c. 17).]



(A) ADOPTION OF THE ACT.

The 14th section of "The Local Government Act, 1858," applies, not only to a place having a defined

boundary of its own, but also to a place which has petitioned and had its boundaries settled by an order of the Secretary of State under section 16; and such latter place, therefore, cannot adopt the act without the previous refusal of the "greater" place, within the limits of which it is situate, to adopt the act. *Ex parte the Matlock Bath District*, 31 Law J. Rep. (N.S.) Q.B. 177; 2 Best & S. 543.

(B) CONSTRUCTION OF THE ACTS.

On the trial of an indictment framed on the statute 24 & 25 Vict. c. 61. s. 28, for bringing forward a house in a street beyond the front wall of the houses on either side, without the consent of the local board of health, it was proved, that a house surrounded by a garden alongside a highway had been so brought forward by the defendant; that alongside the same highway there were other houses in gardens separated from each other by their respective gardens, and standing irregularly and at different distances from the highway:—Held, that it was a question of fact for the jury whether the houses formed a street. In order to constitute a street there must be a row of houses sufficiently continuous and sufficiently proximate to one another.—*Semble*, that a set of detached houses not being in a continuous line, but some facing one way and some another, and having no appearance of uniformity, is not a street within the above-mentioned act of parliament. *R.* v. *Fullford*, 33 Law J. Rep. (N.S.) M.C. 122; 1 L. & C. 403.

The 72nd section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), required certain notices to be given to the local board of health before the laying out, making, or building upon, any new street. This provision is repealed by the Local Government Act, 1858 (21 & 22 Vict. c. 98), except (section 9.) as to "proceedings, matters, and things respectively begun or made" under any section of the former act.—*Semble*, that, where the proper notices had been given and plans lodged under the Public Health Act, this was a "matter or thing begun or made" within section 9. of the Local Government Act, although little or nothing appeared to have been done towards the formation of the streets of which notice had been given. *Felkin* v. *Berridge*, 15 Com. B. Rep. N.S. 257.

(C) RIGHTS AND LIABILITIES OF LOCAL BOARDS GENERALLY.

Works were executed in a street in the district of L, and the expenses charged by the local board of health on the adjoining owners, of whom the respondent was one, under the powers conferred by the Public Health Act, 1848. The respondent, being dissatisfied with the decision of the local board as to the amount due from her, appealed to a Secretary of State under section 65. of the Local Government Act, 1858, who ordered her to pay a less sum than that claimed by the local board "in full of all demands":—Held, that the local board were not entitled under section 62. of the last-mentioned act to claim any further sum for interest than that awarded by the Secretary of State, whose order was conclusive in respect of all claims by the local board upon the respondent. Held, also, per *Byles, J.*, and, *semble*, by the rest of the Court, that interest, being in the nature of damages, did not run under section 65. until the right sum had been demanded by the local board. *Wallington* v. *Wilkes*, 33 Law J. Rep. (N.S.) M.C. 233; 16 Com. B. Rep. N.S. 797.

The corporation of P, in addition to the ordinary functions of a municipal corporation, performed those of managers of baths and washhouses under the Baths and Washhouses Act, 1846, and also those of a local board of health under the Public Health Act, 1848, and kept at the plaintiff's bank three separate accounts, corresponding to these three classes of transactions. At the time of the plaintiff's suspending payment, there was due to the defendants on the account of the municipal affairs of the corporation a large sum of money, and there was due from the plaintiff to the defendants, in respect of the local board of health account, a similar sum:—Held, that the defendants might set off these claims one against the other, inasmuch as though the accounts were separate, the defendants were debtors in the one and creditors in the other, and in the same right. *Pedder* v. *the Mayor of Preston*, 31 Law J. Rep. (N.S.) C.P. 291; 12 Com. B. Rep. N.S. 535.

A corporation, being lords of a market and owners of the soil, are entitled at common law to remove the market; but, where the corporation, acting as a local board, take steps under the statute to set up a market in a new place, they can only act under the powers and subject to the provisoes of the statute, and are not entitled to fall back upon their common law right. Whether the immemorial privilege of householders of erecting and hiring out stalls in front of houses in a market-place is a right protected by the proviso in the 50th section of the Local Government Act—*quære*. *Semble*, the setting up of a new market under the statute at a short distance from, and in lieu of an ancient market, is an establishment of a market within the 50th section and not a mere removal. *Ellis* v. *the Corporation of Bridgnorth*, 2 Jo. & H. 67.

A local board of health, having thought fit to execute certain works in pursuance of the Public Health Act, 1848 (11 & 12 Vict. c. 63), made a contract with the plaintiff to do the actual work for them:—"the work to be done within four calendar months after the signing of the contract, and the contractor to be paid for the work when the money is collected from the owners of the adjacent property." The local board had, unintentionally, given bad notices, and therefore were unable to collect the money from the owners. The plaintiff, having done the work contracted for, brought an action against the local board for the amount due to him by the contract:—Held, that he was entitled to recover, as an undertaking must be implied upon the part of the local board, that they were in a position to collect the money from the owners, and pay it over to him. *Worthington* v. *Sudlow*, 31 Law J. Rep. (N.S.) Q.B. 131; 2 Best & S. 508.

(D) PURCHASE OF LAND.

A provisional order of a Secretary of State empowering a local board to put in force the Lands Clauses Consolidation Act, with respect to the purchase of land, has no validity until it has been confirmed by act of parliament, and cannot be brought up by *certiorari* in order that it may be quashed. *Frewen* v. *the Local Board of Hastings*, 34 Law J. Rep. (N.S.) Q.B. 159.

(E) Compensation.

By section 73. of 21 & 22 Vict. c. 98. it is provided that nothing in that act shall be construed to authorize any local board to injuriously affect any reservoir, river, or stream, &c., or the supply, quality, or fall of water in any reservoir, river, stream, &c., in cases where any company or individuals would, if the act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, &c. unless such board shall have first obtained the consent in writing of such company or individuals so entitled as aforesaid. T, the lessee of a mill upon the river Skerne, enjoyed, as the representative of an ordinary riparian proprietor, the benefit and advantage of the waters of the river for the working of the mill. For the purpose of flushing sewers made by the board, some of the water was taken away from the river, and thereby the working of the mill was stopped. During the construction of one of the sewers, some of the water of the river, and also some underground springs, which would otherwise have percolated into the river, oozed into the sewer, and thus T lost the enjoyment of such quantity of water. By reason also of the making of the sewers, T lost the use of certain surface drainage water, which before had been accustomed to flow into the river. No consent in writing had been obtained from T:—Held, that assuming that T had sustained injuries by the construction and continuance of these sewers, the board had injuriously affected the river and the supply of water therein, within the meaning of section 73, and that the board having acted illegally in doing so, the claim of T was a ground of action, and not the subject of compensation. *R.* v. *the Darlington Local Board*, 33 Law J. Rep. (N.S.) Q.B. 305; 5 Best & S. 515.

(F) By-laws.

The Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 34. empowers local boards to make by-laws with respect *(inter alia)* to the level, width and construction of new streets, and to provide for the observance of the same by enacting therein such provisions as they think necessary as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such by-laws; provided always, that no such by-law shall affect any building erected before the date of the constitution of the district; and section 35. enacts that, "when any house or building has been taken down in order to be rebuilt or altered, the local board may prescribe the line in which any house or building to be hereafter built shall be erected, and the same shall be erected in accordance therewith; and the local board shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back," the compensation to be settled under "the Lands Clauses Consolidation Act, 1845." A by-law of a local board required notices to be given of proposed new works or buildings within certain times, and provided that if any owner or person constructed any works, or did or omitted to do any act or comply with any requirement of the local board, or should make any alteration in any works after they had been completed, whether in new or existing buildings, contrary to the by-laws, the local board might cause such work to be removed, altered or pulled down, or otherwise dealt with as the case might require:—Held, that the by-law was invalid as exceeding the authority of the act. *Brown* v. *the Local Board of Holyhead*, 32 Law J. Rep. (N.S.) Exch. 25; 1 Hurls. & C. 601.

A by-law made by a local board of health, imposing continuing penalties on any person who shall construct any works or do, or omit to do any act, or to comply with any requirement of the board, or shall make any alteration or deviation in any plan approved by the board, whether in new or existing buildings, contrary to the provisions therein contained, or shall do any act, matter, or thing contrary to the by-laws made under the authority of 21 & 22 Vict. c. 98. s. 34, or shall omit, neglect, or fail to perform any of the works, matters or things required by such by-laws, and empowering the board to remove, alter, pull down, or otherwise deal with such work as the case may require, is invalid, as exceeding the authority given by the Local Government Act. *Young* v. *Edwards*, 33 Law J. Rep. (N.S.) M.C. 227.

(G) Buildings in Towns.

The 11th by-law of a local board of health made pursuant to the Local Government Act, 21 & 22 Vict. c. 98. s. 34, directed that "every building to be erected and used as a dwelling-house shall have an open space exclusively belonging thereto to an extent of one-third of the entire area of the ground on which the dwelling-house shall stand." The by-laws also, under a general heading of "width and level of new streets," provided for the width of new streets, dividing them into front, cross and back streets; and a subsequent separate paragraph, but under the same general heading, stipulated that "no dwelling-house should be built immediately adjoining any back street." By the 21 & 22 Vict. c. 98. s. 34. no by-law shall affect any building erected before the date of the constitution of the district, but the re-erecting of any building pulled down to or below the ground-floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, shall be considered the erection of a new building. The proprietor of a house, yard and coach-house and stables erected before the constitution of a board of health, subsequently pulled down the coach-house and stables below the ground-floor and erected a building partly upon their site and partly upon the yard, with rooms over, the ground-floor opening into the yard, and also into an old back street immediately adjoining, but the access to the rooms above was by a covered way from the old house, the object of the new building being to increase the accommodation of the old house, which had been converted into an hotel. Treating the old and new buildings either as one building or as separate buildings, the space left in the yard was insufficient within the 11th by-law:—Held, that there was no violation of the by-laws either in respect of an insufficiency of space, or the building of a dwelling-house adjoining a back street; as, first, the facts shewed that there was no new building erected within the statute and by-laws, but only an addition to the old building, and secondly, the words "back street" must be read as "new back street."

*Semble* (per *Martin, B.*), the by-laws might have been lawfully framed so as to include then existing buildings. *Shiel* v. *the Mayor of Sunderland*, 30 Law J. Rep. (N.S.) M.C. 215; 6 Hurls. & N. 796.

Under a by-law, which requires that in the rear or at the side of every building there should be left an open space of not less than 100 feet, the distance across which, or between such building and the opposite property at the rear or side, shall be 25 feet, the distance of 25 feet is to be measured at any and every part of the building to the opposite property; and it is not sufficient that in some part of the building there is a distance of 25 feet between it and the opposite property. *Anderton* v. *the Birkenhead Commissioners*, 32 Law J. Rep. (N.S.) M.C. 137; 13 Com. B. Rep. N.S. 603.

The owner of a factory, being desirous of rebuilding his premises, submitted the plans, &c. to a committee to whom the town council, also the local board of health, delegated their powers, and, the plans having been approved, pulled down the factory and proceeded to rebuild it according to such plans. The town council, under the 35th section of the Local Government Act, 1858, relating to buildings to be erected, having required the plaintiff to set back his premises, the Court restrained them by injunction from interfering with the erection of the factory according to the approved plans. *Slee* v. *the Corporation of Bradford*, 4 Giff. 262.

The 34th section of the Local Government Act, 1858, which, after repealing the previous provisions on the subject in the Public Health Act, 1848, enacts that the local board may make by-laws, amongst other things, "with respect to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation,—provided always that no such by-law shall affect any building erected before the date of the constitution of the district,"—does not authorize the local board to make such a by-law so as to affect premises erected prior to 1853, when the district was formed. *Burgess* v. *Peacock*, 16 Com. B. Rep. N.S. 624.

### (H) Paving and Levelling Streets.

In 1825, by a local act for improving the town of L, certain commissioners were appointed, who were authorized to repair all streets and highways in such town; and it was enacted that when any new streets should be laid out, and the footways and carriageways thereof should be effectually paved and put in good order to the satisfaction of the commissioners, then, on the application of the owner of the soil, the commissioners were empowered to declare the same to be public highways; and after such declaration, such new streets were to be deemed to be public highways, and were to be repaired by the commissioners as the other parts of the streets within such town. The act gave them power to make rates upon the occupiers of buildings within the town, and exonerated every person who was so assessed under the act from the performance of statute duty for the repairs of the public highways within the town. In 1830 (before the General Highway Act, 5 & 6 Will. 4. c. 50), a new street, called Springfield Street, was laid out in the town of L by the owner of the soil, who then opened and dedicated it to the public; and the same has ever since been used by the public as a common highway; but the same was never declared to be or adopted by the commissioners as a public highway. In 1852 the Public Health Act, 11 & 12 Vict. c. 63, was applied to and put in force in L; and by section 69. of that act, the local board may require the owners of premises abutting on any street, not being a highway (which by the statute 15 & 16 Vict. c. 42. s. 13. is interpreted to mean a highway repairable by the inhabitants at large), to pave the same to the satisfaction of such local board. The local board having, under the authority of this enactment, ordered the owners of premises abutting on Springfield Street to pave it,—Held, that such order was a lawful one, inasmuch as such street was not a highway repairable by the inhabitants at large. *Willes* v. *Wallington* (Ex. Ch.), 32 Law J. Rep. (N.S.) C.P. 86; 13 Com. B. Rep. N.S. 865—affirming the judgment below, see *Wallington* v. *White*, 30 Law J. Rep. (N.S.) M.C. 209; 10 Com. B. Rep. N.S. 128.

Under the 69th section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), the expense of sewering and paving a street must be apportioned among the owners or occupiers of all premises fronting, adjoining, or abutting on the street, whether the premises have direct access to the street or not, and in proportion to the linear frontage of the premises to the street, and irrespective of the width of the street. *R.* v. *the Newport Local Board*, 32 Law J. Rep. (N.S.) M.C. 97; 3 Best & S. 341.

By section 69. of 11 & 12 Vict. c. 63. if any street, not being a highway, be not levelled, paved, &c., to the satisfaction of the local board of health, notice may be given requiring the owners or occupiers of houses fronting upon the same street to level, pave, &c., and in default of their doing so, the local board shall do it if they please, and may recover the expense from the owners, &c.:—Held, that the power given by this section only attaches where the particular street requires to be levelled, &c., looking at it as an isolated street; and therefore that where the local board had required the owner of a house to level the part of the street upon which his house fronted so as to make it on a level with other streets, they could not compel him to pay the money, which they had expended, upon his refusal to do the work. *Cary* v. *the Local Board of Kingston-upon-Hull*, 34 Law J. Rep. (N.S.) M.C. 7.

### (I) Sewers.

A natural stream, supplied by natural and artificial drainage of cultivated soil belonging to private individuals, was cleared out and partially widened and deepened by commissioners acting under a private inclosure act, powers being given to them to do so at the expense of the proprietors. In its passage to the river into which it ultimately flowed, it passed through a town and received the drainage of two or three inhabited houses. *Semble*, that this stream was not a sewer within the meaning of the Public Health Act, 1848. But even if it were so,—Held, that it came within the exceptions in section 43, and that it was not vested in the local board of health, and that they were not liable to cleanse and repair it. *Quære*, whether section 43. includes sewers or streams which are private property. *R.* v. *the Local Board of Godmanchester*, 34 Law J. Rep. (N.S.) Q.B. 13; 5 Best & S. 886.

### (K) Service of Notices.

By section 69. of the Public Health Act, 1848 (11 & 12 Vict. c. 63), the local board of health may, when any street not being a highway is not sewered, &c. to their satisfaction, give notice to the owners or occupiers of premises fronting the street, requiring them to sewer, &c. within a certain time; and in the event of the notice not being complied with, the board may execute the works and recover the expenses from the owners in default. Section 2. of the same act defines "owner" to be "the person for the time being receiving the rack-rent of the premises on his own account or as agent or trustee for another, or who would receive the same if the premises were let at a rack-rent." Section 62. of the Local Government Act, 1858 (21 & 22 Vict. c. 98), enacts that, where the local board have incurred expenses, for the repayment whereof the owner of the premises is made liable, the expenses may be recovered from the person who is the owner when the works are completed:—Held, that the service of a notice under the 69th section of the Public Health Act, 1848, on a person *de facto* receiving the rent, is a service on the "owner" within the meaning of the 2nd section of that act. *Peek* v. *the Waterloo and Seaforth Local Board of Health*, 33 Law J. Rep. (N.S.) M.C. 11; 2 Hurls. & C. 709.

By the 69th section of the 11 & 12 Vict. c. 63, a local board of health may, when any street, not being a highway, is not sewered, &c. to their satisfaction, give notice to the owners or occupiers of premises fronting the street, requiring them to sewer, &c. within a certain time, and, in the event of the notice not being complied with, the board may execute the works and recover the expenses from the owners in default. Section 150. provides, that in all cases in which any notice is required by the act to be given to the owner or occupier of any premises, it shall be sufficient to address the notice to the "owner" or "occupier" of the premises (naming them), and the notice shall be served either personally or by delivery to some inmate of the place of abode:—Held, that service of a notice under the 69th section at the owner's place of business by delivering and reading it to his clerk, is a good service even under the 150th section. Per *Pollock, C.B.*—The 150th section is in aid of the service of notices, and applies where the name of the owner or occupier is unknown, in which it prescribes a particular mode of delivery. *Mason* v. *Bibby*, 33 Law J. Rep. (N.S.) M.C. 105; 2 Hurls. & C. 881.

### (L) Arbitration.

The appointment of an umpire by the two arbitrators, under the Public Health Act, 1848 (11 & 12 Vict. c. 63.) is valid, although made after the twenty-one days, limited by section 125. for the arbitrators to make their award, had elapsed without their having enlarged the time.—So held, on the authority of *Bradshaw's case*, decided on similar enactments in the Lands Clauses Consolidation Act, 1845. *Holdsworth* v. *Barsham*, 31 Law J. Rep. (N.S.) Q.B. 145; 2 Best & S. 480.

Where, under a submission which can be made a rule of Court, the costs are in the discretion of the arbitrator, and he awards the costs generally to be paid by one of the parties, the award is good, inasmuch as the amount of costs can be ascertained by the taxation of the proper officer; but until the amount has been so ascertained an action cannot be brought to recover the costs. So held by *Cockburn, C.J.*, *Blackburn, J.* and *Mellor, J.*; *Crompton, J.* doubting. Ibid.

If arbitrators appointed under the Public Health Act, 1848, allow twenty-one days from the last of their appointments to expire without entering upon the reference or making an award, they may nevertheless, if called upon by the parties afterwards, make a valid appointment of an umpire at any time before the end of three months from the date of the last appointment. *Holdsworth* v. *Wilson* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 289; 4 Best & S. 1.

Where an umpire, on a reference under the before-mentioned statute, orders one party to pay the costs of the reference, not fixing the amount, the award is perfectly valid, and the successful party may commence an action for the costs, without first having had the amount of the costs settled by the Master on taxation. Ibid.

A dispute having arisen between the plaintiff and the local board of health as to the compensation due to the plaintiff in respect of damage done to his property by certain works executed by the board, arbitrators were appointed by each party respectively to determine the amount. No umpire was appointed by the arbitrators within seven days as directed by section 125. of the Public Health Act, 1848, and the plaintiff therefore applied under that section to the Quarter Sessions to appoint one. The Court named one J as umpire, but as his consent to act had not then been obtained, no minute of the order was made by the clerk of the peace, and no formal order was drawn up. The plaintiff, treating this first application as a nullity, applied again at the next Quarter Sessions, and having in the mean time ascertained that J consented to act, obtained a regular order for his appointment as umpire. The board of health opposed both applications. The umpire, under section 125, ought to make his award in twenty-one days, or within such extended time "as shall have been duly appointed by him for that purpose," provided that, under any circumstances, the award shall be made within three months of the umpire being appointed. The umpire did not make his award within the time specified, or make any extension. He, however, after the expiration of the twenty-one days, appointed a day for going into the matter. Both parties attended, but the board protested against the umpire going on with the reference, on two grounds: first, that the appointment at the first sessions was the only valid one, in which case the award could not be made within the three months; or secondly, that, if the second appointment were valid, the power of the umpire had ceased, because the twenty-one days had elapsed, and the time had not been extended. The umpire proceeded notwithstanding, and counsel for the board, under protest, attended all through the reference, cross-examining the witnesses for the plaintiff, and calling witnesses on behalf of the board. The umpire made his award in favour of the plaintiffs:—Held, in an action on the award, that there was no appointment of an umpire at the first sessions, and that the appointment at the second sessions was valid. Held also, that though the board had a valid objection on

account of the umpire not having extended the time within the twenty-one days, they had by proceeding with the reference waived that objection, notwithstanding their protest. *Ringland* v. *Lowndes*, 33 Law J. Rep. (N.S.) C.P. 25; 15 Com. B. Rep. N.S. 173.

Where the parties are before the right tribunal, and the only impediment to proceeding is one of form, that is waived if the party who raises the objection takes part in the inquiry. Ibid.

The plaintiff in his declaration prayed a writ of *mandamus* to compel the board to levy a rate and pay him the amount awarded. The damage for which compensation was claimed occurred more than six months before the application, but the award was made within six months. The board resisted this, on the ground that the expenses for which it was sought to compel them to levy the rate had not been incurred within six months, within the meaning of section 89. of the Public Health Act, 1848:—Held, that the plaintiff was entitled to his writ, for that the six months must be reckoned from the time that the award was made. Ibid.

It is no answer to an application for a writ of *mandamus* to levy a rate in such a case that the board may possibly have funds to pay the amount required, and that a fresh rate may not be necessary. Ibid.

By section 69. of the Public Health Act, 1848, the local board may, by notice in writing to the owners of premises fronting certain streets "require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice, and if such notice be not complied with, the local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case)," in the manner provided by the act:—Held, that this section only authorizes an arbitration in respect of the proportion to be borne by any such defaulting owner, and not in respect of any question as to the expenses being reasonable or properly incurred by the board. *Bayley* v. *Wilkinson*, 33 Law J. Rep. (N.S.) M.C. 161; 16 Com. B. Rep. N.S. 161.

A notice to pave given under this section did not specify the breadth to be paved, or any of the particulars necessary to enable the party to do the work required, but contained a statement at the foot of it that particulars of the necessary works might be obtained from the borough surveyor's office, and it appeared that plans and specifications were lodged at that office and were seen there by the party on whom the notice had been served:—Held, that in the absence of evidence that such plans and specifications did not give ample information of the work to be done, the notice was sufficient. Ibid.

The authority of an umpire appointed under the Public Health Act, 1848, to make an award, endures only twenty-one days from the date of his appointment, unless he enlarge the time, which he may and ought to do during his twenty-one days, notwithstanding the arbitrator's time has not expired. The Court has no power under the Common Law Procedure Act, 1854, section 15, or otherwise, to enlarge the time in arbitrations under the Public Health Act. *Kellett* v. *the Local Board of Tranmere*, 34 Law J. Rep. (N.S.) Q.B. 87.

### (M) Jurisdiction of Justices.

By section 54. of the 11 & 12 Vict. c. 63. the local board of health is authorized to give notices requiring persons whose drains, privies, &c. are in bad condition, to do such works as are necessary for remedying the same; and such persons are liable to certain penalties in case the notices are not complied with:—Held, that the power to determine the nature and extent of the works required to be done is vested in the local board; and that when proceedings are taken before Justices to recover penalties for non-compliance with the notices, such Justices have no power to review the determination of the board—*Blackburn, J. hæsitante.* *Hargreaves* v. *Taylor*, 32 Law J. Rep. (N.S.) M.C. 111; 3 Best & S. 613.

The 2nd section of the Public Health Act, 1848, defines a Justice to be "a Justice acting for the place in which the matter requiring the cognizance of the Justice arises":—Held, that this, in a county, means a Justice acting within the petty sessional division in which the matter arises; and therefore that Justices of the county, not acting within the petty sessional division of it in which the offence under the 148th section of the act had been committed, had no jurisdiction to convict under the 129th section. *R.* v. *Brodhurst*, 32 Law J. Rep. (N.S.) M.C. 168.

### (N) Information; Limitation of Six Months under Jervis's Act.

By section 63. of 21 & 22 Vict. c. 98. "The Local Government Act, 1858"), when a local board of health has incurred expenses, for the repayment of which the owner of premises is liable, and such expenses have been settled and apportioned by the surveyors, such apportionment shall be binding and conclusive upon such owner, unless within the expiration of three months from the time of notice being given by the local board, of the amount of the proportion so settled, he shall, by written notice, dispute the same. By section 11. of 11 & 12 Vict. c. 63, when no time is specially limited for making a complaint or laying an information, in the act or acts of parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose:—Held, that this latter provision applies to such expenses, the amount of which has been apportioned as above; but that the six months do not commence till after the expiration of the three months during which the appointment may be disputed. *Jacomb* v. *Dodgson*, 32 Law J. Rep. (N.S.) M.C. 113; 3 Best & S. 461.

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## PUBLIC HOUSE CLOSING.

[The "Public House Closing Act, 1864" (27 & 28 Vict. c. 64), amended by 28 & 29 Vict. c. 77.]

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## PUBLIC WORKS.

[The Commissioners of Her Majesty's Works empowered to acquire additional land for the purposes of the Public Offices Extension Act, 1859, by 24 & 25 Vict. c. 33.—The execution of Public Works in certain manufacturing districts facilitated, &c. by 26 & 27 Vict. c. 70.—The powers of the Public Works (manufacturing districts) Act, 1863, extended by 27 & 28 Vict. c. 104.]

## QUEEN'S REMEMBRANCER'S ACT.

By the Queen's Remembrancer's Act, the 22 & 23 Vict. c. 21. s. 26, it is enacted, that "it shall be lawful for the Lord Chief Baron and two or more Barons of the Court of Exchequer from time to time to make all such Rules and Orders, as to the process, practice and mode of pleading on the Revenue side of the Court," &c., "as may seem to them necessary and proper; and also from time to time, by any such Rule or Order, to extend, apply, or adapt any of the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and any of the Rules of pleading and practice on the Plea side of the said Court, to the Revenue side of the said Court, as may seem to them expedient for making the process, practice and mode of pleading on the Revenue side of the said Court as nearly as may be uniform with the process, practice and mode of pleading on the Plea side of such Court." It having been held, by the majority of the Court of Exchequer Chamber, that the Chief Baron and Barons of the Exchequer had no power under the provisions of this section to make rules granting, in Revenue cases, rights of appeal to the Exchequer Chamber and House of Lords similar to those given in ordinary cases by sections 34. and 35. of the Common Law Procedure Act, 1854; and that, under such Rules, no appeal lay to the Exchequer Chamber against the decision of the Court of Exchequer on a motion for a new trial, in the case of an information for a forfeiture of a ship, filed, by the Attorney General, under the 59 Geo. 3. c. 69. s. 7: such decision was affirmed, on appeal, by the House of Lords (*Lord Cranworth* and *Lord Wensleydale* dissenting). *The Attorney General* v. *Sillem and others claiming the "Alexandra"* (House of Lords), 33 Law J. Rep. (N.S.) Exch. 209; 10 H.L. Cas. 704.

*Semble*—Rules or Orders made under the provisions of the Queen's Remembrancer's Act will apply to proceedings actually pending at the time of the making of such Rules and Orders. Ibid.

## QUO WARRANTO.

### *Corporate Office.*

A *quo warranto* information alleged that there was a town called Bala, and that the defendant without right exercised the office of mayor of the town, and, together with two other persons, the powers and privileges of a body corporate, by the name and description of the Mayor and Bailiffs of the Borough of Bala. The defendant let judgment go by default, whereupon judgment of ouster was entered up with costs to the relator:—Held, that the relator was entitled to costs under the 9 Ann. c. 20. s. 5, as on this record it must be taken against the defendant that the office which he was charged with assuming was a corporate office in a corporate place. *Lloyd* v. *the Queen* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 209; 2 Best & S. 656.

*Quære*—Whether the statute does not extend to any case in which a defendant is charged with the illegal assumption of a corporate office, as well where the claim is to a fictitious office as where the office really exists. Ibid.

### *Venue.*

An information in the nature of a *quo warranto* was filed against C for exercising the office of town councillor of Liverpool. The venue was "Liverpool." After issue joined a suggestion was entered on the record that the trial "might be more conveniently had" in Middlesex than in Lancashire. The defendant appeared at the trial, and a verdict passed against him:—Held, that he had waived any objection he might have had to the suggestion as irregular, and that it must now be treated as a declaration that a trial could not be fairly had in Lancashire, and the judgment was affirmed. *Clerk* v. *the Queen* (House of Lords), 31 Law J. Rep. (N.S.) Q.B. 175; 9 H.L. Cas. 184.

### *Relator's Interest.*

A rule for a *quo warranto* in respect of the election of a town councillor of the borough of Bolton,—obtained upon an affidavit of a proposed relator which commenced, "I, A B, of Bolton, tailor," but did not shew that he was a burgess, or subject to the jurisdiction of the town council,—was discharged on the ground that the proposed relator did not make out that he had a sufficient interest in the election. *R.* v. *Thirlwind*, 33 Law J. Rep. (N.S.) Q.B. 171.

## RAILWAY.

[Place of Business. See INFERIOR COURT (B) (*a*). And see CARRIER—COMPANY—LANDS CLAUSES CONSOLIDATION ACT.]

[The obtaining of powers for the construction of railways facilitated in certain cases by 27 & 28 Vict. c. 121.—The obtaining of further powers by railway companies facilitated in certain cases by 27 & 28 Vict. c. 120.]

(A) CONSTRUCTION OF ACTS OF PARLIAMENT.
(B) APPLICATION TO PARLIAMENT.
(C) DEPOSIT AND PAYMENT INTO COURT.
(D) POWERS.
  (*a*) *Excess of.*
  (*b*) *Compulsory.*
  (*c*) *Leasing the Line.*
  (*d*) *Appropriation of Income and issuing Bonds.*
(E) RIGHTS OF OWNERS OF PRIVATE LINES.
  (*a*) *To enter Main Line from Private Branches.*
  (*b*) *Right to take Toll.*
(F) RAILWAYS CLAUSES CONSOLIDATION ACT.
  (*a*) *User of and Interference with Roads.*
  (*b*) *Bridges and Level Crossings.*
  (*c*) *Tunnels.*
  (*d*) *Accommodation Works.*

(G) OFFENCES AND INFRINGEMENT OF REGULATIONS.

(A) CONSTRUCTION OF ACTS OF PARLIAMENT.

The words "the railway" found in an act passed to amend previous Railway Acts of the same company, and to authorize the making of a junction railway company, construed to mean the original line, its branches and the new junction railway, and not confined to the junction railway alone. *The Bristol and Exeter Rail. Co.* v. *Garton,* 30 Law J. Rep. (N.S.) Exch. 241; 8 H.L. Cas. 477.

(B) APPLICATION TO PARLIAMENT.

The M Railway Company entered into an agreement under their common seal with the N W Company, by which they covenanted that they would concur in and use their utmost reasonable endeavours to ensure the success of any application to parliament by the N W Company for powers to extend their line, and to raise the additional capital necessary, and to authorize the M Company to contribute one-third of such capital, and to raise additional capital of the M Company for that purpose. On a bill for an injunction being filed by certain shareholders in the M Company,—Held, that a company could not covenant not to oppose a bill which if passed would deprive the shareholders of the protection afforded by the Wharncliffe order. *Maunsell* v. *the Midland Great Western (of Ireland) Rail. Co.,* 32 Law J. Rep. (N.S.) Chanc. 513; 1 Hem. & M. 130.

*Semble*—Though a public company may apply for an act of parliament, it cannot legally covenant with a third party to do so, since it would thereby render its funds liable in the event of its not applying. Ibid.

Shareholders in a company, the directors of which have affixed the company's seal to an agreement, some of the provisions whereof are illegal, are entitled to have the agreement set aside so far as it is *ultra vires,* leaving the operation of the rest of the agreement to be adjusted by litigation or otherwise between the contracting parties. Ibid.

(C) DEPOSIT AND PAYMENT INTO COURT.

Where a bill is introduced into parliament for the construction of several railways, and the money is paid into court under the standing orders of parliament, and afterwards the bill is withdrawn as to some of the railways, the Court will not order a proportional part of the fund in respect of the abandoned railways to be paid out to the promoters, as such withdrawal is not within the meaning of the 5th section of the 9 & 10 Vict. c. 20. *In re the Aberystwith Rail. Co.,* 30 Law J. Rep. (N.S.) Chanc. 674; 3 De Gex, F. & J. 201.

It is not contrary to the policy of the act of parliament (9 & 10 Vict. c. 20), providing for a deposit in respect of the estimated cost of works for which parliamentary authority is sought, to make the deposit with borrowed funds. *Scott* v. *Oakeley,* 33 Law J. Rep. (N.S.) Chanc. 612; 33 Beav. 501.

(D) POWERS.

(*a*) *Excess of.*

The G W Railway Company were empowered to take shares in the M Railway Company, and accordingly took shares to the full extent of their powers, in the names of trustees, who were registered as the holders of such shares. Afterwards the M Railway Company were authorized to extend their railway, and to create new shares; and they resolved at a general meeting to allot the new shares rateably amongst the proprietors of the original shares. The G W Railway Company claimed to be entitled to a proportion of these shares, and filed a bill to enforce their claim, the trustees being joined as co-plaintiffs:—Held, by one of the Vice Chancellors, on demurrer, that it was *ultra vires* for the G W Railway Company to take any of the new shares. That the M Railway Company could not be compelled to allot shares either to the G W Railway Company or to their trustees, as payment by the G W Railway Company of calls on such shares would involve a breach of trust; and that the bill being framed so as to assert a claim on the part of the G W Railway Company alone, any possible title in their co-plaintiffs, the trustees, to have the shares allotted to themselves individually, could not be relied upon for the purpose of sustaining the bill. *The Great Western Rail. Co.* v. *the Metropolitan Rail. Co.,* 32 Law J. Rep. (N.S.) Chanc. 382.

Also, that where a public company is engaging in a transaction which is *ultra vires,* the Court, in adjudicating upon that transaction, can only deal with the law as it exists, and will not take into consideration the possibility of further powers being obtained by the company. Ibid.

On appeal, the Lords Justices considered that the points involved were of too great difficulty to be decided conveniently upon demurrer; and they overruled the demurrer, making the costs on both sides costs in the cause. Ibid.

(*b*) *Compulsory.*

A railway company required a landowner to sell them certain lands, which they were empowered by their act to take for the purposes of their railway. Their engineer stated that they intended to use the land for the purpose of depositing spoil and materials during the construction of the railway, and that it was uncertain whether they would require the land after the completion of the railway. A motion by the landowner for an injunction to restrain the company from taking the land was refused. *Lund* v. *the Midland Rail. Co.,* 34 Law J. Rep. (N.S.) Chanc. 276.

Injunction granted at the instance of a railway company to restrain a landowner from selling property comprised in a notice to treat for the purchase thereof served upon him by the company. *The Metropolitan Rail. Co.* v. *Woodhouse,* 34 Law J. Rep. (N.S.) Chanc. 297.

A railway company were by their special act authorized to take such of certain lands as they might think necessary for the purposes of their act. Upon a bill by a landowner seeking to restrain the company from taking certain portions of land apparently not needed, the company relied upon an affidavit of their engineer, to the effect simply that the land "was or would be required for the purposes of the act":—Held, that the company had no right to take the land unless *bona fide* wanted; that they could not by the simple assertion of their engineer deprive the Court of the means of forming a judgment upon the question of *bona fides;* and, the company having

declined to adduce further evidence as to the purpose for which the land was needed, an injunction to restrain them from taking it was awarded. *Flower* v. *the London, Brighton and South Coast Rail. Co.*, 34 Law J. Rep. (N.S.) Chanc. 540; 2 Dr. & S. 330.

An agreement, by a landowner, with the promoters of a railway company, that in the event of their obtaining an act of parliament he will sell them such land as they require at a fixed rate, is binding, although the company has no existence at the time of the contract; and it is no objection on the ground of want of mutuality that the company are not bound to take the land. *The Bedford and Cambridge Rail. Co.* v. *Stanley*, 32 Law J. Rep. (N.S.) Chanc. 60; 2 Jo. & H. 746.

If, however, the company exercise their compulsory powers, and take proceedings under the sections in the Lands Clauses Consolidation Act relating to the purchase of lands otherwise than by agreement, they cannot afterwards enforce the agreement. Ibid.

(*c*) *Leasing the Line.*

A railway company entered into an agreement to lease their line to another company. The agreement contained provisions which were legal and others which were *ultra vires*, but an application was to be made to parliament for power to carry out such provisions as should be *ultra vires*:—Held, that as the agreement provided for a number of things to be done, which were all for the purpose of accomplishing a certain object that was *ultra vires*, the parties had no right, by virtue of that agreement, until they had obtained the authority of parliament, to do even those acts which independently of the agreement they did not require the authority of parliament to do. The Court, in granting an injunction to this extent, refused to restrain two directors, appointed under the agreement, from acting, on the ground that the shareholders had power to remove them, and that their removal might be detrimental to the business of the company. *Hattersley* v. *the Earl of Shelburne*, 31 Law J. Rep. (N.S.) Chanc. 873.

(*d*) *Appropriation of Income and issuing Bonds.*

Money borrowed by directors under powers in their acts is not payable out of the profits of the company; but debts incurred for rails, stations or the like, and debts which would have been paid at the time they were contracted if the company had held funds, are deductions to be made from profits, and are payable before the net profits can be ascertained, and before any division can be made among the shareholders. *Corry* v. *the Londonderry and Enniskillen Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 290; 29 Beav. 263.

Preference shareholders are entitled to arrears of dividends out of future profits, but without interest on the arrears, and such right must prevail against shareholders over whom they have been preferred. Ibid.

A shareholder in the C and C Railway Company filed a bill against the company and the directors, in which it was alleged that the C and C Railway Company having exhausted their borrowing powers had applied to parliament for fresh powers, and while such application was pending issued bonds binding the assets of the company for the purpose of paying a contractor, but the bill did not distinctly shew that the bonds purported to be assignable bonds issued under the powers of the company's acts, or were intended to be sent into the market as such:—Held, upon demurrer, that the Court would not assume that the issuing of such bonds was illegal or a fraud upon the company's act. *White* v. *the Carmarthen and Cardigan Rail. Co.*, 33 Law J. Rep. (N.S.) Chanc. 93; 1 Hem. & M. 787.

(E) RIGHTS OF OWNERS OF PRIVATE LINES.

(*a*) *To enter Main Line from Private Branches.*

By a clause in a railway act similar to the 76th section of the Railways Clauses Act, the owners or occupiers of land adjoining or near the railway might extend on their own lands, or on lands on the sides thereof belonging to the company, any collateral or continuous branch from such lands to communicate with the railway, for the purpose of bringing carriages upon or across the same; but all the openings and communications for that purpose were to be made at such places as might, as far as practicable, be most convenient to all the parties interested, &c. In the year 1839 the plaintiff had laid down such a siding or branch line from a coal wharf of which he was proprietor, and the assent of the company had been given to an opening being made into their line, which had been accordingly made, and was situate near the L station; and from that time till 1857 the plaintiff enjoyed without dispute the benefit of such opening, and a considerable trade in coal had in consequence become established at his wharf. The defendants, the company, used to bring the coal in trucks to the L station. At the junction the trucks were separated from the rest of the train, and an impulse then given to them which was sufficient to send them down to the wharf. In 1857 the defendants established a wharf of their own at L, and gave notice to the plaintiff that they should cease to supply engine-power for the conveyance of coals to his wharf, Part of the wharf was at this time let to N, at a minimum rent or royalty of 200*l.* a year, and a further royalty on all coals above a certain amount brought to the wharf. Another part was let to G on similar terms, and negotiations were going on with H for letting the rest to H on similar terms. On the 1st of October the defendants refused to deliver some trucks coming to N in the usual way, and took them on to their own wharf at L, and put them in a place where he could not get at them, and refused to allow him to bring horses to take them away, and there the trucks remained. They also constantly kept a line of carriages upon the main line in front of the siding, and commenced building a stage there, and this continued for sixteen months and till the plaintiff obtained an injunction to stop it. In consequence thereof, N and G left plaintiff's wharf and went to that of defendants, and H refused to take his share. There were also circumstances tending to shew that these acts were done intentionally and deliberately, and so the jury found. The declaration stated the making of the siding pursuant to the section of the act for the purpose of carrying coal, &c. to the plaintiff's wharf (following the language of the section), the use of it by the plaintiff's tenants for the purposes aforesaid, and that part was in his own hands; that whilst the said branch, &c.

was being used by the plaintiff and his tenants, the defendants obstructed, stopped up and closed the said communication and opening, and prevented, &c. the plaintiff, and the said occupiers, &c. from using the said branch for the purposes aforesaid. The defendants by their pleas did not deny the plaintiff's right, but pleaded not guilty, and, secondly, a traverse of the possession and user alleged:—Held, first, that there was evidence of an obstruction of the plaintiff's right as stated in the declaration. Secondly, that the obstruction was sufficiently permanent to entitle the plaintiff to recover his loss *qua* reversioner. Thirdly, that the rent being paid by way of royalty, the jury might include in the damages the minimum rent which the tenants were to pay. Per *Willes, J.*, though the action was not in trespass the jury might, on the authority of *Emblen* v. *Myers*, give exemplary damages. Per *Byles, J.*, if the plaintiff had been paid by an ordinary rent, and no part of the wharf had been in his own hands, *quære*, whether he could have maintained the action. *Bell* v. *the Midland Rail. Co.*, 30 Law J. Rep. (N.S.) Q.B. 273; 10 Com. B. Rep. N.S. 287.

*(b) Right to take Toll.*

The act authorizing the construction of the defendants' railway declared that nothing therein contained should prevent the owners, lessees or occupiers of lands near the company's railway, from making railways, roads, &c. across the company's railway, and to use such railway, roads, &c. for the benefit of themselves and others to whom they might give leave, and in such way, and for such purposes as they might require; and the company should not be entitled to demand tonnage or compensation for the making of such railway or the passing of goods, persons, horses, carts, &c. along such railway. *Kindersley, V.C.*, agreeing in opinion with *Channell, B.*, decided (contrary to the opinion of *Willes, J.*) that the plaintiff, who was the owner of adjoining lands, was not entitled to use any railway made by him over the defendants' line for the purpose of carrying passengers and goods as a public carrier, charging fares or tolls for the same; but only for purposes connected with the more beneficial use of his own lands or those of others whom he might authorize:—Held, upon appeal, the Lords Justices agreeing in the opinion of *Willes, J.*, that the plaintiff was entitled to use his line of railway as a common railway carrier taking tolls, and the restrictive words of the Vice Chancellor's order were directed to be struck out. *Hughes* v. *the Chester and Holyhead Rail. Co.*, 31 Law J. Rep. (N.S.) Chanc. 97; 3 De Gex, F. & J. 352; 1 Dr. & S. 524.

(F) RAILWAYS CLAUSES CONSOLIDATION ACT.

*(a) User of and Interference with Roads.*

Section 58. of the Railways Clauses Consolidation Act, 1845, provides that if the company shall in the course of making the railway use or interfere with any road, they shall from time to time make good all damage done by them to such road. A railway company used certain roads by the carriage of stone, bricks, timber and other materials over the same, to be used, and which were actually used, in the making of the said railway and works. In the opinion of two Justices, they had thereby done damage to such roads:—Held, that under the above provision they were liable to make good the damage so done, although the materials were really conveyed in the carts of the contractors, or sub-contractors, or of other persons employed by them. *The West Riding and Grimsby Rail. Co.* v. *the Wakefield Board of Health*, 33 Law J. Rep. (N.S.) M.C. 174; 5 Best & S. 478.

A railway company's special act enacted that, subject to the provisions in the Railways Clauses Consolidation Act, 1845, contained in reference to the crossing of roads on a level, it should be lawful for the company in constructing the railway to carry the same on the level across the road following (which was then indicated), provided that the company should erect and maintain a foot-bridge for the use of foot-passengers over the said road, at or near the point of such level crossing. The company proposed to cross the particular road in question not on a level, but to raise the road and build a bridge over it, and carry the line of railway underneath. On a motion for an injunction to restrain the company from so doing, one of the Vice Chancellors was of opinion that upon the construction of the act the words were compulsory, and not merely permissive, and granted the injunction; but, upon appeal, the Lords Justices decided that the words, coupled with the other sections of the act, were permissive merely, and not mandatory, and dissolved the injunction. *The Warden and Assistants of Dover Harbour* v. *the London, Chatham and Dover Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 474; 3 De Gex, F. & J. 559.

The 16th section of the Railways Clauses Consolidation Act authorizes the permanent diversion of public roads, and not only a temporary diversion, for the purpose of constructing a railway, and the Court dismissed a bill filed for an injunction to restrain such diversion. *Phillips* v. *the London, Brighton and South Coast Rail. Co.*, 4 Giff. 46.

*(b) Bridges and Level Crossings.*

By section 13. of the Railways Clauses Consolidation Act, 1845, it is enacted, that where it is intended to carry a railway on an arch or other viaduct as marked on the plans deposited with the clerk of the peace the same shall be made "accordingly"; by section 14. it is enacted that it shall not be lawful for the company to deviate from, or alter the gradients, curves, tunnels or other engineering works described in the plans, except within certain limits and under certain conditions not applicable to viaducts; and by section 49. it is enacted, that every bridge for carrying a railway over a road shall (except where otherwise provided by the special act) be built in conformity with certain regulations, amongst which is one that the width of the arch, if it be over a turnpike-road, shall be such as to leave thereunder a clear space of not less than 35 feet. *The Attorney General* v. *the Tewkesbury and Malvern Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 482; 1 De Gex, J. & S. 423; 4 Giff. 333.

By the plans deposited by a railway company with the clerk of the peace it appeared that the company intended to carry its railway over a turnpike-road by a bridge, the width of the arch of which was such as to leave thereunder a clear space of 45 feet. Subsequently the company proceeded to

erect the bridge so as to leave a clear space of 35 feet only:—Held, by one of the Vice Chancellors, and on appeal, by the Lords Justices, that the company were bound, by the 14th section, to construct the bridge according to the deposited plans, and that the 49th section did not free them from this obligation; and an injunction was therefore granted restraining the company from erecting a bridge otherwise than in accordance with the deposited plans, or so as to leave thereunder a less width than 45 feet. Ibid.

A bridge, forming part of the line of railway itself, is an "engineering work" within the 14th section. Ibid.

The effect of section 47. of the Railways Clauses Consolidation Act, 1845,—which enacts, that if a railway crosses any turnpike or public carriage-road on a level, the company shall erect and maintain sufficient gates across the road on each side of the railway, and shall employ proper persons to open and shut the gates, which shall be kept constantly closed across the road, except during the time when horses, carriages, &c., passing along it, have to cross the railway, and the person having the care of the gates shall, under the penalty of 40s., cause them to be closed as soon as the horses, &c. have passed through, —is to make the road a highway only when the gates are opened by one of the company's servants; and, if, there being no servant there, after waiting a reasonable time, a passenger open the gates, and attempt to pass through with his horse and carriage, and damage ensue to him from the gates swinging to, he is committing an illegal act, and the company are not liable for the damage—(So held by *Cockburn, C.J.*, *Crompton, J.* and *Shee, J.*; *Blackburn, J.* dissenting.) *Wyatt* v. *the Great Western Rail. Co.*, 34 Law J. Rep. (N.S.) Q.B. 204; 6 Best & S. 709.

(*c*) *Tunnels.*

The owner of land, granting to a railway company the right to make and maintain a tunnel through his land, is in the same position, with respect to his right to work mines under the 77th and 78th sections of the Railways Clauses Consolidation Act, 1845, as if the company had actually purchased the land; and the rule that a grantor cannot derogate from his own grant does not apply. *The London and North Western Rail. Co.* v. *Ackroyd*, 31 Law J. Rep. (N.S.) Chanc. 588.

A railway company, under the powers of their act, bought land for the purposes of their line, and purchased also, for trifling sums, from various landowners, the right of making a tunnel through their lands. Under this act minerals were excepted from purchases, and vendors were enabled to work the minerals, so that no damage be done to the railway. C, who derived title as landowner from the vendors to the company, gave notice, under the assumed powers of a subsequent act, of his intention to work for minerals within a certain distance of the line and the tunnel. The company filed a bill to restrain C from so doing, and the Court being of opinion that the subsequent act was not applicable, and it appearing that his workings would endanger the line of railway, an injunction was granted by one of the Vice Chancellors, although it was admitted that the plaintiff would thereby be prevented from getting minerals of very great value; and, on appeal, the decision was affirmed. *The North-Eastern Rail. Co.* v. *Crosland*, 32 Law J. Rep. (N.S.) Chanc. 353; 2 Jo. & H. 565.

(*c*) *Accommodation Works.*

Section 69. of the 8 & 9 Vict. c. 20. gives power to Justices to determine differences arising between railway companies, and the owners and occupiers of lands adjoining the railway, respecting accommodation works, the making of which is provided for by section 68:—Held, that the question whether works made by the company are works made for the accommodation of such owners and occupiers, is to be determined by the state of things existing at the time such works are done. *R.* v. *Fisher*, 32 Law J. Rep. (N.S.) Q.B. 32; 3 Best & S. 191.

Therefore, where certain persons were owners of mines extending under a railway, and the company had made drains upon their line for their own purposes, and before the mines had been worked at all, but which, when kept open and clear, carried off water, which otherwise percolated through the strata into the mines, and which interfered with the working of the mines, it was held, that they were not such accommodation works as the Justices had jurisdiction over. Ibid.

*Semble* also, that these sections do not apply to matters occurring beneath the surface of the land. Ibid.

(G) Offences and Infringement of Regulations.

Upon an information before Justices on behalf of a railway company, for an offence against their act of corporation, in placing stones and rubbish on the railway and thereby obstructing the same, the evidence was that the act was done by certain persons employed by the defendant to repair a wall between the railway and his premises adjoining, and that on one occasion the defendant himself, who was standing by, directed the workmen:—Held, on appeal under the 20 & 21 Vict. c. 43. s. 2, that there was evidence to warrant the Justices in convicting the defendant. Held also, that the person lodging the complaint on behalf of the company was properly made the respondent in the appeal. *Roberts* v. *Preston*, 9 Com. B. Rep. N.S. 208.

A right to run over a line of railway cannot be claimed independently of the rules and regulations which, by act of parliament, the directors are empowered to make for the management of the line. *The Rhymney Rail. Co.* v. *the Taff Vale Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 482; 29 Beav. 153.

Parties whose right to use a railway is secured by act of parliament cannot insist upon their right and at the same time say that the rules and regulations made for the security of the line, the passengers and the traffic, are unreasonable, unnecessary and inapplicable to their particular traffic. Ibid.

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## RATE.

[The more economical recovery of poor-rates and other local rates and taxes provided for by 25 & 26 Vict. c. 82.]

(A) Poor-Rate.

(*a*) *Assessment of Property.*

(*b*) *Claim to be rated.*

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## (A) POOR-RATE.

### (a) *Assessment of Property.*

[The act to amend the law relating to parochial assessments in England amended by 25 & 26 Vict. c. 103.]

The inhabitants of a parish met in vestry and drew up the following document: "A meeting was held this day at W, for the purpose of carrying out the provisions in the 13 & 14 Vict. c. 99. for the better assessing and collecting the poor-rates upon small tenements situate within the parish, and it was agreed that the same should be carried out in the said parish":—Held, a valid order under the 13 & 14 Vict. c. 99. s. 1. for the adoption of the act. *Bavin* v. *Hutchinson* (Ex. Ch.), 31 Law J. Rep. (N.S.) M.C. 229.

B the owner of several small tenements was assessed to a poor-rate of 4*d.* in the pound; the exact amount of the assessment on the aggregate of the several rateable values as they appeared on the rate would have been 10*s.* 11¼*d.* and a fraction of a farthing, instead of which 11*s.* was entered on the rate. This larger sum was demanded, and not being paid, a warrant was granted and a distress levied for that amount on the goods of B; on which he brought an action against the persons executing the warrant:—Held, that an action would not lie, as the sum demanded was the sum appearing on the rate, and the objection, if any, was that B was overrated, for which an appeal was the proper remedy. Ibid.

An assessment committee, under 25 & 26 Vict. c. 103. having given notice to the overseers of a parish to return a valuation list (under section 14.) of their parish in ten days, proceeded before the lapse of three months from their appointment to appoint a valuer, to make a valuation of the parish. Afterwards, and after the three months, the overseers returned a valuation list, which was deemed unsatisfactory by the committee and guardians, and the valuer was directed to complete his valuation, which exceeded by more than one-sixth the amount of the valuation returned by the parish:—Held, that the expense of this valuation by the person appointed by the committee could not be charged against the parish under section 39, nor as compensation under section 37. *R.* v. *Richmond*, 34 Law J. Rep. (N.S.) M.C. 186; 6 Best & S. 541.

### (b) *Claim to be rated.*

By a local act for the parish of Islington the management of the parish and the relief of the poor were entrusted to certain trustees, but the vestry were to make the poor-rates, and a collector was to collect them. The overseers had nothing to do with the making of the rates or their application:—Held, that the overseers were not the proper parties to whom a person who wished to have his name inserted on a poor-rate should make application for that purpose. *R.* v. *the Overseers of Islington*, 32 Law J. Rep. (N.S.) M.C. 257.

### (c) *Persons and Property rateable.*

#### (1) *In general.*

By agreement between the Royal Commissioners for the Exhibition of 1862 and M, the former agreed, in consideration of certain money, that M should have the right of selling refreshments while the Exhibition was open, on a space of 40,000 square feet at the least of the portion of ground occupied by the Exhibition. He was to fit up the space allotted to him with counters and fittings, to provide cellars, and to lay on gas and water. He was to be subject to the by-laws and regulations made by the Commissioners for the orderly conduct of the Exhibition, and the persons employed therein. Provisions were only to be brought in at specified times. M was to keep the space clean, and to remove the rubbish, &c. every night. All fittings and erections made by M were to become the property of the Commissioners on the erection thereof. M went into occupation under this agreement, and erected fixtures, counters, pipes, &c., and made cellars and drains. He continued to sell refreshments through the whole time the Exhibition was open. The keys of the doors opening from the refreshment-rooms into the Exhibition buildings were always kept by the police employed by the Commissioners, and the said police usually locked M and his servants out every evening, and admitted them again in the morning, but during part of the time M had an entrance from the outside:—Held, that M was not liable to be rated to the relief of the poor, inasmuch as he had no exclusive occupation of the space so allotted to him. *R.* v. *Morrish*, 32 Law J. Rep. (N.S.) M.C. 245.

The occupier of a cotton-mill which, owing to the scarcity of cotton, is not kept at work, may be liable to be rated to the poor-rate upon the value of the mill used as a warehouse for storing the machinery

used therein. *Staley* v. *the Overseers of Castleton*, 33 Law J. Rep. (N.S.) M.C. 178; 5 Best & S. 505.

The owner of a silk-mill, having given up working it himself, but retaining possession of it *in statu quo*, intending to let it with the machinery as a silk-mill, is rateable in respect of his occupation of the mill as a warehouse for his machinery and plant. *Harter* v. *the Overseers of Salford*, 34 Law J. Rep. (N.S.) M.C. 206; 6 Best & S. 591.

Under the powers of an act of parliament, a railway was constructed from G to C, for the common purposes of the G W Company and the M Company, each paying half the cost; on the completion, the half of the railway nearest G became the sole property of the M Company, and the half nearest C the sole property of the G W Company. Each company was bound to keep its own half in repair and supply the staff of officials, &c. necessary on that half for the traffic of both companies. The railway was constructed for broad and narrow gauge traffic, with three rails on each line; and in practice the G W Company used the broad gauge and the M Company the narrow, so that of the three rails one was used in common and one exclusively by each company. The traffic of the M Company far exceeded that of the G W Company:—Held, that there was no rateable occupation by the M Company of the G W Company's half of the railway, but only an easement, and that the M Company were therefore not rateable to the poor-rate of a parish through which that half of the railway passed. *The Midland Rail. Co.* v. *the Overseers of Badgworth*, 34 Law J. Rep. (N.S.) M.C. 25.

*Semble*—That the G W Company were rateable for their half of the railway in respect of the value of the occupation as enhanced by the profits made over by the M Company. Ibid.

### (2) *Special Exemptions.*

#### (i) *In favour of the Crown and Public Institutions.*

S rented a house at 52*l.* 10*s.* per annum; five of the principal rooms were occupied by the surveyor of taxes and by the collector of Inland Revenue, under an agreement, by which S agreed to let, and the other party agreed to take, the rooms (possession to be given and rent to commence at a given time), for the annual consideration of 90*l.*, this sum to include all expenses, viz., rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises to keep clean, light fires, and to attend to the same. Another room in the house was occupied by the appellant as an office for the vending of stamps by him as distributor for the district, for which purpose he employed an assistant, who also took in orders for him for printing, which he executed on other premises. The remainder of the house, viz., two kitchens, and a cellar on the basement, and two bedrooms and a sitting-room on the second floor, were occupied by a person (with his wife and daughter) who, in consideration of being allowed thus to live in the house, and of the sum of 6*l.* 10*s.*, with coals and candles, cleaned the rooms and lighted the fires. The whole of the sum of 90*l.*, with the exception of 2*l.* 10*s.*, was exhausted in payment of the rent of 52*l.* 10*s.* and the expenses of coals and the above wages and other incidental expenses:—Held, that S was the beneficial occupier of the whole house, and liable to be rated in respect of such occupation; and was not entitled to any deduction by reason of part of the benefit being derived from payments made to him by servants of the Crown for privileges given to them in that capacity; nor to any deduction in respect of the room which he himself occupied as distributor of taxes. *R.* v. *Smith*, 30 Law J. Rep. (N.S.) M.C. 74; 3 E & E. 383.

In 1827 the Court of King's Bench, in the case of *The King* v. *the Inhabitants of Liverpool*, decided that the Liverpool Docks were not liable to be rated to the relief of the poor. That decision was never overruled; and many acts of parliament for the extension of the docks and the construction of new docks and warehouses were passed subsequently, on the assumption of the law so laid down being correct, which acts impliedly exempted the new portions of the docks from being rated, by expressly enacting that the new warehouses should be rateable "as if they had been beneficially occupied." Many millions of money were advanced under these acts on the security of the dock dues. The point being raised in a court of error whether the case of *The King* v. *the Inhabitants of Liverpool* was good law, and it being urged that a series of later cases shewed it to be wrong in principle, it was held (affirming the decision below, 30 Law J. Rep. (N.S.) M.C. 185; 9 Com. B. Rep. N.S. 812), that as it had been acquiesced in and acted on so long, and as acts of parliament had been based upon it, it must be taken to have been recognized as law by the legislature, so far as the rateability of the Liverpool Docks was concerned; and that it could not now be questioned on any general principle of law. *The Mersey Docks and Harbour Board* v. *Jones* (Ex. Ch.), 30 Law J. Rep. (N.S.) M.C. 239.

This case, however, has been overruled by the House of Lords—see the next case.

The Crown not being named in the 43 Eliz. c. 2. is not bound by its enactments. Property therefore in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor. "*The Mersey Docks and Harbour Board*" *Trustees* v. *Cameron; Jones* v. "*the Mersey Docks and Harbour Board*" *Trustees*, 11 H.L. Cas. 443; 35 Law J. Rep. (N.S.) M.C. 1.

The statute is, in its provisions, general and inclusive, and no other principle applying to create an exemption from those provisions, all property capable of beneficial occupation, and which if let to a tenant would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under acts of parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupation are exclusively applied to the maintenance of the works. Ibid.

Trustees who were constituted by acts of parliament, "The Mersey Docks Board," and were specially appointed to have the control of certain docks, &c., vested in them as such trustees, in order to maintain these docks for the benefit of the shipping frequenting the port of Liverpool, were therefore held liable to be rated as occupiers, though they occupied such docks, &c. only for the purposes of these acts, and derived no benefit from the occupation. Ibid.

*The King* v. *the Commissioners of the Salter's Load Sluice*, 4 T. R. 730; and *The King* v. *Liverpool*, 7 B. & C. 61, overruled. Ibid.

Recent acts expressly declared that certain warehouses and parts of the docks, then for the first time erected and put under the control of the trustees, were to be liable to rates. Per *Lord Chelmsford*—These acts did not by implication declare that the other parts of the docks were not liable to rates. Ibid.

(ii) *Premises occupied for Charitable Purposes.*

The Society of Licensed Victuallers was incorporated by royal charter, which directed that the business of the society should be conducted by a governor and committee of management. The members of the society were to meet together four times a year or more, with power to make by-laws. The society possessed a school-room, house, ground and premises, which were used for the purpose of a school for the benefit of the children of licensed victuallers, and for the purpose of holding the quarterly and other meetings of the society upon the general business of the society. By the by-laws the meetings were directed to be held at the premises of the school, or at such place as the governor and committee might appoint. The society having been rated to the poor-rate, the sewers-rate, and the general rate for defraying the expenses of the metropolis, it was held, that they had a beneficial occupation of the premises, and that they were rateable in respect thereof. *R.* v. *the Licensed Victuallers' Society*, 30 Law J. Rep. (N.S.) M.C. 131; 1 Best & S. 71.

A house and premises, together with other lands, were conveyed to feoffees in trust to permit the master and commonalty of the Merchants Venturers in Bristol, as trustees, to hold the house and premises for a residence for 100 poor boys, a schoolmaster and necessary servants, and for a school, &c., to teach the boys. The trustees were to provide from the general funds board and lodging, and ultimately to put the boys out as apprentices with a premium of 10*l*. Any surplus funds were to be applied to increase the number of boys. Of the boys eighty were to be sons of freemen, or born in the borough of Bristol, and twenty in any other part of England, with a preference to founder's kin. All must be poor and of the Church of England. The house and premises being used for the above purpose, the schoolmaster was rated to the poor-rate for that part of the premises occupied exclusively by him as his private residence, and the trustees for the rest of the premises, On a case, in which the only question raised was, whether the fact that the premises were held for the above purpose prevented the occupation from being beneficial so as to be rateable,—Held, that the premises were occupied, not for a public purpose, but for a private charity, and were therefore rateable. *R.* v. *the Inhabitants of Stapleton*, 33 Law J. Rep. (N.S.) M.C. 17; 4 Best & S. 629.

(iii) *Lunatic Asylums.*

The 16 & 17 Vict. c. 97. s. 35. enacts that no lands or buildings purchased for the purposes of a lunatic asylum (with any additional building to be erected thereon) shall, while used for such purposes, be assessed to county, or parochial, or other local rates at a higher value than that at which the same were assessed at the time of such purchase:—Held, that a house appropriated by the visitors to the use of the chaplain of a county lunatic asylum was not within this enactment, as the chaplain, though required by the visitors, was not required by the statute to be resident; but that a residence so appropriated to the medical superintendent was within the enactment, as he was required by section 55. to be "resident in the asylum"; and that a separate house, but conveniently situate near the other buildings, with garden and reasonable accommodation for a man of his education and position, was assessable only at the lower value. *Congreve* v. *the Overseers of Upton*, 33 Law J. Rep. (N.S.) M.C. 83; 4 Best & S. 857.

A county lunatic asylum, though many pauper lunatics not belonging to the county are confined in it, and some patients not paupers, from both of which classes considerable profits are made, is "used for the purposes of an asylum" within the meaning of the 35th section of 16 & 17 Vict. c. 97, and therefore rateable only at the value at which the land on which it is built was assessed at the time it was purchased. *R.* v. *the Overseers of Fulbourn*, 34 Law J. Rep. (N.S.) M.C. 106; 6 Best & S. 451.

Land cultivated as farm and garden by the lunatics assisted by skilled labourers, the produce beyond that consumed by the inmates of the asylum being sold and a profit realized, is land used for the purposes of an asylum within the meaning of the above section, if the primary object is not the profit but the healthful employment of the lunatics. Ibid.

(iv) *Premises occupied as a Reformatory.*

A reformatory school was established according to the statutes 17 & 18 Vict. c. 86, 18 & 19 Vict. c. 87. and 20 & 21 Vict, c. 55, which oblige parents in many instances to contribute to the maintenance of their children whilst in the reformatory. Offenders from all parts of the kingdom were admitted to this reformatory, paying entrance fees upon their admission, and a small fund was derived from work done by them on the premises, which was applied towards the maintenance of the institution:—Held, that the reformatory in question was in the nature of a jail, and not liable to be rated to the relief of the poor. *Sheppard* v. *the Churchwardens of Bradford*, 33 Law J. Rep. (N.S.) M.C. 182; 16 Com. B. Rep. N.S. 369.

(v) *Land covered with Water or used as a Railway under the Local Government Act.*

By the Local Government Act, 1858, section 55, "the occupier of any land covered with water, or used only as a railway constructed under the powers of any act of parliament for public conveyance," is to be assessed to the district rate at one-fourth only of the net annual value, as ascertained by the last poor-rate:—Held, that a wet dock was "land covered with water" within this provision; and that a railway, which had been constructed by a dock company in connexion with their docks and joining a public railway and canal, under the powers of their private act, by which the company were bound to complete the railway for the use of the public on the payment of tolls, was a railway within the provision, although it was not constructed to carry passengers. *R.* v. *the Newport Dock Co.*, 31 Law J. Rep. (N.S.) M.C. 266.

*(d) Rateable Value and Principle of Assessment.*

In assessing a railway company in respect of the portion of their line passing through a parish, and in respect of station, buildings, and sidings within the same, an allowance must be made for interest on capital and tenants' profits, calculated with reference to the actual value of the rolling stock at the time the rate is made. *R.* v. *the North Staffordshire Rail. Co.*, 30 Law J. Rep. (N.S.) M.C. 68; 3 E. & E. 392.

The N S Railway Company were obliged, in order to work their line properly, to provide, in addition to such rolling stock as above referred to, certain turn-tables, cranes, weighing-machines, stationary steam-engines, lathes, electric telegraph and apparatus, office and station furniture, and gas-works used for supplying the stations with gas:—Held, that in rating the company a deduction should be allowed in respect of such of the above things as were movable, such as office and station furniture; that none should be allowed in respect of such as were so attached to the freehold as to become part of it; and in respect of such as, though capable of being removed, were yet so far attached as that they were intended to remain permanently connected with the railway, or the premises connected with it, and to remain permanent appendages to it, as essential to its working, no deduction should be allowed. Ibid.

It was also necessary for the carrying on the traffic and business of the railway, that the company should have in hand a sum of money by way of floating capital for the purpose of providing surplus stores (such as rails, sleepers, &c.), to be used in case of accident on the line or other emergency, and partly in paying the wages of servants of the company and other current expenses:—Held, that this Court could not say whether the company were entitled to a deduction for interest and tenants' profits, or either, upon the said floating capital, but that in determining the rateable value of the railway, one question to be considered was, whether on the whole capital employed a greater delay would occur in realizing the returns than was ordinarily incidental to the employment of the capital.—Held, also, that in assessing the company, a deduction ought to be allowed in respect of the stations, buildings and sidings along the line of railway, such deduction being calculated on the actual value at which they ought to be assessed. Ibid.

The appellants, a railway company, and the sole owners of a station, in 1848 entered into an arrangement, by deed, with the N W Railway Company, by which the latter company were for 999 years to have the joint use of part of the station, and the exclusive use of another part, on certain stipulated terms. In consequence of a subsequent falling off in their traffic, the station became of less value to the N W Company, and the real present value to them was much below the sum actually paid by them to the appellants under the agreement. On appeal against a poor-rate,—Held, on a case in which the appellants were to be deemed the persons rateable for the whole occupation of the station, that they were assessable on the full amount which they received from the N W Company. *R.* v. *the Overseers of Fletton*, 30 Law J. Rep. (N.S.) M.C. 89; 3 E. & E. 450.

The lay impropriators of the tithes of the parish of B granted a lease of their tithe-rentcharge, at a nominal rent, to the appellant for twenty-one years, if he should so long remain the vicar of the adjoining parish of W, he covenanting to serve the cure of B either by himself or a curate. In order to the proper discharge of the duties of the two parishes, it was necessary to employ a curate for B:—Held, that, in assessing the appellant to the poor-rate of B, as occupier of the tithe-rentcharge, he was not entitled to any deduction in respect of the stipend which he paid the curate.—*Semble*, if the impropriators received the tithe-rentcharge of B, they would not be entitled to any deduction in respect of the salary of a curate paid by them. *Wheeler* v. *the Overseers of Burmington*, 31 Law J. Rep. (N.S.) M.C. 57; 1 Best & S. 709.

Where two parishes, each separately supporting its own poor, and having each its own church, have been immemorially united as one ecclesiastical benefice, and in order to the due performance of the clerical duties of his two parishes the incumbent necessarily requires the assistance of a curate, in assessing his tithe commutation rentcharge in one of the parishes to the poor-rate, the incumbent is entitled to a deduction in respect of the salary which he pays the curate. *Williams* v. *the Overseers of Llangeinwen*, 31 Law J. Rep. (N.S.) M.C. 57; 1 Best & S. 699.

The rector of a parish, who, pursuant to the statutes in that behalf, has charged the tithe-rentcharge with the perpetual payment of an annual sum, towards the stipend of the incumbent for the time being of a new ecclesiastical district, formed, under the statutes, partly of part of the parish, is not entitled to have the sum so charged deducted in assessing the tithe-rentcharge to the poor-rate. *Lawrence* v. *the Overseers of Tolleshunt*, 31 Law J. Rep. (N.S.) M.C. 148.

The property of a gas company lay in five townships, of which the respondent township was one, and consisted of lands and buildings, with retorts and furnaces, and pipes attached thereto, used for the making of gas; of buildings used as storehouses and offices; and of land occupied by mains and pipes. The property in the respondent township consisted of the lands and buildings and apparatus for making the gas, and of part of the mains and pipes, which passed through the respondent township into the other townships:—Held, that the rateable value of the whole of the property of the company might be ascertained as follows: by taking from the latest published accounts of the company the sum of the annual gross receipts for sale of gas, and of the residuary products from the materials after the gas had been made, and for the hire of gas-meters and fittings, and work done; from this amount, by deducting the gross expenditure, the net receipts might be obtained, and a proper sum would then have to be deducted for tenants' profits and for interest on capital, rates and taxes, the cost of renewal, repairs and insurance of buildings and plant, and renewal of the mains. *R.* v. *the Sheffield United Gaslight Co.*, 32 Law J. Rep. (N.S.) M.C. 169; 4 Best & S. 135.

Held, also, in accordance with *R.* v. *Mile End Old Town*, and *R.* v. *the West Middlesex Waterworks Co.*, that the stations, works, buildings, &c.,

ought to be valued as fixed property, deriving some additional value from their being used as part of the gasworks. Ibid.

Held, also, that the rateable value of the mains and pipes, which would be the residue, after deducting the net rateable value of the stations, works, buildings and lands within the respondents' township from the value of the whole rateable property of the company, must be apportioned among the different townships, not simply according to the extent of the mains contained in each, but keeping in view also the fact that part of them contributed directly, and part only indirectly, to the profits, as had been held in *R.* v. *the West Middlesex Waterworks Co.* Ibid.

By arrangement between the N L and B Railway Companies the passengers were booked through, and carried from stations on the N L line along and to stations on the B line, the N L Company paying over out of the whole fare charged a fixed sum to the B Company for every passenger so carried, such sum being a reasonable one:—Held, that, in ascertaining, for the poor-rate, the rateable value of a part of the N L line in a particular parish, the aggregate of the sums so paid over to the B Company was to be thrown altogether out of consideration. *R.* v. *the Vestry of St. Pancras*, 32 Law J. Rep. (N.S.) M.C. 146; 3 Best & S. 810.

Where the income of the incumbent of a parish is made up of a tithe-rentcharge, glebe land and interest of a sum invested in the public funds, and the incumbent necessarily employs a curate to assist him,—in assessing the rentcharge to the poor-rate the salary of the curate must be set against the whole income, and a proportionate sum only deducted from the amount of the rentcharge. *The Overseers of Scriven-with-Tentergate* v. *Fawcett*, 32 Law J. Rep. (N.S.) M.C. 161; 3 Best & S. 797.

In ascertaining the net rateable value of property assessable to the poor-rate, an allowance is to be made for rates and taxes. And such allowance ought to be made upon the net rateable value after the rates and taxes themselves, in addition to all other proper allowances, have been deducted. *The Tyne Improvement Commissioners* v. *the Churchwardens of Chirton*, 32 Law J. Rep. (N.S.) M.C. 192.

The E C Railway Company were rated to the poor-rates of the parish of A in respect of their line of railway running through the parish. The company made a gross charge to their customers for goods carried over their line, such charge including not only the carriage along the line, but also the various services rendered at the stations in loading, unloading, &c. No appropriation was made in the books or accounts of the company of such last portion of the amount charged for the carriage of goods; but according to the clearing system mentioned in the Railway Clearing Act, 1848, 13 & 14 Vict. c. xxviii, the appellants calculated the terminal charges upon 6,036*l.*, the gross parochial earnings in A, to be 2,829*l.*, and they contended that the gross amount of parochial earnings was the difference between those two sums:—Held, that the stations were to be treated as only indirectly contributing to the profits of the line; that the amount of the terminals, and the amount of the expenses incurred in earning them, were parts of the general earnings and expenses of the line, and were to be treated as any other part of the gross receipts and outgoings, and therefore that the appellants were wrong. *R.* v. *the Eastern Counties Rail. Co.*, 32 Law J. Rep. (N.S.) M.C. 174; 4 Best & S. 58.

The appellants, the E C Railway Company, were the sole owners of a railway station, and in 1848, by an agreement by deed, the N W Railway Company were for 999 years to have exclusive use of part of the station, and the joint use with the appellants of another part, at a certain sum per annum. The occupation of the station afterwards became of much less value to the N W Railway Company than the annual sum to be paid by them to the appellants under the agreement:—Held, that the effect of the deed (as regarded the part of the station jointly occupied) was only to give to the N W Company the right to the joint occupation, and that the appellants were rateable to the poor-rate as the sole occupiers of this part of the station, and that in rating them for such occupation the sum paid by the N W Company must be considered as part of the profits. *R.* v. *Lord Sherard*, 33 Law J. Rep. (N.S.) M.C. 5.

The parishes of L B and F were inclosed by a local act, which directed commissioners to set out certain portions of land in those parishes in full bar, satisfaction and compensation of and for all tithes, both great and small, and all compositions and payments in lieu of tithes within the said parishes (Easter offerings, surplice fees and mortuaries only excepted). Of the lands so set out, the commissioners were directed to allot thirty acres to the vicar, and the remainder to the rector; the latter being subject to the payment of a corn-rent to the vicar. This rent was directed to be paid to the vicar "clear of all parochial taxes, rates, dues and assessments whatever"; and it was enacted, that the tithes, in lieu whereof the thirty acres of land were directed to be allotted and the corn-rent was to be paid, should cease and be for ever extinguished:—Held, that the occupiers of the land charged with the payment of the corn-rent above mentioned were not entitled to have the amount of such corn-rent deducted in estimating the net annual value of their property liable to the poor-rate under 25 & 26 Vict. c. 103. s. 15. and 6 & 7 Will. 4. c. 96. s. 1. *Hackett* v. *the Churchwardens of Long Bennington*, 33 Law J. Rep. (N.S.) M.C. 137; 16 Com. B. Rep. N.S. 38.

In assessing land to the poor-rate, deductions are to be allowed in respect of the general sewers-rate imposed by the Commissioners of Sewers, and the annual tax imposed by them for maintenance and cleansing of the sewers and works within the district; and for the annual average cost of the maintenance of a sluice and flood-gate, by which the land alone is benefited, and of the maintenance of a sea-wall, which the owner of the land is bound to keep up under a due presentment under the commission of sewers. *R.* v. *Halldare*, 34 Law J. Rep. (N.S.) M.C. 17; 5 Best & S. 785.

An assessment committee, appointed under "The Union Assessment Committee Act, 1862," amended the valuation list of a parish which had adopted the "Small Tenements Rating Act," by inserting in the column for rateable value the full rateable value of the small tenements:—Held, that they were right. *The Overseers of Sunderland* v. *the Guardians of the Sunderland Union*, 34 Law J. Rep. (N.S.) M.C. 121; 18 Com. B. Rep. N.S. 531.

The occupiers of certain public-houses were obliged by contracts to take their beer from a particular brewery, and paid less rent in consequence:—Held, by *Erle, C.J.* and *Smith, J., dissentiente Byles, J.*, that the rateable value of the public-houses was not to be decreased because of the burden, nor that of the brewery to be increased because of the benefit of such contracts, and that the case of *Allison* v. *Monkwearmouth* was both unsatisfactory and distinguishable. Ibid.

*(e) Appeal against.*

An order of Quarter Sessions made on an appeal against a poor-rate and directing the rate to be quashed is not bad because it does not also order the overseers to make a new rate. *R.* v. *the Justices of Hampshire*, 33 Law J. Rep. (N.S.) M.C. 104.

If a Court of Quarter Sessions on hearing an appeal direct costs to be given and adjourn the Court, it is sufficient to have the costs taxed by the clerk of the peace between the day of hearing and the adjournment day, and on the adjournment day to draw up the order, inserting a direction to pay the amount of costs ascertained on the taxation. Ibid.

*(f) Collector's Right to Rate-Books.*

A retired collector of rates cannot retain the rate-books; though, for purposes of account, he is entitled to free access to them. *Rate-collector Sellar* v. *Griffin*, 33 Law J. Rep. (N.S.) Chanc. 6; 32 Beav. 542.

(B) CHURCH-RATE.

*(a) For what it may be made.*

In a district constituted under the provisions of the 58 Geo. 3. c. 45. s. 21. and assigned to a church built under that act, it is competent for the churchwardens and parishioners to make a rate not merely for the repairs of the church, but also for the expenses necessary for the due performance of the offices of the church. *R.* v. *the Consistory Court*, 31 Law J. Rep. (N.S.) Q.B. 106; 2 Best & S. 339.

The rate which is directed to be made by the 58 Geo. 3. c. 45. s. 70, for the "repairs" of district churches and chapels, is the same kind of rate as an ordinary church-rate; and it may be legally made for all purposes for which an ordinary church-rate may be made. *Ex parte Beall*, 31 Law J. Rep. (N.S.) C.P. 237; 12 Com. B. Rep. N.S. 220.

*(b) Notice of Vestry Meeting.*

The following notice of a vestry meeting was affixed to the church-door of the parish of H (pursuant to the 58 Geo. 3. c. 69. s. 1): "Notice is hereby given, the churchwardens, overseers and other principal inhabitants of this parish, are requested to meet in the vestry, on Wednesday, the 14th of July instant, at half-past nine o'clock in the forenoon, to examine the churchwardens' accounts, and to grant them a rate. Given under our hands, the 3rd of July, 1858,

"J. Rand,
"W. Grimwade, } Churchwardens."

Held, a sufficient notice. *Rand* v. *Green*, 30 Law J. Rep. (N.S.) C.P. 80; 9 Com. B. Rep. N.S. 470.

*(c) Jurisdiction of Justices to enforce.*

A declaration alleged that the defendants were Justices of the Peace in and for the county of D; that the plaintiffs were rated to a certain church-rate, the validity of which said rate was, at the time of the making thereof, and from thence hitherto had been and still is disputed by the plaintiffs; that the plaintiffs were summoned to answer a complaint that they had refused to pay the rate; that they attended before the defendants; that at the hearing the plaintiffs, intending to dispute the validity of the rate, gave the defendants notice that they disputed the validity of the rate, and required the defendants to forbear from and not to give judgment in respect of the matter of the complaint; that no evidence was given that they did not in fact or in good faith dispute the validity of the rate, or that they did not in good faith give such notice to the defendants as aforesaid; that the defendants proceeded to give and did then give judgment, and did then make an order upon the plaintiffs for the payment of the amount of the rate; that the said order was afterwards removed by *certiorari* and quashed before the commencement of this suit; that the defendants, before the said order was quashed, issued their warrant to make a distress of the goods and chattels of the plaintiffs; that by virtue of the said warrant the goods of the plaintiffs were seized and distrained; whereby &c. Upon demurrer to this declaration, it was held, that it sufficiently appeared that the defendants had acted without jurisdiction, and therefore that the declaration was good, although it contained no allegation that the defendants had acted maliciously and without reasonable and probable cause. *Pease* v. *Chaytor*, 31 Law J. Rep. (N.S.) M.C. 1; 1 Best & S. 658.

*Semble*, per *Blackburn, J.*, that, if the defendants acted erroneously under the belief that the validity of the rate was not *bona fide* disputed, the action would be within section 1. of 11 & 12 Vict. c. 44. The proviso in 53 Geo. 3. c. 127. s. 7. extends to Quakers. Ibid.

The plaintiffs were summoned before the defendants, who were Justices of the Peace, for non-payment of a church-rate; they attended, and gave notice to the defendants that they disputed the validity of the said rate, but the defendants decided that the dispute was not *bona fide*, and therefore made an order and issued a distress-warrant, under which the goods of the plaintiff were seized. Upon the trial of an action brought against the defendants in respect of such seizure, the Judge directed the jury, that if they believed that the plaintiffs *bona fide* intended to dispute, and did dispute, the validity of the rate in question, and gave notice thereof to the defendants, who, notwithstanding, determined to proceed, the plaintiffs were entitled to recover; but if the jury thought that the plaintiffs' assertion that they disputed the validity of the rate was a mere pretence for the purpose of evading payment and ousting the jurisdiction of the Justices, they should find a verdict for the defendants:—Held, by *Wightman, J.* and *Blackburn, J.*, that this was a misdirection, inasmuch as the Justices would not be liable unless they had acted without reasonable and probable cause in determining that the plaintiffs did not *bona fide* dispute the rate. By *Mellor, J.*, that there was no misdirection. *Pease* v. *Chaytor*, 32 Law J. Rep. (N.S.) M.C. 121; 3 Best & S. 620.

After the seizure of the goods as above mentioned, the plaintiffs brought an action of replevin in the

county court, against the churchwardens at whose instance the warrant of distress was issued, for and in respect of the said seizure, and the damages occasioned thereby to the plaintiffs, and recovered damages and costs. The defendants pleaded these facts specially, and also pleaded not guilty:—Held, that the judgment in the county court was a bar to the recovery of damages for the seizure; but that, upon the plea of not guilty, the plaintiffs were entitled to nominal damages of one shilling, unless the defendants elected to have the rule for a new trial made absolute on the ground of misdirection. Ibid.

A person having been summoned before Justices, under the 53 Geo. 3. c. 127. s. 7, for the non-payment of a church-rate, evidence in support of the complaint was fully gone into, and two specific objections were then taken on behalf of the defendant, one to the validity of the rate, and the other to the form of summons, and arguments having been heard on both sides, the Justices were about to deliberate on the matter, when notice was given on behalf of the defendant, that he disputed, under the proviso in the above section, the validity of the rate and his liability to pay, upon which the Justices refused to proceed in the matter:—Held, that the objection (which must be assumed to have been considered by the Justices *bona fide*) was taken in time, and the Justices were right in forbearing to give judgment. *Ex parte Mannering*, 31 Law J. Rep. (N.S.) M.C. 153; 2 Best & S. 431.

On the hearing of an information before two Justices for the non-payment of 1*s.* 8*d.* church-rate, the attorney for the defendant objected, first, that the rate was illegal, on the ground that the whole parish was not included in it, as the B district, a part of the parish, was not rated; secondly, that explanation and details of the estimate for the rate were required and refused; thirdly, that the rate was unnecessary and excessive. The complainant gave evidence that at the vestry meeting at which the rate was made an explanation of the estimate was given, and that the amount sought to be raised was necessary; and the Justices at once decided that the last two objections were not *bona fide* made. Further evidence having been adduced at an adjourned meeting by the complainant that the B district had been legally separated from the parish by an Order in Council and formed into a new parish for ecclesiastical purposes under the statutes relating thereto, the Justices being about to give judgment, the defendant stated that he objected to the validity of the rate; the Justices, however, held this objection also not *bona fide*, and made an order on the defendant to pay. The Court held, that the Justices had acted within their jurisdiction, and directed them to issue their distress warrant to enforce their order for payment of the rate. *R.* v. *Blackburn*, 32 Law J. Rep. (N.S.) M.C. 41.

If a person summoned before Justices for non-payment of a church-rate submits certain objections to the validity of the rate to the Justices for decision, and they overrule the objections and order payment, the Court will not grant a *certiorari* to bring up the order for the purpose of having it quashed. *R.* v. *Knox*, 32 Law J. Rep. (N.S.) M.C. 257.

At the hearing of a summons to enforce payment of a church-rate, although the Justices are the tribunal to decide in the first instance whether the defendant's objection is *bona fide* or not, they cannot, by deciding contrary to the facts that it is not *bona fide*, give themselves jurisdiction; and this Court will review their decision. *R.* v. *Huntsworth*, 33 Law J. Rep. (N.S.) M.C. 131.

By a local act (5 Geo. 1. c. ix.) power was given to choose a certain number of "inhabitants" of a parish to be vestrymen for such parish, and for the rector and majority of the vestrymen to assess persons and property in the parish for defraying the expense of obtaining the act, and for buying of bells for the church, and for doing what should be fit to be done in or about the church and keeping the same in repair, and, in case of default in payment of the sums so assessed, the Justices were empowered to issue their warrant for the levy thereof by distress and sale of the offender's goods. The act also stated that any person aggrieved by any such assessment or distress might appeal to the Quarter Sessions "within three months after such distress":—Held, that the jurisdiction of the Justices under such local act to enforce the rate was not taken away by 5 & 6 Will. 4. c. 74, though the person on whom the rate was made was a Quaker and disputed its validity.—Held, also, that the local act gave a power of appeal against the assessment before as well as after the distress, and that it was, therefore, not competent to the Justices to inquire as to the validity of the constitution of the vestrymen. *Semble*—That it was not necessary for the qualification of a vestryman chosen pursuant to the act that he should sleep as well as reside within the parish, the word "inhabitant" not having in the act such a limited meaning. *Wilson* v. *the Churchwardens of Sunderland*, 34 Law J. Rep. (N.S.) M.C. 90.

Declaration against Justices of the Peace alleged that the plaintiff was rated to a church-rate, which was demanded on the 8th of September, 1857, that the plaintiff was summoned for non-payment thereof on the 5th of May, 1859; that at the hearing on the 12th of May, 1859, the plaintiff gave evidence that the rate had been demanded of him and the matter of complaint had arisen more than six months before the complaint, and contended that by statute 11 & 12 Vict. c. 43. s. 11, the defendants had no jurisdiction; yet the defendants made an order for the payment of the rate, which order had been quashed. Plea, that upon the hearing of the complaint, it was proved that, besides the demand of the rate in the declaration mentioned, the same was again demanded on the 25th of March, 1859, and the complaint was laid within six calendar months from the time of that demand. Upon demurrer, held, that it was within the duty of the defendants, as Justices, to determine the question whether a complaint was made within the time limited, and therefore by section 1. of statute 11 & 12 Vict. c. 44, the action was not maintainable without proof of malice and want of reasonable and probable cause. *Sommerville* v. *Mirehouse*, 1 Best & S. 652.

### (C) COUNTY AND POLICE RATE.

Section 7. of 15 & 16 Vict. c. 81,—by which the committee (appointed for preparing a standard for an equal county rate, to be based on the net annual value of property, as by law assessed to the poor-rate) are enabled to require overseers of the poor, constables, assessors, and *any other persons whom-*

*soever*, to attend before them, and to produce all parochial and other rates, assessments, valuations and apportionments, and *other documents*, in their custody, relating to the value and assessments on all or any property in any parish, and to be examined on oath touching such rates, &c., or the value of such property,—applies to private persons, as well as to the public officers mentioned in section 5; and a person having in his possession private accounts and documents relating to the annual value of certain collieries and coal-mines, and being able to give information as to their annual value, is bound to attend when required by the committee, and, on refusal, is liable to the penalty imposed by section 8. *Dickson* v. *Doubleday*, 30 Law J. Rep. (N.S.) M.C. 99.

The borough of East Looe having been previously incorporated by royal charter, a further charter was granted by James the Second, by which certain officers of the borough were to be Justices of the Peace within the limits of the borough, and to hold sessions twice a year, and to inquire, hear, and determine whatsoever trespasses, misprisions, and other defects and articles the Justices of the Peace for any county might hear and determine; so that they did not proceed to the determination of any treason, murder, felony, or other matter touching the loss of life; the charter also contained a non-intromittant clause as to the Justices of the county. Sessions had been regularly held by the borough Justices; but the only business done at them was the presentment of nuisances, and no persons were indicted or tried at them, the practice being to send all offenders to the county gaol for trial at the assizes or sessions of the county, the cost of maintaining the persons so committed being in general paid out of the borough poor-rate. The county Justices had never exercised any jurisdiction in the borough beyond the above custody and trial of prisoners. The borough had never been assessed to or contributed in any way to the county rate; but no rate in the nature of a county rate had ever been assessed or made in the borough:—Held, that the borough came within the definition of "county" in the 51st sect. of 15 & 16 Vict. c. 81, as "a liberty, franchise, or other place, in which rates in the nature of county rates may be levied, and not subject to the jurisdiction of the county at large in which it may lie, nor contributing to the county rates for such county." And that the Justices for the county at large had therefore no jurisdiction under that act to include the borough in the basis for the county rates. *R.* v. *the Mayor of East Looe*, 31 Law J. Rep. (N.S.) M.C. 245; 3 Best & S. 20.

By a charter of James the First, the mayor and recorder of the borough of B, in the county of D, for the time being, were empowered to be Justices to keep the peace in the borough, and to have full power and authority to inquire concerning whatsoever trespasses, misprisions, and other minor offences, defaults and articles done, moved, or committed within the borough, which ought or might be inquired into before the keepers and Justices of the Peace in any county, so that they should not in any manner proceed to the determination of any treason, murder, or felony, or of any other matter touching the loss of life or limb, &c. By the same charter was granted to them the same and similar courts of record, customs, liberties, privileges, franchises, &c. which they had theretofore holden and enjoyed, or ought to have holden and enjoyed. The mayor and recorder had always held a separate Court of Quarter Sessions, and had tried felonies and misdemeanors without any interference by the county Justices, although there was not any non-intromittant clause in the charter under which the privileges of the borough were claimed. In making a county and police rate the borough had been ordered to pay its proper proportion, although it had never contributed before, and although the Justices had been in the habit of making a rate in the nature of a county rate, and had their own police. Upon appeal against such rate, it was held, that in the absence of a non-intromittant clause, it must be taken that the county Justices had at any rate concurrent jurisdiction in the borough, and that, under 15 & 16 Vict. c. 81, the borough was liable to pay its proportion. So held, also, with regard to the police rate. *Were* v. *the Clerk of the Peace of Devon*, 34 Law J. Rep. (N.S.) M.C. 47; 6 Best & S. 7.

Sections 32, 34, and 35. of the 15 & 16 Vict. c. 81. only apply to a borough exempt from contributing to the county rate; and where a parish is situate partly within the limits of a borough or town, not so exempt but governed by a local act of parliament, the quota of the parish towards the county police-rate must be paid out of the general funds of the whole parish, although the part within the limits also contributes to the borough police, and they alone act within those limits. *R.* v. *the Overseers of Huddersfield*, 31 Law J. Rep. (N.S.) M.C. 131; 1 Best & S. 961.

### (D) DISTRICT AND LOCAL RATES.

#### (*a*) *Validity of the Rate.*

##### (1) *Signing and Sealing.*

The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 149, enacts that whenever the consent, sanction, approval, or authority of the local board of health is required by the provisions of the act, the same shall (in the case of a non-corporate district) be in writing under their seal and the hands of five or more of them:—Held, that this enactment applied to a general district rate made by the board, and that the want of the seal and signatures was fatal to the validity of the rate. *R.* v. *the Local Board of Worksop*, 34 Law J. Rep. (N.S.) M.C. 220; 5 Best & S. 951.

*Semble*—That one general district rate may be made under section 89. to include both past and future expenses, if the amount of each is distinguished in the estimate, Ibid.

*Quære*—What is the consequence of an insufficient compliance in the estimate with the requirements of section 98, Ibid.

##### (2) *Limitation of Time.*

A local board of health having erroneously made a special rate, the plaintiff paid his quota before the error was discovered; five years afterwards he commenced an action against the board to recover the money back, and obtained a judgment, and then sued them on the judgment, demanding in his declaration a mandamus to them to make and levy a rate under the Public Health Act, 1848, for the purpose of satisfying the judgment:—Held, that, assuming the debt so contracted by the board was a charge within

the 89th section, the plaintiff was not entitled to a mandamus to levy a rate, as the original action was not commenced within six months after the charge was incurred. *Burland* v. *the Local Board of Health of Kingston-upon-Hull*, 32 Law J. Rep. (N.S.) Q.B. 17; 3 Best & S. 271.

(*b*) *Property rateable.*

By the Public Health and Local Government Act, the 21 & 22 Vict. c. 98. s. 55, the general district rate is to be "made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor." T, a poor-law union, consisted of two parts, one within and one without the borough of L. The guardians built a workhouse and workhouse hospital in the part without the borough, and used them for the poor of the whole union. A local board of health for the part without the borough having made a sewer which was used by the guardians in respect of the workhouse and hospital, assessed them in a general district rate:—Held, that the appellants (the guardians) were the occupiers of such kind of property as was assessable, &c. to rates for the relief of the poor, and therefore that they were liable to pay the general district rate made by the local board of health. *The Guardians of Toxteth Park* v. *the Local Board of Toxteth Park*, 30 Law J. Rep. (N.S.) M.C. 154; 1 Best & S. 167.

Where the town council of a borough have caused the whole of the borough to be watched by day and by night, and have made an order that the whole borough shall be liable to the watch-rate, the council are empowered, by 5 & 6 Will. 4. c. 76. s. 92. and 2 & 3 Vict. c. 28, to rate to such watch-rate the occupiers of land within the borough, though situate more than 200 yards distant from a street or continuous line of houses regularly watched within the borough. *The Great Western Rail. Co.* v. *Maidenhead*, 31 Law J. Rep. (N.S.) M.C. 113; 11 Com. B. Rep. N.S. 653.

(*c*) *Amount of Rate.*

By a local act the council of L were empowered to make a rate for the purpose of defraying the expenses of a library and museum established under the act. It was provided that the amount to be levied should "not in any one year exceed 1*d.* in the pound upon the rateable value of the property within the borough liable to such rate":—Held, that the amount must not exceed 1*d.* in the pound upon the rateable value of the property within the borough actually capable of producing and yielding the amount. *Ex parte Brown, in re the Corporation of Liverpool*, 31 Law J. Rep. (N.S.) M.C. 108.

The Birmingham Waterworks Company, incorporated by statute 7 Geo. 4. c. cix, were empowered by that statute to construct waterworks and to supply, by means of aqueducts, pipes, mains and reservoirs, the borough of Birmingham, &c. with water. The company executed the necessary works, and made a large reservoir without, and a small reservoir within, the borough; the latter of which was supplied with water forced from the former through mains and pipes under the ground, thereby supplying a small portion of the borough with water. By 18 Vict. c. xxxiv, embodying the Waterworks Clauses Act, 10 & 11 Vict. c. 17, the former act was repealed, and the company empowered to form other reservoirs, obtain water from fresh sources, and erect additional works. The company proceeded to execute new works; and constructed new reservoirs outside the borough, and laid down new mains and pipes for carrying the water from them into the old one without the borough, and thence into and through the borough: the streams supplying the reservoirs being open streams and brooks courses running over the surface of the ground; the reservoirs both within and without the borough being wholly uncovered. By the Birmingham Improvement Act, 14 & 15 Vict. c. xciii, with which a considerable part of the Towns Improvements Clauses Act, 10 & 11 Vict. c. 34, is incorporated, the town council are authorized to make and levy a rate, called "the borough improvement rate," upon "every person who occupies any house, shop, warehouse, counting-house, coach-house, stable, cellar, vault, building, workshop, manufactory, garden, land or tenement whatsoever, except as herein excepted, within the limits of that act, according to the full net annual value thereof respectively." And by clause 129. it is provided that "the occupiers of any land covered with water or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any act of parliament for public conveyance, shall be rated in respect of the same to the rates authorized to be levied by the act at one-fourth part only of the net annual value":—Held, that the reservoir within the borough was rateable to the borough rate at only one-fourth part of its net annual value. That the pipes and mains of the company within the borough were rateable to the borough rate to the full extent, and not merely to one-fourth part of their net annual value as "land covered with water." *R.* v. *the Birmingham Waterworks*, 1 Best & S. 84.

(*d*) *Application of.*

Where a body of persons are by statute constituted trustees for certain public purposes, and powers are conferred on them to levy rates upon the district to a certain limited amount, they are authorized (if not expressly prohibited) to apply the rates of any one year in the payment of debts properly incurred in a previous year in the execution of their trust. *Secus*, if their power of rating be unlimited in amount. *The Attorney General* v. *Church*, 2 Hem. & M. 697.

Where in such a case one of the purposes of the trust is such that it can only be properly carried out by raising a sum of money larger than the current rates can supply, the trustees are justified in raising this sum by way of loan and paying the same with interest out of future rates. Ibid.

(E) HIGHWAY RATES.

(*a*) *Application of.*

In 1859 an act was obtained for making a turnpike-road from L to A, a distance of about sixteen miles, and empowering the trustees to take tolls on two portions of the road so soon as they were respectively completed and open to the public. In 1861, one of these portions being a distance about nine miles, was opened to the public and tolls were taken on it. The other portion had not been commenced. Upon an information, under statute 4 & 5 Vict. c. 59. s. 1, alleging that the funds of the trust were insufficient for the repairs of the turnpike-roads

comprised therein, and that part of the road so opened was out of repair,—Held, that the Justices had jurisdiction to order a portion of the highway-rate to be applied to the repair of the road. *Roberts* v. *Roberts*, 3 Best & S. 183.

(*b*) *Exemption from.*

A highway-rate having been duly made for a parish, payment was refused on the ground that the property in respect of which the occupier was assessed was in a tything immemorially exempt from contributing to highway-rates of the parish at large; and Justices having refused to issue a warrant of distress to enforce payment, were ordered by the Court of Queen's Bench to do so; and the surveyor of highways having distrained under the warrant, an action was brought against him by the occupier, who at the trial proved the exemption claimed:—Held, that the action lay against the surveyor as the person executing the warrant. *Freeman* v. *Read*, 32 Law J. Rep. (N.S.) M.C. 226; 4 Best & S. 174.

It having been proved that a tything consisting of two farms only, had never been rated to the highway-rate of the parish at large, though rated to the poor-rate, and that the occupiers for the time being had always done what repairs were necessary, though of little amount, to the roads in the tything without assistance from the rest of the parish,—Held, that this constituted a sufficient legal exemption from the *prima facie* liability to the highway-rate. Ibid.

A parliamentary survey made in the time of the Commonwealth is good evidence of reputation, whether it be considered as made by competent authority or not. Ibid.

The hamlet of M forms part of the parish of S, but the lands in M had never been assessed to the highway-rates of S, nor had S ever repaired or contributed to the repair of the highways in M. From 1828 to 1841, by living testimony, and previously, by evidence of reputation, it appeared that highway-rates were assessed upon the lands in M by the neighbouring parish of W, jointly with the lands in W, and the highways in M were repaired by the surveyors of W out of such rates jointly with the highways in W, without any distinction. Since 1841, by private arrangement between M and W, M ceased to be assessed to the highway-rates of W; and the occupiers in M, by arrangement among themselves, repaired the highways in M without the rate or assessment being made:—Held, that a part of one parish could not legally be united to another parish for the purpose of the repair of the highways, and that no continuing consideration was shewn on the part of S, so as to create a liability on the part of W to repair the highways in M being part of S; and that there was no sufficient evidence to draw the inference of fact, that M, though part of S, had been originally a hamlet repairing its own highways. That there was therefore no sufficient ground of exemption shewn by the hamlet of M to avoid its *prima facie* liability to contribute to the highway-rates of the parish of S, of which it formed part. *Dawson* v. *the Surveyor of Willoughby*, 34 Law J. Rep. (N.S.) M.C. 37; 5 Best & S. 920.

(*c*) *Notice of Action.*

The 5 & 6 Vict. c. 97. s. 4. enacts that in all cases where notice of action is required, such notice shall be given one calendar month at least before any action shall be commenced:—Held, that a notice having been given on the 28th of a month an action might be commenced on the 29th of the following month, whatever the length of the preceding month. *Freeman* v. *Read*, 32 Law J. Rep. (N.S.) M.C. 226; 4 Best & S. 174.

(F) Enforcing Payment of Rates.

[See *Ex parte May*, title Justice of the Peace.]

Arrears of poor-rate can be levied under the 43 Eliz. c. 2. s. 4. by overseers other than the immediate successors of those who made the rate; and the 17 Geo. 2. c. 38. s. 11. has not the effect of confining this right to the immediate successors. *The Overseers of East Dean* v. *Everett*, 30 Law J. Rep. (N.S.) M.C. 117; 3 E. & E. 574.

## RECEIVING STOLEN GOODS.

A wife, in the absence of her husband, and without his knowledge, received stolen goods, and paid money on account of them. The thief and husband afterwards met. The latter then learnt that the goods were stolen, and he agreed on the price which he was to pay for them, and paid the balance to the thief:—Held, that, on these facts, the husband might be convicted of receiving the goods, knowing them to be stolen. *R.* v. *Woodward*, 31 Law J. Rep. (N.S.) M.C. 93; 1 L. & C. 122.

If a husband knowing that his wife has stolen certain goods receive them from her, he may be convicted of receiving goods knowing them to have been stolen. *R.* v. *M'Athey*, 32 Law J. Rep. (N.S.) M.C. 35; 1 L. & C. 250.

The prisoner lodged at the prosecutor's house, and left his lodgings on the 8th of April. On the next day the prosecutor's wife left her home, taking a bundle with her, which, however, was not large enough to contain the things which, the evening she left, it was found had been stolen from the house. Two days after this all the things were found in the prisoner's cabin, or on his person, in a vessel in which the prosecutor's wife was, the prisoner and the prosecutor's wife having taken their passage in the vessel as man and wife:—Held, that the jury were justified on the evidence in drawing the inference that he had received the property knowing it to have been stolen by some evilly-disposed person. *R.* v. *Deer*, 32 Law J. Rep. (N.S.) M.C. 33; 1 L. & C. 240.

Recent possession of stolen property is evidence, either that the person in possession stole the property, or that he received it knowing it to be stolen, according to the other circumstances of the case. Where the prisoner was found in the recent possession of some stolen sheep of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances, that he did not steal them himself, it was held that there was evidence for the jury that he received them knowing them to have been stolen. *R.* v. *Langmead*, 1 L. & C. 427.

## REFRESHMENT HOUSES.

In order to convict the keeper of refreshment-rooms licensed under 23 Vict. c. 27. of the offence created by the 32nd section of "knowingly suffering prostitutes to assemble and continue upon his premises," it is not necessary that there should be any indecency in the house; all that the Magistrate has to determine is, whether the facts proved in evidence fairly lead to the inference that women came to the house, to the defendant's knowledge, not merely to obtain refreshment, but for the purpose of meeting men as prostitutes. *Belasco* v. *Hannant*, 31 Law J. Rep. (N.S.) M.C. 225; 3 Best & S. 13.

By statute 23 Vict. c. 27. s. 6, the resident, owner, tenant, or occupier of refreshment-houses is required to take out a licence; and "all houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment at any time between the hours of nine at night and five of the following morning, not being licensed for the sale of beer, cider, wine, or spirits, respectively, shall be deemed refreshment-houses within this act." On the hearing of an information against S & O, the evidence was, that they kept a dancing saloon. The entrance from the street led to a room fitted with chairs, looking-glasses and a number of shelves holding glass measures and pots. This room opened into the dancing-room. When the house was visited in the night, O was found behind a counter at the entrance of the dancing-room pouring beer from one jug into another. A number of persons were in the room, some dancing, some drinking beer, and men were at a table, sitting drinking and singing, and there were a number of quarts of beer in persons' hands, from which glasses were filled and handed about. Similar things were seen on two other occasions during the same month, but no sale of anything was witnessed; 3*d.* was charged for admission. A witness, a police-constable, stated that he visited the saloon nearly every night in December, and he saw S and his wife take money for admission, and he had seen a great number of persons drinking in the saloon and dancing. O said, in defence, that 3*d.* was charged for admission, and if a pot of beer was wanted, the persons paid 6*d.* first and one of the defendants went for it. S said that no refreshment was sold there. The Magistrate was of opinion that the evidence did not bring the house within the definition in the act. Regarding "entertainment" as the provision of food, drink, and whatever else might be reasonably required for the personal comfort of guests, of such entertainment there was no sufficient evidence, and he could not say it was a house kept for public refreshment, inasmuch as no refreshments at all were kept there; only one kind of refreshment was obtainable, and visitors wanting that were dependent upon the chance of being able to procure it from other places:—Held, that the evidence raised questions of fact, upon the finding of which the decision of the Magistrate was conclusive. And by *Pollock, C.B.*—The construction of the word "entertainment" by the Magistrate was correct. By *Martin, B.*—The evidence was sufficient to support a conviction. By *Bramwell, B.*—The decision of the Magistrate was correct in law and fact. *Taylor* v. *Oram*, 31 Law J. Rep. (N.S.) M.C. 252; 1 Hurls. & C. 370.

## REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES.

In every case of vacancy of the office of superintendent registrar of births, deaths, and marriages in any union, the power of filling up the vacancy is, by 6 & 7 Will. 4. c. 86, given to the guardians, and the clerk to the guardians has no right to claim the appointment except in the case of the first appointment after the act first came into operation. *R.* v. *Acason*, 31 Law J. Rep. (N.S.) Q.B. 227.

## REGISTRATION OF DEEDS, WILLS, AND INCUMBRANCES.

A memorandum not under seal, accompanying a deposit by way of equitable mortgage of deeds relating to lands in Middlesex, requires registration, under 7 Ann. c. 20. *Neve* v. *Pennell*, 33 Law J. Rep. (N.S.) Chanc. 19; 2 Hem. & M. 170.

According to the memorandum of registration indorsed on two mortgage securities of different dates brought to the Middlesex Registry, they were both registered on the same day and at the same hour; but one was numbered 764, the other 768:—Held, that the security numbered 764 must be regarded as having been registered first. Ibid.

A died in 1854 seised in fee, in equity, of land in the East Riding of Yorkshire, and her heir took possession of the land. In 1861 a will of A devising the land to the heir upon certain trusts was found, but the heir was not told of the discovery. In 1862 the heir mortgaged the land, and the mortgage was immediately registered in the East Riding Registry. In 1864 the will was registered:—Held, that under the East Riding Registration Act, 6 Ann. c. 35. the mortgagee had priority over those claiming under the will. *Chadwick* v. *Turner*, 34 Law J. Rep. (N.S.) Chanc. 356; 34 Beav. 634—affirmed 35 Law J. Rep. (N.S.) Chanc. 349.

*Semble*—Under the East Riding Registration Act, a devisee under an undiscovered will must be postponed to a mortgagee from the heir, even though the will be registered within six months after discovery thereof. Ibid.

## RELEASE.

To a plea of release in trover for indigo and indigo warrants, the plaintiffs replied, on equitable grounds, that the defendants were indebted to the plaintiffs in a sum of money, and by a deed of inspectorship and liquidation the defendants and the other creditors covenanted that at the expiration of twelve months the debtors should be absolutely released and discharged from all actions, causes of action, trespasses, claims and demands both at law and in equity, or otherwise howsoever, which the creditors then had or thereafter might claim or demand against the debtors, for or by reason or on account of the debts or claims to or of the creditors then due and owing from or enforceable against the debtors, or in respect of which any proof or claim to dividend might be made or sustained under the deed or of any other matter, cause or thing whatsoever in respect of the said debts or claims, and that the said deed might be pleaded

and given in evidence as an actual release; and the replication further alleged that the plaintiffs did not know that the defendants had committed the grievances sued for, or that the plaintiffs had any claim or cause of action against the defendants in respect thereof, and that the defendants did know that they had committed the said grievances, and that the plaintiffs had a claim or cause of action against them in respect of the said goods, and did not inform the plaintiffs thereof, and that the defendants executed the deed intending and believing that it did, and that it was intended by the defendants to relate only to the sum of money in which the defendants were indebted to the plaintiffs, and intending only to release the said debt, and that if they had known of the claim in respect of which the action was brought they would not have executed the indenture:—Held, that the replication was an answer to the release, and that the effect of the replication was not avoided by a rejoinder that there were cross-claims between the plaintiffs and the defendants, and that the defendants had deposited the indigo warrants with certain parties as security for moneys obtained by them for the plaintiffs, and the defendants being unable to meet their engagements, the plaintiffs' goods were sold, and that the state of the accounts and whether the defendants had exceeded their authority in depositing the warrants was unknown to them and the plaintiffs, and that the deed was executed, amongst other considerations, in consideration of the defendants giving up their property for the benefit of their creditors, and that the other creditors supposed that the release was intended by the plaintiffs as it was intended by the defendants to include all claims by the plaintiffs. *Lyall* v. *Edwards*, 30 Law J. Rep. (N.S.) Exch. 193; 6 Hurls. & N. 337.

Negotiations antecedent to a suit (save in a case of bad faith), unless amounting to a release or binding agreement, cannot be regarded. *Edelsten* v. *Edelsten*, 1 De Gex, J. & S. 185.

A testator bequeathed two legacies of 2,000*l*. The executor rendered an account of the estate to A B, one of the legatees, shewing it to be about 1,750*l*. in the whole. The legatee on receipt of half, executed a general release. Afterwards, it appeared that there was a further asset of 2,000*l*., belonging to the estate, which had been omitted:—Held, that the release was binding *pro tanto*, and the executor was ordered to pay to A B a moiety of the 2,000*l*. *Anonymous*, 31 Beav. 310.

The trustee of a sum of money charged on real estate, who is also owner of the estate subject to the charge is entitled to sell any portion of the estate discharged from the trust, provided he reserves a portion sufficient to answer the charge, and the estate so sold cannot be followed into the hands of a purchaser with notice of the trust. *Grundy* v. *Heathcote*, 1 Hem. & M. 172.

## REPLEVIN.

Replevin lies in the case of goods taken under a warrant of distress issued by a Justice to enforce payment of the costs ordered on an appeal against a poor-rate under 12 & 13 Vict. c. 45. s. 5. and 11 & 12 Vict. c. 43. s. 27. *Gay* v. *Mathews*, 32 Law J. Rep. (N.S.) Q.B. 69; 4 Best & S. 425.

The 24 Geo. 2. c. 44. s. 6, as to previous demand of the warrant, and 2 & 3 Vict. c. 93. s. 8. and 1 & 2 Will. 4. c. 41. s. 19, as to notice of action, do not apply to an action of replevin. Ibid.

An order under 12 & 13 Vict. c. 45. s. 5. (which enacts that, upon any appeal to the Quarter Sessions, the Court may order and direct the party against whom it shall be decided to pay costs *to the other party*, such costs to be recoverable in the manner provided by the 11 & 12 Vict. c. 43. s. 27.) is rightly made directing the unsuccessful party to pay the costs *to the clerk of the peace*, to be handed over by him to the other party.

## RENTCHARGE.

Where, by a testamentary appointment under a power in a settlement, a charge was created and a term vested in trustees to raise the same by sale thereof, *semble*—That the money could not be raised by a sale of the fee, though the term was insufficient for the purpose. But a life annuity, being granted in the same settlement, by way of rentcharge, and it appearing that arrears which had accrued could not be otherwise satisfied, a decree was made for sale of the fee. *Hall* v. *Hurt*, 2 Ju. & H. 76.

## REVENUE.

[Right of Appeal. See QUEEN'S REMEMBRANCER'S ACT—PROBATE DUTY. See LEGACY—STAMP—WILL.]

[An act to provide for the preparation, audit, and presentation to parliament of annual accounts of the appropriation of the moneys voted for the revenue departments—24 & 25 Vict. c. 93.]

(A) CUSTOMS AND EXCISE.
(B) ASSESSED TAXES.
(C) INCOME TAX.
(D) SUCCESSION DUTY.
  (*a*) *Relationship of Predecessor and Successor.*
  (*b*) *The Succession.*
  (*c*) *Allowances.*
  (*d*) *Unproductive Land.*
(E) DUTIES ON RAILWAY FARES.

### (A) CUSTOMS AND EXCISE.

[Certain duties of Customs and Inland Revenue repealed and altered by 24 Vict. c. 20.—Certain duties of Customs and Inland Revenue continued, and certain other duties granted, altered and repealed by 25 Vict. c. 22.—The laws relating to the sale of spirits amended by 25 & 26 Vict. c. 38.—The duties of Excise on sugar made in the United Kingdom continued, and the laws relating to the duties of Excise amended by 25 & 26 Vict. c. 84.—The credit for payment of a portion of the Excise duty on malt extended by 26 Vict. c. 3.—The duties on tobacco altered by 26 Vict. c. 7.—Certain duties granted and the laws relating to the Inland Revenue amended by 26 & 27 Vict. c. 32.—The duty on rum reduced in certain cases by 26 & 27 Vict. c. 102.—Malt to be used in feeding animals made free of duty by 27 Vict.

c. 9.—The laws relating to the warehousing of British spirits amended by 27 Vict. c. 12.—Certain duties of Customs and Inland Revenue granted by 28 Vict. c. 30.—The law relating to the sugar duties and the drawbacks thereon amended by 28 & 29 Vict. c. 95.—The Excise duty on malt allowed to be charged according to the weight of the grain used by 28 & 29 Vict. c. 66.]

The 6 & 7 Will. 4. c. 38. s. 3. did not repeal the previous statute, 6 Geo. 4. c. 81. s. 2, and the schedule thereto, but all are to be read together. Therefore, when the 3rd section of 6 & 7 Will. 4. c. 38, was itself repealed, the provisions of 6 Geo. 4. c. 81, still continued; and a person in Ireland, licensed to trade in grocery, and obtaining a spirit licence, was liable to the larger duty charged by the earlier statute on a person of that description, as fixed by the schedule to the 2nd section of that statute. *Dickson* v. *the Queen*, 11 H.L. Cas. 175.

### (B) ASSESSED TAXES.

Defendant kept, at his private residence, articles liable to duties under the Assessed Taxes Act, 43 Geo. 3. c. 161. He carried on business in two shops in different districts, one in the parish of St. B, and one in the parish of M in London, but made no return of the above-mentioned articles at either:—Held, that the defendant was bound to make a return at his shop in St. B, although no evidence was given that he ever slept there; but that he was only liable to one penalty for all the omissions. *The Attorney General* v. *M'Lean*, 32 Law J. Rep. (N.S.) Exch. 101; 1 Hurls. & C. 750.

A tradesman's place of business is a place where he "resides or is," within the meaning of section 27. of 43 Geo. 3. c. 161. Ibid.

### C) INCOME TAX.

Persons employed by a railway company at weekly wages are not persons holding public employments, &c., within the 3rd rule of Schedule E, and a railway company is not liable to be assessed in respect of such servants under 23 Vict. c. 14. s. 6. *The Attorney General* v. *the Lancashire and Yorkshire Rail. Co.*, 33 Law J. Rep. (N.S.) Exch. 163; 2 Hurls. & C. 792.

*Semble* — That such persons, if their income amount to 100*l.* a year, are liable to be assessed under Schedule D. Ibid.

If a testator by his will grant a rentcharge to be paid free of income-tax, the annuitant will be entitled to have the full amount paid him without the tax being deducted. *Festing* v. *Taylor* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 41; 3 Best & S. 235—reversing the decision below, 31 Law J. Rep. (N.S.) Q.B. 36; 3 Best & S. 217.

Section 103. of 5 & 6 Vict. c. 35, which renders void all contracts to pay rentcharges without allowing the owner of the land to deduct the income-tax, does not extend to rentcharges granted by will. Ibid.

### (D) SUCCESSION DUTY.

#### (*a*) *Relationship of Predecessor and Successor.*

Succession duty is payable by a person entitled under the will of an officer of Customs to the amoun of "The Customs Annuity Benevolent Fund," payable at his death under the 56 Geo. 3. c. lxxiii.; for the relationship of predecessor and successor exists between the officer and the nominee, within the meaning of the Succession Duty Act, 1853. *The Attorney General* v. *Abdy*, 32 Law J. Rep. (N.S.) Exch. 9; 1 Hurls. & C. 266.

#### (*b*) *The Succession.*

Under the will of Sir J S, made in 1802, W C was tenant for life of certain real estates, remainder to his first and other sons in tail, remainder to Miss G for life, remainder to her first and other sons in tail, remainder to J S C for life, remainder to his son, W F R C, in tail, with remainders over. In December, 1850, a disentailing deed was executed, and the estates re-settled. By another deed of the 23rd of the same month, the said W F R C, for valuable consideration, charged his estate with a sum of 20,000*l.* in favour of the said W C, payable upon the day of the expiration of twelve calendar months to be computed from the day upon which the limitations to the said W C and the said Miss G for their lives and to their sons in tail, or the last of such limitations should fail, with interest at 5*l.* per cent. from the day of the termination of the last of such limitations. Upon the 31st of the same month W C, by a deed of settlement, assigned the charge of 20,000*l.* to trustees (the present defendants), in trust as to 14,000*l.* for his adopted son, W C the younger, and as to the remaining 6,000*l.* for his adopted daughter, Mrs. B. W C died in February, 1855, without legitimate male issue, and Miss G died, without issue, in November, 1857; thereupon W C the younger and Mrs. B respectively became entitled to the above-mentioned sums of 14,000*l.* and 6,000*l.*:—Held, per *Pollock, C.B.*, *Martin, B.* and *Channell, B.*, that the deed of the 31st of December, 1850, was a disposition of property within the meaning of section 2. of 16 & 17 Vict. c. 51, and that W C the younger and Mrs. B having become beneficially entitled to the property by reason of it, and having become so entitled upon the death of a person dying after the time appointed for the commencement of the act; such disposition conferred on them a "succession" within the meaning of the 2nd and 17th sections, and, therefore, a duty of 10*l.* per cent. became payable under section 10. in respect of the succession of each of them, in respect of the said sum of 20,000*l.* *The Attorney General* v. *Yelverton*, 30 Law J. Rep. (N.S.) Exch. 333; 7 Hurls. & N. 306.

Per *Bramwell, B.*, that the case was not within the provisions of the 2nd and 17th sections; that the assignment by W C to the defendants was not such as "in itself to create a succession" within the meaning of the act; not being a disposition of property, but a transfer of property before disposed of, and that the defendants were not liable to any duty in respect of the said sum of 20,000*l.* Ibid.

*Quære*—Whether W F R C would not be liable to succession duty in respect of the same 20,000*l.* Ibid.

In 1774 H B devised certain estates to his son H B, for life, with remainder to the first and other sons of the said H B, in tail male. In 1810 H B the son, and his eldest son, W J B, suffered a recovery, barring the entail, and in 1821, by virtue of a joint power of appointment reserved to them, re-settled

the estates to the use of H B for life, with remainder to W J B for life, and to his sons in tail male, with remainder to G B (another son of H B) for life, and to his sons in tail male; and power was given to the tenants for life to charge portions for daughters and younger children. H B died in 1834, and was succeeded by his son, W J B, upon whose death, without issue, in 1855, G B became tenant for life in possession. In July, 1855, E G B, the son of G B, being tenant in tail, with the consent of his father disentailed the estates, and conveyed them to such uses as his father and himself should jointly appoint, and the next day they exercised their joint power of appointment, and limited the estates to the respondents for a term of 500 years; the trusts of the term being, in case E G B survived his father (an event which happened), to pay him an annuity during his life. And power was given to G B, the tenant for life, to charge portions for daughters and younger children. G B, by his will, in exercise of the powers contained in the deeds of 1821 and 1855 respectively, charged the estates with portions for his younger children. Under these circumstances, the Crown claimed duty at the rate of 3*l.* per cent., first, in respect of the succession of G B, as having been wholly derived by him from his elder brother, W J B, as predecessor; secondly, in respect of the succession of E G B, as having been derived under a disposition made by himself, at the date of which he was expectantly entitled to the estates as a succession derived from his uncle, W J B, as predecessor; and thirdly, in respect of the portions of the younger children of G B, as being derived from either their uncle, W J B, or their own brother, E G B, as predecessor:—Held, reversing the decree of the Court of Exchequer, that the Crown was entitled to duty, at the rate of 3*l.* per cent. in all the above-mentioned cases. *The Attorney General* v. *Floyer; The Attorney General* v. *Smythe*, 31 Law J. Rep. (N.S.) Exch. 404; 9 H.L. Cas. 477.

In 1812, Sir E J S, upon his marriage, settled property to the use of himself for life, with remainder to the first and other sons of the marriage in tail male. In 1840, E J S, the eldest son of Sir E J S, being tenant in tail, with the consent of his father, disentailed the property and conveyed it to such uses as his father and himself should jointly appoint. Afterwards, on the marriage of E J S, the son, articles of agreement, to which both father and son were parties, were entered into, for settling the property upon the father for life, with remainder to the son for life, with remainder to the first and other sons of the marriage in tail male, with remainder to the father's second son, R P C S, for life, with remainder to his first and other sons in tail male, with remainder to the respondent, C F S (the father's third son) for life, with remainder to his first and other sons in tail male. The marriage took place in 1841. E J S died without issue. In 1842, R P C S being then tenant in tail, with the consent of his father, disentailed the property and conveyed it to such uses as his father and himself should jointly appoint. In 1843, the father and son appointed the property to the use of the father for life, with remainder to R P C S for life, with remainder to his first and other sons in tail male, with remainder to the respondent C F S for life, with remainder to his first and other sons in tail male. R P C S died in his father's lifetime; the father died in 1856, and the respondent thereupon became tenant for life in possession. Under these circumstances, the Crown also claimed duty at the rate of 3*l.* per cent. in respect of his succession, as having been wholly derived by him from either one or other of his elder brothers, E J S or R P C S, as predecessor:—Held, also, reversing the decree of the Court of Exchequer, that the Crown was entitled to duty at the rate of 3*l.* per cent. Ibid.

E J L, by will, devised real property to trustees, upon trust, during the life of his wife, E L, to pay to her the annual proceeds, for her sole and separate use, and after her death upon such trusts as she should by deed or will appoint, and in default thereof upon other trusts in the will mentioned. E J L died in 1850, before the passing of the Succession Duty Act, 1853, leaving E L him surviving. E L, in 1858, by will, after reciting the power, devised portions of the said estates to trustees, upon trust, to pay the annual income to S M B, for her sole and separate use; S M B being the descendant of a sister of E J L, but a stranger in blood to E L. E L died in 1859:—Held (*dissentiente Bramwell, B.*), that S M B derived her succession from E J L, as predecessor, and not from E L, and that therefore the succession was liable to 3*l.* per cent., and not to 10*l.* per cent. duty. *In re Barker*, 30 Law J. Rep. (N.S.) Exch. 404; 7 Hurls. & N. 109.

M T, pursuant to a power reserved to her in her marriage settlement, appointed real property (which had been settled on her by her father, W D G), from and after the death of the survivor of her husband and herself without issue, to such uses as her father, the said W D G, should by deed or will appoint; and in default of such appointment, to the use of W D G absolutely. M T survived her husband, and died in 1855 without issue. W D G died in 1831, and by his will, dated the same year, devised the said property to the defendant, a stranger in blood:—Held, that W D G, at the time of making his will, was absolute owner in fee simple of an estate which, for the purposes of the succession duty, was a reversion expectant on the estates for life of M T and her husband and the contingent estates of the unborn children, and that by the devise to the defendant the latter became beneficially entitled, on the death of M T in 1855, to a new "succession" under "a past disposition of property," under section 2, and was liable to a duty of 10*l.* per cent. under section 10. of the Succession Duty Act, 1853. *The Attorney General* v. *Gardner*, 32 Law J. Rep. (N.S.) Exch. 84; 1 Hurls. & C. 639.

A title by descent is a "derivative title" within section 15. of the Succession Duty Act, 1853 (16&17 Vict. c. 51). *The Attorney General* v. *Rushton*, 33 Law J. Rep. (N.S.) Exch. 184; 2 Hurls. & C. 812.

A testator, who died in 1832, devised real estate to his wife for life, and the reversion to R, who died in 1844. The testator's wife died in 1859, and R's son, in whom the reversionary interest of his father was vested, as his heir, became entitled in possession. R and his son were strangers in blood to the testator:—Held, that the son was liable, on the death of the wife, to a duty of 10*l.* per cent. upon a succession derived from the testator, and not to a duty of 1*l.* per cent. as on a devolution from his father. Ibid.

A tenant in tail, liable to duty on his succession,

barred the entail and acquired the fee simple by his own act, and died before the instalments of duty payable on his succession became due:—Held (*Pollock, C.B.* dissenting), that the instalments were a continuing charge on the property under section 21. of the Succession Duty Act, 1853. *The Attorney General* v. *Lord Lilford*, 34 Law J. Rep. (N.S.) Exch. 44; 3 Hurls. & C. 239.

The 2nd section of the Succession Duty Act applies not merely to cases where the title accrues at death, but also to cases where the title has accrued before the act, but is made an interest in possession at once, or after an interval on a death occurring after the act. *The Attorney General* v. *Gell*, 34 Law J. Rep. (N.S.) Exch. 145; 3 Hurls. & C. 615.

P G, the testator, devised certain property to his daughter for life if she survived her then husband, and after her death to such child or children by a second husband as she should appoint, and to them equally in default of appointment. If his daughter died before her then husband, or without having children by a second husband, then the trustees were to convey the estate to the use of E S C Pole for life, with remainder to such child of E S C Pole, other than the eldest (if more than one), as he should appoint, and for default of appointment to his second and other sons in tail. The testator further directed that the rents and profits of his estate during the joint lives of his daughter and her then husband should accumulate for twenty-one years if the daughter and her then husband should so long live, and be added to the corpus, and if they lived beyond twenty-one years then during the remainder of the joint lives the rents and profits should be paid to the person or persons who would have been entitled to the corpus if the daughter were dead without a child by her then husband. E S C Pole died on the 19th of January, 1863, without making any appointment, and the defendant was his second son. The twenty-one years expired on the 25th of January, 1863:—Held, that the defendant was a person who had become beneficially entitled to the income of property upon the death of a person dying after the commencement of the Succession Duty Act, within the meaning of section 2. of that act, and that the Crown was entitled to succession duty. Ibid.

Upon the second marriage of a mother, who had children by her former husband, the second husband transferred a sum of 10,000*l.* to trustees for himself and his wife successively for life, and, in default of there being any children of the marriage, upon trust for the children of his wife by her former husband:—Held, upon there being no issue of the second marriage, that the children of the first marriage took through the second husband, and not through their mother; and that, consequently, they were strangers to the predecessor, and were subject to a succession duty of 10*l.* per cent. *In re Ramsay's Settlement*, 30 Law J. Rep. (N.S.) Chanc. 849; 30 Beav. 75.

The words of the 17th section apply to all contracts, and exempt them from duty; and the funds of a tontine becoming divisible are within that section, so that the Crown is not entitled to duty; such division, however, would not affect any devolution or disposition after the commencement of the act. *Oldfield* v. *Preston*, 31 Law J. Rep. (N.S.) Chanc. 256; 3 De Gex, F. & J. 398.

In the case of a father who had subscribed for one share in the tontine in the names of his three infant children, two of whom died before the act came into operation, the Court decided that there was no succession at all in the surviving child, who took in his own right only that which had been given to him before the act came into operation. Ibid.

The 17th section is not confined to cases where the relation of debtor and creditor exists between the parties, but extends to every case of a contract *bona fide* for valuable consideration in money or money's worth for the payment of money or money's worth after the death of another person—per *Turner, L.J.*) Ibid.

The consideration of marriage is not a valuable consideration in money or money's worth within the meaning of the 17th section of the Succession Duty Act (16 & 17 Vict. c. 51), and a jointure rentcharge settled in consideration of marriage is therefore not exempt from duty. *Floyer* v. *Bankes*, 33 Law J. Rep. (N.S.) Chanc. 1.

Nor is the release by the lady of a bare possibility of future dower or freebench a sufficient consideration to exempt the jointure from duty. Ibid.

On the marriage of G B with G C N, real estates were limited by the father and elder brother of G B to the use that G C N might, in case she survived G B, receive during her life for her jointure, in lieu and satisfaction of dower and thirds, a yearly rentcharge of 800*l.*, to be issuing thereout, without any deduction or abatement whatsoever on account of or in respect of any taxes, charges, impositions or assessments already taxed, charged, assessed or imposed, or thereafter to be taxed, charged, assessed or imposed, on the hereditaments, or on the said annual rentcharge or on the said G C N, or her assigns, in respect thereof, by authority of parliament, or otherwise howsoever. The marriage took effect, and G B died after the passing of the Succession Duty Act, in the lifetime of G C N:—Held, first, that the jointure was a "succession" within the meaning of the 2nd section of the Succession Duty Act, and (reversing the decision of the Master of the Rolls) that it was not exempted from duty by the operation of the 17th section of the act; and, secondly, that as between G C N and the estates charged with the jointure, she was entitled to receive it free from succession duty. Ibid.

H G, a married woman, domiciled abroad, exercised by her will a general absolute power of appointment, given to her by the will of her father, over property situate in England,—Held, per *Turner, L.J.*, that legacy duty was not, but that succession duty was, payable by the appointees; *Knight Bruce, L.J.* expressing no further opinion than that one duty or the other (it being immaterial which) was payable. *In re Wallop's Trusts, and in re the Trustee Relief Act*, 33 Law J. Rep. (N.S.) Chanc. 351; 1 De Gex, J. & S. 656.

The Succession Duty Act applies to persons wherever domiciled, and the rule "*mobilia sequuntur personam*" cannot, as under the Legacy Duty Acts, be made the ground of an exemption from duty—(per *Turner, L.J.*). Ibid.

Real estate devised to trustees with a power of sale and sold in administration suit,—Held, liable to legacy duty. *Harding* v. *Harding*, 2 Giff. 597.

Where the Court ordered the testator's real estate out of which his widow was dowable to be sold free

from dower,—Held, that succession duty was payable on the widow's dower. Ibid.

Where the testator bequeathed certain moneys, believing that he had the power to do so, but which were in fact comprised in his marriage settlement, and the legatees elected to take under the will,—Held, that legacy duty was payable. Ibid.

A having a general power of appointment, subject to a life interest in his sister B, appoints by will to C for life with remainder to such persons as B shall appoint. A dies, and then B dies in C's lifetime having appointed to strangers. Then C dies:—Held, that B's appointees were liable to 10*l.* per cent. legacy duty, but that the fund was not liable to succession duty in respect of the succession of B. *In re Chapman's Trust*, 2 Hem. & M. 447.

(c) *Allowances.*

Mortgages executed by a tenant for life and remainderman under a joint power of appointment reserved to them, are (*Bramwell, B. dissentiente*) incumbrances created or incurred by the remainderman, and, therefore, he cannot on the death of the tenant for life, deduct them from the value of his succession, the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 34, enacting that "in estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor. Sir H P being seised in fee, settled his real estate to himself for life, remainder to his first and other sons in tail male. The petitioner, his only son, on attaining twenty-one, joined his father in barring the entail, and the property was re-settled to Sir H P for life, remainder to such uses as Sir H P and the petitioner should by deed direct, and in default to the petitioner for life, with remainder to the petitioner's first and other sons in tail. Sir H P and the petitioner, in exercise of the power, raised various sums by way of mortgage and further charge upon the estates as for money lent to them jointly, with joint and several covenants by them for repayment. They also executed a mortgage to secure a debt due from the father, and for the payment of which the father alone covenanted. They also, in further exercise of the power, created an annuity by way of appointment and rentcharge for the joint lives of the petitioner's eldest son and of Sir H P and the petitioner. Upon the death of Sir H P, the petitioner was assessed upon his succession without any deduction in respect of the mortgages or annuity:—Held, upon appeal (*Bramwell, B. dissentiente*), that the petitioner was not entitled to any such deduction. *In re Peyton*, 31 Law J. Rep. (N.S.) Exch. 50; 7 Hurls. & N. 265.

A, in 1796, executed a will, by which he made B tenant for life of an estate, remainder to her eldest son in tail male. In 1841 B and his eldest son (B being then in possession of the life estate, and being protector of the settlement, and the son being tenant in tail in remainder under the will) executed a disentailing deed, vesting the estate in trustees for such uses as they, or the son of the survivor, should appoint. In 1850 B and his son, under this power of appointment, executed a deed, by which, in consideration of B bringing other estates into settlement, and of the son giving up to B certain rights to be employed by the former in favour of younger children, an annuity of 700*l.* for the life of B was granted to the son (to be increased to 1,200*l.* on his marriage), and the estate was re-settled on B for life, and on the son in tail male. The son married, and the annuity was increased to 1,200*l.* B died after the date of the Succession Duty Act:—Held, affirming the decree of the Court of Exchequer, but *dubitante Lord Wensleydale*, that the son was liable to duty, at the rate of 10*l.* per cent., on the succession, which was not a new "disposition," as to which his father was to be considered the "predecessor." But held also, reversing a decree of the Court of Exchequer, that the son was entitled to an allowance in respect of the annuity of which he was to be considered as "deprived" on coming to the succession to the estate. *Lord Braybrooke v. the Attorney General* (House of Lords), 31 Law J. Rep. (N.S.) Exch. 177; 9 H.L. Cas. 150.

(d) *Unproductive Land.*

The late Earl of S died in 1855, and the defendant, the present Earl, became entitled, under the will of his father, to certain real property, in respect to portions of which he paid succession duty, at the rate of 1*l.* per cent. on the value; with respect to other portions, amounting to 48,000 square yards, in the neighbourhood of Liverpool, he omitted such portions from his return for assessment, being advised that no duty was payable thereon, inasmuch as the same was not in demand as marketable or building land, nor was capable of being sold or let profitably as such, nor was capable of being used productively for agricultural or other purposes, and was then and had been for ten years previously and ever since wholly unoccupied and unproductive. He informed the officers of Inland Revenue of such omission and his reasons for so omitting such portions, and was told in reply that if after any interval he should derive income or profit from such portions he would be expected to deliver a further account. Some time after the late Earl's death, the present Earl still denying his liability to pay duty, gave notice to the officers of Inland Revenue that he had sold 1,561 square yards of the land at 16*s.* per yard, and he subsequently sold a further portion thereof. Upon an information, by the Attorney General, asking for duty at the rate of 1*l.* per cent. in respect of the defendant's succession to the whole of the 48,000 square yards, or at least in respect of so much of such land as had then been or might at any time thereafter be sold or otherwise disposed of, it was held by the majority of the Court of Exchequer (see 32 Law J. Rep. (N.S.) Exch. 230; 2 Hurls. & C. 362), that the defendant was not liable to pay the duty claimed on any portion of the 48,000 square yards; that "annual value," in the 26th section, means present actual annual value, and that such value, and not possible or prospective annual value, is the basis on which succession duty is to be calculated; and this decision was affirmed, on appeal, by the House of Lords. *The Attorney General v. the Earl of Sefton* (House of Lords), 34 Law J. Rep. (N.S.) Exch. 98; 11 H.L. Cas. 257.

*Semble* (per the Lord Chancellor and *Lord Chelmsford*), that property, such as that in the present case, capable of being sold, has an annual value within the meaning of the act; and (per the Lord Chancellor) a value equal to interest at 3*l.* per cent. on the sum that

might have been realised if the property had been sold at the time of the accruing of the succession, and (per *Lord Chelmsford*) the value of an annuity which could be purchased with the amount for which the land would sell. But that, inasmuch as the Crown had in the present case assented to the statement of the Earl that the property was of no saleable value at the time of his succession, it must be bound by such assent. Ibid.

### (E) Duties on Railway Fares.

The B and G Railway Company were the owners of a line from B to G, passing through S and A. The defendants were the owners of a line between S and A connected with the B and G line at the points S and A, and hereafter called the Loop Line. The B and G Company had running powers, paying a certain rent and subject to certain conditions, over the loop line, but were not permitted to carry passengers between S and A, excepting such as were going to or coming from some station on their own line, whereby the traffic properly belonging to the loop line was secured to the defendants. In 1855, the M Railway Company became the owners of the B and G Railway, and discontinued carrying passengers on the B and G line between S and A, using instead of their own line the loop line exclusively between those points for all their passenger traffic between their termini B and G and intermediate stations. By the 7 & 8 Vict. c. 85. s. 6. it is enacted that every railway company shall run a train at the rate of 1*d.* a mile daily from one end to the other of their line, stopping to take up and set down passengers at every passenger station on their line, "with the immunities applicable by law to the carriage of passengers by railway," subject to the approval of the Board of Trade. By the 5 & 6 Vict. c. 79, a duty at the rate of 5*l.* per cent. is made payable in respect of all sums received for the conveyance of passengers upon railways, except so far as it is remitted by the 7 & 8 Vict. c. 85. in respect of cheap traffic trains approved by the Board of Trade, as therein mentioned; and by the 4th section of that act the duty is made payable by the party receiving the money. On the 1st of October, 1855, the M Railway Company began to run cheap traffic trains over the loop line, for the conveyance of passengers between the stations on their own line and those on the defendants' line, and the defendants collected and received the money paid for the conveyance of passengers from the stations on their line to the stations on the line of the M Railway Company. The Board of Trade, as soon as it became aware of this arrangement, withdrew its approval of the M Railway Company's cheap traffic trains, so far as they were trains for the conveyance of passengers over the loop line. And the M Railway Company paid duty upon so much of the fares of their cheap traffic trains as were derived from the conveyance of passengers over the loop line, but declined to pay the duty upon that portion of the fares derived from the conveyance of such passengers over the loop line which had been received on their account at the stations on the defendants' line. The arrangement between the M Railway Company and the defendants, under which the former used the loop line, was, that the M Railway Company should pay the defendants in respect of traffic from or to the M Railway Company's system to or from stations on the defendants' line 50*l.* per cent. of the gross receipts, and in respect of traffic from the M Railway Company's system passing through the defendants' line, 1,200*l.* a year, as way-leave. The clerks employed by the defendants received and collected the money at the stations on their line (as the defendants alleged) as agents of the M Railway Company. On an information to obtain payment by the defendants of the duty on the fares of the passengers of the cheap traffic trains of the M Railway Company, derived from the conveyance of passengers over the loop line,—Held, *per Curiam*, that the defendants received the fares, and that they and not the M Railway Company were the parties liable to pay the duty (if any duty were payable). And, per *Pollock, C.B., Channell, B.* and *Wilde, B.*, that the trains in respect of which exemption was claimed did not comply with all the conditions entitling them to exemption, inasmuch as they did not stop and put down passengers at every passenger station they passed on the line; and that the defendants were liable for the duty. That inasmuch as the defendants claimed the benefit of an exemption from a duty granted in very clear terms, it was for them to bring themselves precisely within the terms creating the exemption. Per *Martin, B.*, that the trains in question were entitled to the exemption, as well after as before the withdrawal of their approval by the Board of Trade, and that such approval was not a condition precedent to the remission of the duty, and that no duty was payable by either company. *The Attorney General* v. *the Oxford, Worcester and Wolverhampton Rail. Co.*, 31 Law J. Rep. (N.S.) Exch. 218; 7 Hurls. & N. 840.

## REWARD.

A boy having absconded with the defendant's property, the defendant offered a reward for such information as should lead to the recovery of the stolen property and the apprehension and conviction of the thief. The plaintiffs, alleging that they had given such information, sued the defendant on his promise to reward. The defendant pleaded that the plaintiffs had the boy in their custody before the reward was advertised, and that though they knew of this robbery, contrary to their duty, neglected to inform the defendant that they had apprehended the boy, by reason whereof the defendant was induced to offer the reward. The plaintiffs replied that they were policemen, and that in accordance with their duty in that behalf, they in a reasonable time informed their superintendent of all the circumstances which had come to their knowledge concerning the theft, and that the superintendent, at the request of the plaintiffs, within a reasonable time, conveyed this information to the defendant, and that it would have been contrary to the duty of the plaintiffs, as policemen, if they had themselves given the information to the defendant:—Held, on demurrer, that the plea must be taken as a plea of misconduct on the part of the plaintiffs, in keeping back the information from the defendant till after the offered reward was published, and that the replication was good as taking off that charge of misconduct. *Neville* v. *Kelly*, 32 Law J. Rep. (N.S.) C.P. 118; 12 Com. B. Rep. N.S. 740.

## SALE.

[See Frauds, Statute of—Vendor and Purchaser—Warranty.]



### (A) Of Goods.

#### (a) *Sale by Sample or Description.*

The defendant, a hop-merchant, entered into a contract with the plaintiff, who was a hop-grower, for the purchase of hops by sample. Inasmuch as the defendant could not sell hops to his customers if sulphur had been used in their growth, he inquired of the plaintiff at the time of making such contract if sulphur had been so used, and the plaintiff stated that it had not, and thereupon the contract was made. The plaintiff knew of the objection by hop-merchants to sulphured hops, and the defendant would not have bought the hops if he had been aware that sulphur had, in fact, been used:—Held, that the contract was conditional on sulphur not having been used in the growth of the hops; and that if sulphur had been so used, the defendant was at liberty to reject the hops, although they corresponded with the sample by which they had been sold. *Bannerman* v. *White*, 31 Law J. Rep. (N.S.) Q.B. 28; 10 Com. B. Rep. N.S. 844.

Where goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk, and without warranty. *Josling* v. *Kingsford*, 32 Law J. Rep. (N.S.) C.P. 94; 13 Com. B. Rep. N.S. 447.

The plaintiffs, H & Co., carried on business as iron-manufacturers, having succeeded to a firm of S & H. The defendant was acquainted with the iron manufactured by the latter firm, which was always marked "S & H." Upon his inquiring for iron so marked, he was informed of the change in the firm, and he then ordered of H & Co. a quantity of "S & H crown bars." The plaintiffs sent iron of the same quality as that made by S & H, but marked "H & Co." instead of "S & H," which the defendants rejected on account of the difference in the brand. The jury found that there was no value in the brand "S & H":—Held, that upon the true construction of the above contract, there was no stipulation for a particular brand, the letters "S & H" being used to describe a particular quality of iron only. *Hopkins* v. *Hitchcock*, 32 Law J. Rep. (N.S.) C.P. 154; 14 Com. B. Rep. N.S. 65.

#### (b) *Caveat Emptor.*

If the maker of a chattel make it with a patent defect so serious as to render it worthless, and the person for whom it is made have an opportunity of inspecting it before it be delivered, the maker is not guilty of a fraud if he do not point out the defect. *Horsfall* v. *Thomas*, 31 Law J. Rep. (N.S.) Exch. 322; 1 Hurls. & C. 90.

To an action by the drawers against the acceptor of a bill of exchange, the defendant pleaded *(inter alia)* that he had been induced to accept the bill by fraud. In support of this plea, evidence was given and tendered, that the bill was in part payment of a steel gun, which the plaintiffs had undertaken to make for the defendant, of certain agreed dimensions and quality, but in which there was a defect, such that had the defendant known of it he would have been justified in refusing to accept the gun; that this defect was known to the plaintiffs, and had been artificially concealed by the insertion of a plug by the plaintiff's workmen, so as not to be apparent on inspection. It appeared that the defendant had had an opportunity of inspecting the gun before delivery, but had not availed himself of it. The gun at first answered the purpose for which the plaintiffs wanted it, but ultimately burst and became worthless, as it was alleged, in consequence of the defect:—Held, that there was no evidence in support of the plea of fraud. Ibid.

#### (c) *Transfer and Vesting of Property.*

A contracted to supply to B 1,000 tons of coals, delivered at Rangoon, at 45*s.* per ton, alongside craft, &c. as might be directed by B; payment, one-half of invoice value by bill at three months, on handing the bills of lading and policy of insurance to cover the amount, or in cash at 5*l.* per cent discount, at A's option, and the balance in cash on right delivery at Rangoon. A chartered a ship, and in pursuance of his contract shipped on board 1,166 tons of coals, and delivered to B the bill of lading and a policy of insurance covering half the invoice price, and B paid to A the half invoice price. On the voyage the ship became disabled, and part of the coals were obliged to be thrown overboard; and the master chartered another vessel, and transhipped the residue, 850 tons, on board of her, at 45*s.* per ton freight to Rangoon. On arrival at Rangoon the master of the latter vessel offered the coals to B's agent on payment of the 45*s.* per ton freight. This offer being refused, the master put up the coals for auction, and B's agent *bona fide* bought them at a price of 1*l.* 5*s.* a ton:—Held, by *Erle, C.J.*, *Willes, J.*, and *Channell, B.*, that the property in the coals passed to B on A's shipping the coals on board and delivering to B the bills of lading and policy of insurance; and that A having done this was entitled to retain the half of the invoice price that had been paid to him; that A was bound to have delivered to B at Rangoon so much of the coals as had escaped the sea risk and arrived there; but that the offer of the coals at Rangoon on the terms of paying 45*s.* per ton freight was not a delivery by A according to his contract, consequently that A was not entitled to demand from B any part of the residue of the invoice price; and, *semble*, by *Willes, J.*, that B might sue A for the non-delivery at Rangoon, and recover as damages the difference between 1*l.* 5*s.* per ton, which B actually paid to get the coals, and the 1*l.* 2*s.* 6*d.*, which B was to have paid under the contract. Held, by *Martin, B.* and *Pigott, B.*, that the property in

the coals did not pass to B; but that, by the special terms as to payment, A was entitled to keep the half price paid him, but that he could not recover more, since he had not delivered the coals at Rangoon pursuant to his contract. Held, by *Williams, J.*, that the property in the coals passed to B on the shipment and delivery of the shipping documents; but that A was bound to deliver the coals at Rangoon, and that as he had not done so, B was entitled to recover back the half price paid, and also any damages sustained by A's breach of contract in not delivering the coals. *The Calcutta and Burmah Steam Navigation Co.* v. *De Mattos* (Ex. Ch.), 33 Law J. Rep. (N.S.) Q.B. 214.

There cannot be a sale in market overt unless the goods be openly exposed in bulk in the market; therefore, where a sale takes place by sample, in a shop in the city of London, of such goods as are usually sold in the shop, and the goods are afterwards delivered to the vendee at another shop in the city where another kind of business is carried on, such a sale is not a sale in market overt, and does not change the property in the goods as against the true owner. *Crane* v. *the London Dock Co.*, 33 Law J. Rep. (N.S.) Q.B. 224; 5 Best & S. 313.

*Quære*—Whether the sale, not being *to* the owner of the shop, and not by him, is within the principle applicable to sales in market overt. Ibid.

The rule "that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted," is not to be understood to include cases where all that remains to be done is to be done by the *buyer* with full authority from the seller, but only cases where something remains to be done by the *seller*. The intention of the parties is to be looked at in every case, and the above rule does not apply where they have sufficiently shewn whether they intended the property to pass or not. *Furley* v. *Bates*, 33 Law J. Rep. (N.S.) Exch. 43; *nom. Turley* v. *Bates*, 2 Hurls. & C. 200.

Therefore, where A agreed to sell and B to buy a quantity of fire-clay, at a certain price per ton, then stacked in a heap adjoining a pit belonging to A, and B was to load the clay in his own carts, and weigh each load at a certain weighing-machine which his carts would pass on their way from A's pit to B's place of deposit, and B having only carted away and paid for a certain portion of the clay, refused to take the remainder,—in an action brought by A to recover the price of the remainder of the heap not removed, the jury having found that the contract between the parties was for the sale of the whole heap,—Held, that on this finding it was to be presumed to have been the intention of the parties that the property in the whole heap should pass, notwithstanding something remained to be done by the buyer, namely, the weighing of the clay by B, and that A, the seller, was therefore entitled to recover the contract price of the whole heap. Ibid.

D, a merchant in London, was in the habit of shipping salt for exportation at the port of Liverpool. He usually employed the plaintiff to purchase the salt, and the plaintiff shipped it, taking receipts in his own name from the mate for each delivery, and when the cargo was complete, taking bills of lading in his own name, which he remitted to D, in exchange for D's acceptances for the price of the salt. The plaintiff was paid no commission, but he charged D an advance on the price of the salt. On the present occasion D had chartered a ship to load a full cargo of salt for Calcutta, and the plaintiff had placed on board her, in accordance with instructions from D, 1,000 tons of salt which he had purchased for that purpose, and for which he had taken the mate's receipts in the usual course. When this quantity had been placed on board D stopped payment, and the plaintiff then ceased loading, and demanded bills of lading for the salt already on board in his own name. The defendant, the shipowner, refused to allow them to be given and filled up the ship, and sent her with salt to Calcutta. The jury found that when the plaintiff put the salt on board he did not intend to pass the property therein to D, but to retain it in himself:—Held, that this was the proper question for the jury, and that on this finding and these facts there was a conversion of the salt by the defendant at Liverpool. *Falke* v. *Fletcher*, 34 Law J. Rep. (N.S.) C.P. 146; 18 Com. B. Rep. N.S. 403.

A bought coal of B, to be shipped in a ship chartered by A, payment in cash against bill of lading in the hands of B's agent. Before shipment A sold to the plaintiff, and at the time of both sales the coal was unascertained. The coal was shipped and three bills of lading signed for delivery to A or order; one only was stamped and retained by B, another was sent to A. Not being paid, B sent the stamped bill of lading to the defendant and the captain delivered the coal to him:—Held, that the plaintiff had no right of action against the defendant. *Moakes* v. *Nicholson*, 34 Law J. Rep. (N.S.) C.P. 273; 19 Com. B. Rep. N.S. 290.

A sale of a given number of bales out of a larger number does not vest the property in the vendee, until there has been a specific appropriation by the vendor, assented to by the vendee or his agent. *Campbell* v. *the Mersey Docks*, 14 Com. B. Rep. N.S. 412.

The defendants entered into a contract with G as follows: "21st of September, 1864. Sold to G the oak timber offered to him at the prices stated in his letter of the 12th of September, viz., trees of 60 feet and upwards at 2*s.* 8*d.* per foot; trees under 60 feet 2*s.* 5*d.* per foot, delivered to boats. The above to be 12 inches girth and upwards; and two coffin logs, at 4*s.* per foot. Payment 100*l.* by bill at one month, and balance by bill at four months by measurement." The timber had been brought by the defendants to certain wharfs belonging to the Herefordshire Canal Company. On the 7th of October G's agent measured the timber, marked it and had it "squared," paying 5*l.* to the persons employed. On the 15th of October G gave 100*l.* bill at one month, which was paid, and two other bills, one for 100*l.* and the other for 75*l.* for four months. While these last bills were running G became insolvent and made an assignment of his estate to the plaintiffs as trustees for the benefit of creditors; the defendants took possession of the timber and claimed to retain it as unpaid vendors:—Held, in an action by the plaintiffs, the

Court having power to draw inferences of fact, that there was a transfer of the possession of the timber to G the vendee, and that the vendors had no lien for the price. *Cooper* v. *Bill*, 34 Law J. Rep. (N.S.) Exch. 161; 3 Hurls. & C. 722.

The defendant on the 14th of April signed the following bought note: "I have this day bought from you the following: 500 piculs China cotton at 17*d.* per lb., June or July delivery, guaranteed fair, marks to be given when cotton ready for delivery; in case of dispute arising out of this contract, the matter to be referred to two respectable brokers for settlement, who shall decide as to quality and allowance, if any, to be made; the cotton to be taken from the warehouse with customary allowances of tare and draft, and the invoice to be dated from the date of the notice being given that the cotton is ready for delivery; to be delivered in merchantable condition to the buyer; the damaged, if any, to be rejected, provided it cannot be made merchantable." The defendant sold the cotton to Curry on the 25th of June. The plaintiff declared the marks on 420 piculs *ex Queensbury*, which were warehoused at the docks, and 80 piculs *ex Princess Royal*, but he never was in a position to deliver the latter. Owing to a dispute as to the quality of the 420 piculs of cotton, the matter was referred and an allowance made. The 420 piculs were afterwards weighed, the price ascertained, the invoice made out, and subsequently, at the defendant's request, corrected by deducting the amount of the allowance:—Held, that there was evidence that the defendant consented to take the 420 piculs, and the property in the same passed to him so that the plaintiff could maintain an action for goods bargained and sold. *Morgan* v. *Gath*, 34 Law J. Rep. (N.S.) Exch. 165; 3 Hurls. & C. 748.

There may be a complete contract so as to pass the property in goods from the seller to the buyer, although the price has not been definitely agreed on between them. Where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining unindorsed, will not prevent its passing. *Joyce* v. *Swann*, 17 Com. B. Rep. N.S. 84.

(*d*) *Custom of Trade.*

On the 14th of May, 1861, the plaintiff, as broker, bought for the defendant at a public sale three lots of sugar in bags, the lots being respectively numbered 67, 68 and 69, the prompt day being the 20th of July. By the terms of sale, payment was to be made either by cash on the 20th of July, by acceptance at seventy days from the day of sale, or on delivery of the warrants,—interest at the rate of 5*l.* per cent. per annum being allowed to the expiration of seventy-three days from the day of sale if payment made within twenty-one days. On the 25th of May, the plaintiff (according to the usage of the trade), at the request of the defendant, paid the price of lot 67, and obtained a warrant for it, and cleared it at the Custom House. He at the same time, but without any special instructions from the defendant, paid the price of lots 68 and 69, and obtained the warrants for the same. The effect of this payment was, that the risk of loss by fire was transferred from the seller to the buyer. It was proved to be the common course for brokers, when so employed, to clear before prompt one of several lots of sugar in bags bought under one contract, to pay the price and obtain warrants for all the lots, the broker taking the discount under the conditions of sale. The defendant not only knew that this was the common course among the brokers, and that it had been pursued in former instances in relation to sugars bought for him by the plaintiff, but he was informed by a clerk of the plaintiff shortly after the 25th of May that the plaintiff had so paid the price of lots 67 and 68, and obtained the warrants. On the 22nd of June, the defendant sent instructions to the plaintiff to clear lot 68. On the same day, and before those instructions could in the usual course of business be acted upon, a fire broke out at the bonded warehouse where the sugars were deposited, and they were destroyed:—Held, that the plaintiff was entitled to recover from the defendant the money so paid by him in respect of lot 68 on the 25th of May, as money paid to his use. *Sentance* v. *Hawley*, 13 Com. B. Rep. N.S. 458.

(*e*) *Rescission of the Contract.*

Whilst a portion only of goods had been delivered by the plaintiffs under a contract for the sale and delivery of a larger quantity to be ordered by the defendant, on the terms of payment of half in cash and half by bill at six months, the defendant, instead of giving any cash or bill, said "I now close all further orders":—Held, that the plaintiffs might treat the contract as rescinded, and sue on a *quantum meruit* in respect of the goods delivered, although the six months for which the bill was to have run had not expired. *Bartholomew* v. *Markwick*, 33 Law J. Rep. (N.S.) C.P. 145; 15 Com. B. Rep. N.S. 711.

(*f*) *Plea of Payment.*

In an action on the common counts, the defendant pleaded, that the claim of the plaintiff was in respect of the price of 500 bags of rice, agreed to be sold to be equal to sample; that a difference arose as to whether or not the rice was equal to the sample; and that, in consideration that the defendant would at once pay the whole of the claim of the plaintiff, except 40*l.*, which the defendant claimed as a deduction in consequence of the alleged inferiority of the rice, the plaintiff agreed that the 40*l.* should be deposited in the hands of B, to be held in trust for the plaintiff and the defendant, until the said difference was adjusted; that the defendant performed his agreement, and had always been ready and willing to do and concur in all acts and matters necessary to bring the said difference to an adjustment according to the agreement:—Held, a good plea, as amounting to a special plea of payment. *Page* v. *Meek*, 32 Law J. Rep. (N.S.) Q.B. 4; 3 Best & S. 259.

*Quære*—Whether good as a plea of accord and satisfaction. Ibid.

(*g*) *Damages.*

On a contract to sell cotton of a certain quality at a certain price, to be delivered at a future time, the measure of damages for non-delivery is the difference between the contract price and the market price at the time limited for the delivery; and the buyer cannot recover for the loss of profit which he would have made by carrying out a re-sale at a higher price

made in the interval between the contract and the time for delivery. *Williams* v. *Reynolds*, 34 Law J. Rep. (N.S.) Q.B. 221; 6 Best & S. 495.

(B) Of Goodwill.

A sold to B his practice as a surgeon, agreeing not to practise in the neighbourhood for ten years, and to introduce B to the patients. B, in consideration of the premises, agreed to pay to A at the end of each of the first four years after the sale one-fourth part of the gross earnings, provided they did not fall below 300*l*. There was no special agreement by B to keep up the practice:—Held, that there was an implied contract to do so; and that a breach alleging that B had "by his own acts and defaults wholly disabled himself from further carrying on the said business, and from getting or obtaining any further earnings or receipts therefrom, and had never since carried on the business or obtained any further earnings or receipts therefrom," was well assigned. *M'Intyre* v. *Belcher*, 32 Law J. Rep. (N.S.) C.P. 254; 14 Com. B. Rep. N.S. 654.

(C) Deed of Bargain and Sale.

In 1802, by deed, reciting a contract of marriage between L and J, and that L was entitled as the nephew and devisee of an uncle, after the death of certain persons, to certain messuages, L granted, bargained, sold, assigned and set over unto trustees, the reversion, upon the trusts and for the uses therein mentioned, that is to say, upon trust for and until marriage, and then in trust to permit his intended wife to receive the rents for life, and then in trust for L for life, and after the death of the survivor in trust for their children for such estate as they should appoint. In 1829, L and his wife, by deed, exercised the appointment in favour of their son F L by appointing that after the decease of the survivor of L and J, the hereditaments should enure to the uses therein declared, and they thereby granted, bargained, sold and released to F L the said messuages, to hold to him, his heirs and assigns, in remainder expectant upon the death of the survivor of L and J his wife, with a declaration that the appointment should enure after the death of such survivor to such uses as F L should appoint; in 1839, F L, by deed, appointed to the plaintiff subject to the life estates of L and his wife:—Held, that the legal estate (subject to the life interests) was in the plaintiff, and that the deed of 1802 did not require to be enrolled as a bargain and sale, and that proof of the receipt of rent by the wife of L in her lifetime and by L afterwards, until his death, was sufficient to let in the deeds as evidence, and establish a title in the plaintiff in ejectment. *Nash* v. *Ash*, 32 Law J. Rep. (N.S.) Exch. 165; 1 Hurls. & C. 160.

(D) By Auction.

The presence of a single puffer at a sale of goods by auction is evidence of fraud, whether the sale be advertised to be without reserve or no. *Green* v. *Baverstock*, 32 Law J. Rep. (N.S.) C.P. 181; 14 Com. B. Rep. N.S. 204.

An auctioneer and a puffer employed by him made eleven fictitious biddings against one another, but did not go beyond the reserved price; a purchaser then made the first real bid, and the property was knocked down to him. The conditions of sale provided that the highest bidder should be the purchaser, and were silent as to any reserved bidding:—Held, that the fictitious biddings did not constitute a good defence to a suit by the vendors for specific performance. *Mortimer* v. *Bell*, 34 Law J. Rep. (N.S.) Chanc. 360—reversed on appeal, 35 Law J. Rep. (N.S.) Chanc. 25.

*Semble*—That a vendor cannot after real estate has been knocked down at an auction, and before the signature of the written contract, revoke the authority of the auctioneer. *Day* v. *Wells*, 30 Beav. 220.

## SALMON FISHERY ACT.

[See Fishery.]

The occupier of a mill and fishing mill-dam was convicted under section 20. of 24 & 25 Vict. c. 109. (the Salmon Fishery Act), for not removing during the close season from the waters of his fishery the things required to be moved by that section. It appeared that the dam extended across the river and was of such height that very few salmon passing up the stream could leap over it. At either end of the dam was a fish lock, in which, before the Salmon Fishery Act, were movable doors and sluices, and also hecks, by means of which the locks were used for taking salmon, as well as for supplying water for the purposes of the mill. Since the act the hecks had been removed, and the locks had afterwards not been used for catching fish, but the doors or sluices had not been taken away, and for thirteen days during the close season they had not been drawn up out of the water, and there had consequently during that time been an impassable obstruction to the free passage of salmon through the locks:—Held, that the conviction was right, as the contrivance for taking the fish was a fishery within the meaning of the act, and the doors or sluices formed part of such contrivance, and were obstructions which were required by the 20th section to be removed by the occupier of the fishery. *Hodgson* v. *Little*, 32 Law J. Rep. (N.S.) M.C. 220; 14 Com. B. Rep. N.S. 111.

*Semble*—per *Byles*, *J.*, that the sluices when not drawn up formed a new dam within section 25, and to which, therefore, a fish-pass ought to be attached. Ibid.

A net, six yards in length, and one yard sixteen inches in depth, and stretched across a river by means of corks and lead, and fastened at one end to a large stone lying on the bank of the river, which keeps the net in its place, but gives way as soon as salmon touches the net, which then rolls up, and the salmon gets entangled and dies, is not "a fixed engine" or "net temporarily fixed to the soil," and as such illegal, under the Salmon Fishery Act, 1861, (24 & 25 Vict. c. 109.) s. 11. *Thomas* v. *Jones*, 34 Law J. Rep. (N.S.) M.C. 45; 5 Best & S. 916.

## SAVINGS BANK.

[Additional facilities provided for depositing small savings at interest in Post-office savings banks by 24 Vict. c. 14.—The law relating to Post-office savings banks amended by 26 Vict. c. 14.—The laws relating to savings banks consolidated and amended by 26 & 27 Vict. c. 87.]

## SCHOOL.

[The law relating to industrial schools amended and consolidated by the Industrial Schools Act, 1861 (24 & 25 Vict. c. 113).—The operation of the Industrial Schools Act, 1861, and the Industrial Schools (Scotland) Act, 1861, extended by 25 Vict. c. 10.]

## SCOTCH BANKRUPTCY.

*Warrant in Meditatione Fugæ.*

By the Scotch Bankruptcy Act (19 & 20 Vict. c. 79), s. 47, the warrant granting protection shall protect the debtor from arrest in Great Britain and Ireland and Her Majesty's other dominions for civil debt contracted previous to the sequestration; but such warrant shall not be of any effect against the execution of a warrant of apprehension *in meditatione fugæ*:—Held, that the exception was not confined to the warrant *in meditatione fugæ* peculiar to Scotland, but extended to analogous process in other parts of the Queen's dominions. Therefore, a Scotch debtor, who has obtained a warrant of protection and then comes to England, is liable to be arrested on a *capias* under the 1 & 2 Vict. c. 110. s. 3, when he is about to leave this country for New Zealand. *Dutton* v. *Hally*, 31 Law J. Rep. (N.S.) Q.B. 297; 2 Best & S. 748.

*Set-off.*

To an action by the trustee of a Scotch bankrupt for money received by the defendant for the use of the plaintiff, as trustee, after the bankruptcy, and for interest upon money due from the defendant to the plaintiff, as trustee, forborne to the defendant at his request for long terms, it is a good defence to plead that there were mutual credits between the bankrupt and the defendant, and that by the Scotch law the trustee is only entitled to sue for the balance. *Macfarlane* v. *Norris*, 31 Law J. Rep. (N.S.) Q.B. 245; 2 Best & S. 783.

*Quære*—Whether an analogous plea would be good between the original parties. Ibid.

*Quære*—Whether set-off is governed by the *lex fori* or the *lex loci contractus*. *Semble*—That it is matter of procedure, and is therefore governed by the *lex fori*. Ibid.

## SEDUCTION.

A girl was bound to serve the defendant for eleven hours during the day, as servant in husbandry. She slept at her father's, and after her day's work performed services for her father. The defendant seduced her, and she had a child:—Held, that there was a sufficient service to the father to enable him to maintain action for the seduction. *Rist* v. *Faux* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 386; 4 Best & S. 409.

## SESSIONS.



### (A) Jurisdiction and Power.

*(a) In case of Contempt of Court.*

A Court of Quarter Sessions has power to fine a person who is guilty of a contempt of Court, even if that person be a barrister engaged in his professional duty. The Court of Queen's Bench will not interfere in such a case if there be reasonable ground upon which the conduct of the person might be treated as a contempt. *In re Pater*, 33 Law J. Rep. (N.S.) M.C. 142; 5 Best & S. 299.

*(b) Adjournment of Appeal.*

At the hearing of an appeal against an order made by Justices adjudicating the settlement of a pauper lunatic and ordering payment for his maintenance, the Court have power to adjourn the hearing to the next sessions, and this after the hearing and trial of the appeal has been partly proceeded with. But the power of so adjourning ought to be cautiously and carefully exercised. *R.* v. *the Guardians of Cambridge*, 30 Law J. Rep. (N.S.) M.C. 137; 1 Best & S. 61.

*(c) In Criminal Cases.*

There is nothing in the provisions of the statute 25 Geo. 2. c. 36. which takes away or prevents a Court of Quarter Sessions for a borough from having jurisdiction to try an indictment against a person for keeping a disorderly house. *R.* v. *Charles*, 31 Law J. Rep. (N.S.) M.C. 69; 1 L. & C. 90.

The jurisdiction of the Courts of Quarter Sessions to try a person for the common law misdemeanor of attempting to commit suicide is not taken away by the statute 24 & 25 Vict. c. 100; for attempting to kill oneself is not an attempt to commit murder within the meaning of that statute. *R.* v. *Burgess*, 32 Law J. Rep. (N.S.) M.C. 55; 1 L. & C. 258.

### (B) Special Case; Right to begin.

By the practice of the Court of Common Pleas (unlike that of the Courts of Queen's Bench and Exchequer) the appellant upon the hearing of a case stated for the opinion of the Court, under 12 & 13 Vict. c. 45. s. 11, is entitled to begin. *Sheppard* v. *the Churchwardens and Overseers of Bradford*, 33 Law J. Rep. (N.S.) M.C. 182; 16 Com. B. Rep. N.S. 369.

### (C) Appeal.

*(a) When the only Remedy.*

Where it is a question whether a person appointed an overseer by a Justice's order is a householder, the Court will not grant a *certiorari* to bring up the order for the purpose of quashing it. The objection must be taken by appeal to the Quarter

Sessions. *In re the Overseers of Pudding Norton*, 33 Law J. Rep. (N.S.) M.C. 136.

*(b) Notice of Appeal; Service.*

If a party intends to appeal, under section 335. of the Mersey Docks Consolidation Act, 1858, against a conviction by Justices, under section 95. of the same act, for injury inflicted by him on any vessel, it is sufficient if he serve his notice of appeal on one of the several part-owners of the injured vessel, and within three days after giving the notice enter into a recognizance to try the appeal. *R.* v. *the Recorder of Liverpool*, 31 Law J. Rep. (N.S.) M.C. 127.

(D) Costs.

*(a) Reference of Appeal to Arbitration.*

Where the matter of an appeal at Quarter Sessions is referred to an arbitrator, under 12 & 13 Vict. c. 45. s. 13, and the order of reference is silent as to the costs of the arbitration, the subsequent Sessions at which the award is entered as the judgment of the Court have no power to order either party to pay the costs of the reference. *R.* v. *the Justices of the West Riding*, 34 Law J. Rep. (N.S.) M.C. 142; 6 Best & S. 531.

*(b) Subject to Decision of Special Case.*

A having appealed to the Quarter Sessions against an order of two Justices, convicting him of a nuisance, and prohibiting its continuance; the Court of Quarter Sessions, on hearing the appeal on the 3rd of January, 1859, made an order confirming the conviction, subject to the case, and ordering that the costs of the appeal should abide the result of the decision of the Court of Queen's Bench. And after argument that Court quashed the order, saying nothing about costs. A protracted negotiation about the costs took place between the attorneys, in which it was for a long time assumed on both sides, that the respondent was liable to pay costs; but the clerk of the peace refused to tax the costs, and in April, 1862, the Court of Quarter Sessions refused to order such taxation, considering that they had no longer any jurisdiction:—Held, that the taxation of the costs could only be ordered as ancillary to the giving of final judgment; and that, as there remained nothing of a judicial nature to be done by the Court of Quarter Sessions in the matter of the appeal, the order having been removed from that Court and entirely quashed, that Court had no longer any power to tax the costs. *R.* v. *the Justices of Hampshire*, 32 Law J. Rep. (N.S.) M.C. 46.

*(c) Taxation of, and Practice as to.*

The 5th section of 12 & 13 Vict. c. 45. includes appeals in which the appellant has entered into recognizances to pay costs. *Freeman* v. *Read*, 30 Law J. Rep. (N.S.) M.C. 123; 9 Com. B. Rep. N.S. 301.

A Court of Quarter Sessions has authority to make a standing order that in all appeals costs shall follow the event, unless the Justices who hear the appeal shall order to the contrary. Ibid.

Justices at Quarter Sessions may direct their officer to tax the costs of an appeal, and may adopt his taxation as their own act and insert the amount in their order, provided all this be done before the end of the sessions. But if the party against whom costs are given consent that the taxation shall take place after the sessions are over, and the Justices give judgment for costs *nunc pro tunc*, the party so consenting is precluded from afterwards objecting to their want of jurisdiction. Ibid.

The appellant, in an appeal against a highway rate, entered into recognizances to pay costs, as required by 5 & 6 Will. 4. c. 50. s. 105. The appeal was heard at the October Sessions, 1858, when the Justices confirmed the rate. Nothing was said at those sessions as to costs, but by a Standing Order of Sessions, made in 1843, it was ordered that the costs of every appeal tried should be taxed by the clerk of the peace during the sessions and be paid by the unsuccessful party, unless the Justices who tried the appeal should order to the contrary. The clerk of the peace certified (under 11 & 12 Vict. c. 43. s. 27.) that, at the trial, in October, 1858, the Justices had made no order to the contrary, and that the solicitors of the respective parties had agreed that the costs should be taxed out of court; that in April, 1859, he attended the respondent's solicitor and taxed his costs at 33*l.* 7*s.*, the appellant's solicitor having objected to attend the taxation, and that the costs had not been paid to him the clerk of the peace. A distress warrant having issued on application by the respondent against the appellant for these costs,—Held, that the distress warrant had properly issued; that the appellant, by consenting at the trial that the costs should be taxed after the sessions, was precluded from objecting that the taxation was not made at the sessions; that the Justices might well assume, it being so stated in the certificate of the clerk of the peace, that the appellant had consented. Ibid.

*(d) By and to whom to be paid.*

On an appeal against a poor-rate, the Court of Quarter Sessions by their order awarded and ordered 21*l.* 15*s.* 2*d.* to be paid to the respondents for their costs in and about the appeal, and further directed the appellant to pay the said sum of 21*l.* 15*s.* 2*d.* to the clerk of the peace for the use of the parties entitled to the same:—Held, that this was a proper form of order as to the costs. *Gay* v. *Matthews* (Ex. Ch.), 33 Law J. Rep. (N.S.) M.C. 14; 4 Best & S. 425, 440.

Upon an appeal to the Quarter Sessions against the conviction of the appellant, as a rogue and a vagabond under 5 Geo. 4. c. 83, the Sessions have power to give costs against the prosecutor; and the Justices who have convicted the appellant, and who do not appear to support the conviction, are not the parties against whom an order for costs can be made. *R.* v. *Purdey*, 34 Law J. Rep. (N.S.) M.C. 4; 5 Best & S. 909.

By 12 & 13 Vict. c. 45. s. 7, no objection on account of any omission or mistake in any order brought up upon a return to a writ of *certiorari* shall be allowed, unless such omission or mistake shall have been specified by the rule for issuing such *certiorari*:—*Semble*, per *Mellor*, *J.*, that the appellant could not upon a motion to quash the order, object that it was bad for not finding as a fact that the person against whom the order was made was the prosecutor, unless the omission so to find was specified in the rule. Ibid.

## SET-OFF.

[See PLEADING—TRUCK ACT.]

(A) AT LAW.
(B) IN EQUITY.

### (A) AT LAW.

Declaration, that in consideration that the plaintiff would accept for the defendant's accommodation a bill of exchange, and would deliver it to him in order that he might negotiate it for his own use, the defendant promised to indemnify and save harmless the plaintiff from any loss or damage by reason thereof; that the plaintiff accepted the bill, &c.; yet the defendant did not indemnify and save harmless the plaintiff from loss or damage by reason thereof, and the plaintiff, as acceptor, was obliged and did pay the holder the amount of the bill, with interest, and the costs of the action brought on the bill, and the plaintiff also incurred costs and expenses in defending and settling the action. First plea, to the plaintiff's claim in respect of the amount of the bill and interest, a set-off. Second plea, to the costs of the action, and the costs and expenses incurred by the plaintiff in defending and settling the action, that the whole of these were incurred at the defendant's request; concluding with a set-off:—Held, that the first plea was good, as the defendant might sever so much of the plaintiff's claim as was liquidated, and plead a set-off to that; that the second plea was bad, as pleaded to costs incurred but not paid, and therefore not constituting a liquidated demand. *Crampton* v. *Walker*, 30 Law J. Rep. (N.S.) Q.B. 19; 3 E. & E. 321.

### (B) IN EQUITY.

W S B borrowed money of W K, who died leaving his residuary estate to E R B absolutely. E R B bequeathed her residuary estate to W S B and five other persons, in equal shares. The debt due from W S B to W K's estate was never got in, but that estate presented a clear residue without counting that debt. After E R B's death, and before W S B had received his share of E R B's estate, he became bankrupt:—Held (affirming an order of the Master of the Rolls), that the executors of E R B were entitled to retain or set off the debt owing from W S B to W K's estate, out of or against W S B's share of E R B's residuary estate. *Bousfield* v. *Lawford*, 33 Law J. Rep. (N.S.) Chanc. 26; 1 De Gex, J. & S. 459.

A legacy may be set off against a debt of the legatee to the testator, though such debt is barred by the Statute of Limitations. *Coates* v. *Coates*, 33 Law J. Rep. (N.S.) Chanc. 448; 33 Beav. 249.

J G, in 1836, borrowed a sum of 1,000*l.* of B C upon the promissory note of himself and his brother W G, who joined as surety, which sum (together with a further loan of 1,000*l.* from B C) he further secured, in 1839, by depositing with B C a policy of assurance upon his own life for 2,000*l.* In 1841 B C bequeathed a deferred legacy of 1,000*l.* to W G, and in 1843 B C died. In 1845 J G became a bankrupt. The executrixes of B C then surrendered the policy, and proved for the balance of the debts against the estates of J G. The legacy became payable to W G in 1859:—Held, that the surviving executrix was entitled to retain out of the legacy the amount due from W G as surety, notwithstanding the bar of the Statute of Limitations; and also that the surrender of the policy of assurance was a proper act, and did not release the surety or prejudice the right of retainer of the executrix. Ibid.

A bill will not lie by a tenant against his landlord to restrain proceedings upon a replevin bond on the ground of set-off against the rent distrained for. *Pratt* v. *Keith*, 33 Law J. Rep. (N.S.) Chanc. 528.

The defendant, with his mother's money, purchased certain leaseholds, which were assigned to him, and subsequently, at her request, he covenanted to hold them upon trust for her for life, and afterwards for himself and two others. He afterwards re-assigned them to his mother, who sub-let them to the plaintiff. The mother received the rents from the sub-lease during her lifetime, and on her death the plaintiff, in ignorance of the real nature of his lessor's title, paid the rent to her executrix. Disputes arose between the persons interested under the settlement, and a suit was instituted, in the course of which the defendant was declared to be a trustee of the leasehold upon the trusts of the settlement. The defendant subsequently brought an action of ejectment against the plaintiff, and failed in it; but succeeded in an action of replevin. The plaintiff then filed the bill in this suit, for a declaration that he was entitled to set off the costs due to him in the ejectment and other items against the rent due from him to the plaintiff. The defendant demurred for want of equity:—Held, that the demurrer must be allowed. Ibid.

A director of an insurance company, indebted for calls, delivered a deposit note of the company to the plaintiff for value and without notice:—Held, that the company were liable on the note, and could not set off against the plaintiff the amount due from the director for calls. *Woodhams* v. *the Anglo-Australian and Universal Family Life Assur. Co.*, 3 Giff. 238.

## SETTLED ESTATES ACT.

[The Leases and Settled Estates Act, 1856, amended by 27 & 28 Vict. c. 45.]

A testator, who, at the time of his decease, had made contracts for building leases of parts of his estates, gave his trustees power, during the minority of the tenant for life, to grant building leases in a similar manner. On an application to the Court, by petition of the trustees, who were plaintiffs in a suit for the administration of the real estate under a decree of the Court, it was held, that an application to parliament was necessary to authorize the trustees to carry the contracts into effect, as the terms of the contracts entered into by the testator were not identical with the terms prescribed for leases by the Settled Estates Act, 19 & 20 Vict. c. 120. *Cust* v. *Middleton*, 30 Law J. Rep. (N.S.) Chanc. 260; 3 De Gex, F. & J. 33.

A leasing power having been granted by the Court under the act to a tenant for life who had since died, a petition was presented by the succeeding tenant for life and her husband, praying that the power might be vested in one of the trustees of the settlement:—Held, that it was not necessary, under such circumstances, to repeat the advertise-

ments, and an order was made accordingly. *In re Kentish Town Estate*, 1 Jo. & H. 230.

The Court has power, under the Leases and Sales of Settled Estates Act, to authorize the sale and conveyance of minerals apart from the surface of the land. *In re Mallin's Settled Estates*, 30 Law J. Rep. (N.S.) Chanc. 929; 3 Giff. 126.

The contract for sale was ordered to be carried into effect by a grant with a provision limiting the time within which the coal was to be worked out. Ibid.

Certain estates having been sold under the Leases and Settled Estates Act (19 & 20 Vict. c. 120), and the proceeds paid into court, a petition was presented for re-investment in other hands:—Held, that it was unnecessary again to serve those parties whose concurrence had previously been obtained at the time of the sale. *In re the Duke of Cleveland's Harte Estate, In re the Leases and Settled Estates Act*, 30 Law J. Rep. (N.S.) Chanc. 862; 1 Dr. & S. 481.

Property in the County Palatine of Lancaster was, by will, limited to trustees during the life of the longest liver of the testator's wife and five children; and from the death of such longest liver to the respective issue then living of his children in undivided fifth shares, as tenants in common in fee, with cross limitations. The longest liver of testator's wife and five children died in 1861, when the property vested absolutely in fee in undivided shares in numerous persons. All these persons, several of whom were still infants, concurred in an application for an order under the Settled Estates Act to sell the property; but the Vice Chancellor of the County Palatine thought the property had ceased to be "settled" within the meaning of the act, and that he had no power to make an order. The Lords Justices agreed, considering that, as when the application was made the particular limitations were spent and the property had vested in fee, the case was not within the act. *In re Birtle's Estates*, 32 Law J. Rep. (N.S.) Chanc. 439.

The time for ascertaining whether hereditaments stand limited by way of succession so as to bring them within the operation of the Settled Estates Act, is when application is made to the Court. Ibid.

The Court, in making an order for a lease of mines under the Settled Estates Act, will, in a proper case, authorize a lease, not only of the mines themselves, but also of so much land as may appear necessary for the convenient and effective working of the minerals. *In re Reveley's Settled Estates*, 32 Law J. Rep. (N.S.) Chanc. 812.

The description, in an advertisement, of property being dealt with under the Leases and Sales of Settled Estates Acts, must correspond verbally with the description in a petition under those acts. *In re Bateman's Settled Estate*, 34 Law J. Rep. (N.S.) Chanc. 320.

In determining what, under the Settled Estates Act, is a settled estate, the Court will refer to the state of circumstances at the date of the instrument, not to the circumstances at the time when it came into operation. *In re Goodwin's Settled Estates, ex parte Butler*, 3 Giff. 620.

Interests arising "by accruer" under trusts to which property stands limited are within the meaning of the word "succession." Ibid.

Where parties, entitled absolutely to some of the shares, joined as petitioners, the Court decreed the whole estate to be sold. Ibid.

Where a sub-purchaser, at an improved price, applied by summons to be substituted in the place of his vendor (the original purchaser) who resisted the application, the Court refused to make the order, but at the suggestion of the trustees ordered a re-sale on the terms that the original purchaser pay the improved price into court. *In re Settled Estates Act, 1854 and 1859*, 4 Giff. 90.

When a tenant for life without power to dedicate roads to the public applies to the Court for that purpose, the Court will direct such roads to be made only where they are either beneficial to the property in its actually existing state or required for the purposes of houses then about to be built on leases then immediately contemplated, and will not sanction the laying out of roads prospectively upon the chance that they may be beneficial at some future time to the property in its then state; and the Court will not in any case sell any portion of the property for the purpose of making such roads. *In re Hurle's Settled Estates*, 2 Hem. & M. 196.

Upon a petition under the Settled Estates Act (19 & 20 Vict. c. 120), an infant, remotely interested, had been born after the advertisement had been made. The Court permitted him to be made a party by amendment, and dispensed with further advertisements. *In re Horton's Settled Estates*, 34 Beav. 386.

Order made under Settled Estates Act (19 & 20 Vict. c. 120.) saving the rights of pecuniary legatees interested in the estate, who were numerous. *In re Parry's Will*, 34 Beav. 462.

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## SETTLEMENT.

[See DEVISE—LEGACY—TRUST AND TRUSTEE.]



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### (A) WHAT CONSTITUTES A SETTLEMENT.

A settlement of all his property made by a father on his family in contemplation of death, was set aside on his recovery, although no power of revocation was reserved in the deed. *Forshaw* v. *Welsby*, 30 Law J. Rep. (N.S.) Chanc. 331; 30 Beav. 243.

It is the duty of a solicitor in preparing a settlement under such circumstances to insert a power of revocation. Ibid.

By a marriage settlement real estate belonging to the wife was conveyed, subject to mortgages, to trustees, to such uses as the husband and wife should jointly appoint, and, in default of appointment, to the use of the husband in fee. The wife afterwards joined her husband in raising money by way of mort-

gage for the purchase of an estate at Q, which was conveyed to uses in favour of the husband and wife:—Held, that there was sufficient consideration moving from the wife to support the uses in her favour contained in the purchase deed against the husband's creditors. *Acraman* v. *Corbett*, 30 Law J. Rep. (N.S.) Chanc. 642; 1 Jo. & H. 410.

In a settlement under which the settlor takes a life interest, a gift over on bankruptcy or alienation, though void as against the assignees in bankruptcy, is valid as against a mortgagee. *Knight* v. *Browne*, 30 Law J. Rep. (N.S.) Chanc. 649.

By a marriage settlement all the personal estate of both husband and wife was assigned to trustees upon trust that the husband and wife might have the use and enjoyment thereof for their lives, and after the decease of either of them the whole property should go absolutely to the survivor. Within a year after the marriage the husband built several houses, and purchased a lease of the land. There was evidence that the husband said he had laid out his "wife's money" upon this property. The husband died first, and the wife occupied the property until her death: she died intestate:—Held, that the houses must be presumed to have been built out of the capital and not the income of the wife's property, and that her representatives were entitled to a charge on them for the amount expended by the husband. *Williams* v. *Thomas*, 31 Law J. Rep. (N.S.) Chanc. 674; 2 Dr. & S. 29.

Upon negotiations taking place previous to a marriage, the father of the lady wrote to the gentleman's father in these words: "When my eldest daughter married, I gave her 1,000*l.* settled on herself, with a promise of sharing with my other daughters what I may be able hereafter to leave them; and this I can do for Augusta" (the intended bride). A settlement was then prepared in the Scotch form, and executed, whereby the father assigned 1,000*l.* to trustees for his daughter, and also all other means and estate whatsoever which she would be entitled to succeed to on his death. The father afterwards transferred a sum of 3,333*l.* to the trustees of his daughter Augusta's settlement, and he made his will, whereby he gave more property to his other daughters than to Augusta. Upon a bill filed by the daughter and her husband claiming to be entitled to an equal share with the other children of the testator, it was held that the settlement was a final instrument, and the estate of the father could not be bound by his letter, and the daughter had no right to come upon his assets for an equal share with his other children. *Sands* v. *Soden*, 31 Law J. Rep. (N.S.) Chanc. 870.

A gentleman wrote a letter to a young lady's mother making a proposal of marriage with the young lady, who was then a minor, and saying "that if the latter had or might have money his wish and intention would be that it should be settled for her sole and entire use." The gentleman's proposal was accepted. The young lady was entitled to certain property, and the marriage took place while she was yet an infant, but without any settlement having been made of her property:—Held, that the plaintiff was entitled to have a proper settlement made upon her and her children of all her property present and future. *Alt* v. *Alt*, 32 Law J. Rep. (N.S.) Chanc. 52; 4 Giff. 84.

(B) VALIDITY OF.

A Frenchman residing in France married, according to the French law, an English woman who had been for some time domiciled there. The parties at the same time declared, before a notary public, that they married without a marriage contract. They had, however, previously joined in a deed settling the wife's property in England. This being an English deed had no validity in France in consequence of the omission to comply with the French forms. Upon a bill by the husband asking that the deed might be declared void and for payment of the money,—Held, that the settlement was not affected by the domicil of the husband and wife, that the settlement was valid, and that its trusts must be performed. *Van Grutten* v. *Digby*, 32 Law J. Rep. (N.S.) Chanc. 179; 31 Beav. 561.

F, a widow, who was entitled to an annuity determinable in the event of her re-marriage in the lifetime of E B, to avoid the forfeiture of her annuity, consented to live with D as his wife, under a promise of marriage. In 1857, E B died, and upon her death differences arose, owing to which F and D lived separate for about two years, though D occasionally visited F. While living separate, F made a settlement of property to which she had become absolutely entitled for the benefit of herself, her illegitimate daughter, and a daughter by a first marriage and her children, and other members of her family. About seven weeks afterwards D married her, knowing of her property, and without having been informed of the settlement. Upon bill filed by D,—Held, that the settlement must be regarded as a fraud upon his marital rights, and it was set aside. *Downes* v. *Jennings*, 32 Law J. Rep. (N.S.) Chanc. 643; 32 Beav. 200.

A delay of two years and a half from the time of discovery of the settlement to the filing of his bill, held, not sufficient to deprive D of his right to relief, there being no suggestion that evidence had been lost in consequence of the delay. *Hunt* v. *Matthews* (1 Vern. 408) doubted. Ibid.

W O B, by a settlement expressed to be made in consideration of an intended marriage with the niece of his deceased wife, and of his natural love and affection for his children by his late wife, assigned certain funds to trustees upon trust for himself until the solemnization of the intended marriage, and after solemnization thereof, upon trusts for the benefit of himself, his intended wife and the children of his former wife and of his then intended marriage. He afterwards died in debt. Upon a bill by creditors,—Held, by the Master of the Rolls, that the legal and illegal consideration for the deed were so mixed up together, that the deed was void. On appeal, the Lords Justices affirmed the decree, but on the ground that no marriage had ever been solemnized within the proper meaning of the settlement, and that the first trust in favour of the settlor remained therefore in force. *Chapman* v. *Bradley*, 33 Law J. Rep. (N.S.) Chanc. 139; 33 Beav. 61.

The principle on which the Court acts in discouraging mortgages, sales and dealings by expectant heirs, has no application to the case of an expectant heir who has made a post-nuptial settlement upon his wife and children. *Shafto* v. *Adams*, 33 Law J. Rep. (N.S.) Chanc. 287; 4 Giff. 492.

Where, therefore, a husband who had by a post-nuptial settlement settled a reversionary life interest in real estate, to which he was entitled expectant upon the deaths of his uncle and father, for the benefit of his wife, and after her death, as to a portion of the annual income of such real estate, of his children, for their maintenance and education, and as to the residue for himself, filed a bill alleging that he had executed the settlement without professional advice, in ignorance of its effect and of the value of his reversionary interest, and that the settlement was made without adequate consideration, and praying that it might be set aside,—the Court dismissed the bill, but without costs. Ibid.

### (C) CONSTRUCTION OF.

A domiciled Irishman, upon the marriage of his daughter with a domiciled Englishman, paid 3,000*l.*, Irish currency, to the trustees of the settlement; the husband also paid 5,000*l.* to the trustees, upon trust to invest both the sums in England and accumulate the income for the joint lives of the husband and wife, and for the life of the husband surviving, and after his death, if there should be only one child or, there being more than one, if all but one should have died unmarried and without issue, then in trust for such one child; but if there should be more than one child, then upon trust for all the children, in such shares as the husband or wife, or the survivor, should appoint; and, in default, for all such children equally, the shares to be vested at twenty-one or marriage. The wife died in 1844, leaving ten children surviving. In 1849 the husband married again. The husband upon the marriage of two of his sons, one of whom now had issue, appointed one-tenth of the accumulated fund to each; and he subsequently made an appointment of another one-tenth to the plaintiff, a third son; and upon a bill filed by him it was held that the word "unmarried," as used in the settlement, was applied to persons who were not married at the time; and that a gift over, in the event of their dying unmarried, meant "without ever having been married"; and that the superadded words, "and without issue," meant "without ever having any issue;" that the provision was only to take effect in the event of no child ever having been married previous to the distribution of the fund; and that as two of the children had married, the interests had vested, and ceased to be contingent; and that the children, on whose behalf appointments had been made, were entitled to the fund. *Heywood* v. *Heywood*, 30 Law J. Rep. (N.S.) Chanc. 155; 29 Beav. 9.

Held, further, that the income of the 5,000*l.* might be accumulated under 39 & 40 Geo. 3. c. 98. during the life of the husband, it being a settlement made by him; and that the income of the 3,000*l.* might also be accumulated, either under the settlement, as being made by the wife's father, in which case it was an Irish deed, and not within the Thellusson Act, or within the act, as being a settlement made by the husband of the wife's portion. Ibid.

Whether a trust was created for raising portions for younger children within the 39 & 40 Geo. 3. c. 98. s. 2.—*quære.* Ibid.

The rule that a younger son becoming an elder cannot have the benefit of a provision made for younger children only applies where the settlor is a parent or *in loco parentis*. *Sandeman* v. *Mackenzie*, 30 Law J. Rep. (N.S.) Chanc. 838; 1 Jo. & H. 613.

Sir T R, on his marriage with E C, settled a sum of 10,000*l.* upon trust for himself for life, with remainder to E C for life, with remainder, in default of children of the marriage, to the then present children of E C by her former marriage (other than A W C, her eldest son), who should attain the age of twenty-one years, if more than one, in equal shares, and in default of such younger children, in trust for A W C, his executors, administrators and assigns. After the death of Sir T R, there being no children of the marriage, Lady R, erroneously believing that she had a power of appointment, at the request of D M C, one of her younger children by the former marriage, affected to appoint a portion of the fund in his favour, and assigned to him her life interest therein. She afterwards by will made a general appointment in favour of E C B, her only other child. By the death of A W C in the lifetime of Lady R, D M C became her eldest son:—Held, first, that neither the acceptance of the appointment nor of the life interest amounted to a confirmation by D M C of Lady R's power of appointment; secondly, that the settlement not being by a person *in loco parentis*, D M C did not forfeit his interest in the fund on becoming an eldest son; thirdly, that the time for ascertaining the class of younger children was the period of vesting, and not of distribution. Ibid.

A residuary legatee having an option to purchase real property of the testator, and having elected to purchase, afterwards, by a voluntary deed, assigned his share of the moneys to arise from the testator's estate to trustees to secure 3,000*l.* The purchase-money of the testator's real property was afterwards deducted from the share of residue:—Held, that purchased realty as well as residuary personalty was charged with the 3,000*l.* *Harrison* v. *Barton*, 1 Jo. & H. 287.

By a marriage settlement a provision was made for the wife out of real and personal estate, and it was declared that such provision was in lieu of dower or thirds. The husband having died intestate,—Held, that the provision was in satisfaction of dower out of real estate and thirds of personalty, and the wife could claim nothing under the Statute of Distributions. *Thompson* v. *Watts*, 31 Law J. Rep. (N.S.) Chanc. 445; 2 Jo. & H. 291.

Where articles recited in a post-nuptial settlement are lost, and there is no further evidence of the contents, the Court will adopt the provisions of the settlement though they vary from the articles recited. *Mignan* v. *Parry*, 31 Law J. Rep. (N.S.) Chanc. 819; 31 Beav. 211.

Property was settled on John Garner, of Sambourne, and Elizabeth his wife, and her children. There was a person named John Garner, of Sambourne, whose wife was Hannah, but they were not related to the settlor. There was also a William Garner, of Besley, whose wife was Elizabeth, and she was a niece of, and intimate with, the settlor:—Held, that the latter were intended. *Garner* v. *Garner*, 29 Beav. 114.

Personal estate was settled on a husband and wife successively for life, with remainder to their children, and on failure of children, "then to the

right heirs" of the survivor of the husband and wife:—Held, that, under the last limitation, the heir-at-law of the survivor, and not the next-of-kin, was entitled. *Hamilton* v. *Mills*, 29 Beav. 193.

A B conveyed freeholds to trustees and their heirs, on trust for his wife during widowhood, and afterwards on trust to convey and divide "such estate and premises" amongst the children and the issue of their children who should be then living as tenants in common (the issue of any deceased child to take their parents' share):—Held, first, that "issue" must be read children; and, secondly, that the children and their issue took life estates only. *Tatham* v. *Vernon*, 29 Beav. 604.

A lady being entitled to an interest in certain funds under a will, by her marriage settlement assigned all the share to which she was then or might become entitled by accruer, survivorship, "or otherwise," in the specified funds:—Held, that the general words, "or otherwise," must be limited to interests taken under the will, and that a share to which she had become entitled under the will of her father, who had become entitled thereto under his son, was not affected by the settlement. *Parkinson* v. *Dashwood*, 30 Beav. 49.

By a marriage settlement, property belonging to the intended wife was conveyed to trustees upon trust (after the death of the husband and wife) for the children of the marriage in the usual way. It was then declared that if all the children should die the trustees should convey the property to A B and C. There never was any issue of the marriage:—Held, that, although the language of the deed only provided for death of issue, the gift over took effect. *Osborn* v. *Bellman*, 2 Giff. 593.

Under a limitation of real estate in a marriage settlement, after the decease and failure of issue of husband and wife, "in trust for nephews and nieces then living, and the several and respective heirs of nephews and nieces then dead, having left lawful issue, living at the time of the failure of issue of the marriage, as tenants in common,"—Held, that nephews and nieces took life estates, and that the eldest son of a nephew deceased at the time of such failure of issue took in fee. *Marshall* v. *Peascod*, 2 Jo. & H. 73.

A fund was settled by deed in trust for A for life, and then for her children, and in default of children to B, if then living, but in case of B's death before A, in trust for the "surviving children" of B by her deceased husband:—Held, that the survivorship had reference to the death of A. *Reid* v. *Reid*, 30 Beav. 388.

A marriage was dissolved by the Divorce Court, but, before the decree had become absolute, the husband married A B abroad; and by a settlement, reciting that marriage, a power was reserved to him to appoint a life interest to any surviving wife:—Held, upon the construction of the settlement, that A B was an object of power whether the second marriage was valid or not. *Dolby* v. *Powell*, 30 Beav. 534.

By a voluntary settlement, real and personal property was limited after the death of the settlor to trustees, to receive rents and profits, and to pay an annuity of 150*l.* to the wife of the settlor, and an annuity of 200*l.* to his daughter; and the trustees were to apply a portion of the income for the maintenance and education of the six children of the daughter, and accumulate the surplus till the death of the wife and daughter, and until the youngest child attained twenty-one. And when the youngest child attained twenty-one, if the wife and daughter should be then dead, or if living when the youngest child attained twenty-one, then, immediately after the death of the survivor of the wife and daughter, to transfer the trust premises to the six children, or such as should be then living, as joint tenants, and not as tenants in common. And it was declared, that if any of the said children previously to the conveyance to them of their shares should alienate his or her expectant share, then such share should be forfeited and go to the others. Two of the children died in the lifetime of the wife. One of the children assigned all his property to the others. He was then convicted of felony, and transported. The other three children executed a deed of arrangement, by which they agreed that the 200*l.* annuity fallen in by the death of the settlor's daughter should be enjoyed *in præsenti*, that the joint tenancy should be severed and converted into a tenancy in common, and that the shares should be settled; and they included in this arrangement the child who was convicted of felony. The latter received a pardon from the Crown, on the condition of his not returning to this country. The settlor's wife died in 1860, and this suit was then instituted to administer the trusts of the settlement:—Held, that no child took a vested interest until the attainment of twenty-one, and the death of the widow; that the alienation by the felon acted as a forfeiture; that the pardon was valid under the act, 6 & 7 Vict. c. 7; but, inasmuch as the interest was not vested in the felon till after the pardon, the Crown had no right to claim, and the forfeiture operated in favour of the felon's brothers and sisters. *Blake* v. *Barnett*, 31 Law J. Rep. (N.S.) Chanc. 898; s. c. *nom. Barnett* v. *Blake*, 2 Dr. & S. 117.

A B voluntarily assigned a policy on his life to trustees for his infant son, if he attained twenty-five; but if he died under that age, and A B should think proper to keep up the policy, upon trust for C D. A B covenanted to pay the premiums during the life of his son only, and in the event of A B ceasing to pay the premiums, he should be at liberty to sell the policy and retain the money. The son died under twenty-five, and A B mortgaged the policy, covenanting to pay the premiums, which he did:—Held, on the death of A B, that the produce of the policy belonged to the mortgagees, and not to C D. *Pedder* v. *Moseley*, 31 Beav. 159.

A power of sale and exchange was given to the trustees of a settlement, at the request of the person for the time being seised of the freehold and inheritance of the manors, &c.:—Held, that reading the word "and" conjunctively, the power could not be exercised at the request of a tenant for life, who, subject to intervening limitations, had the ultimate remainder in fee:—Held, also, that the word "and" could not be read disjunctively as "or." *Earl of Malmesbury* v. *the Countess of Malmesbury*, 31 Beav. 407.

The word "issue" in a deed construed "children," in regard to personalty. *Marshall* v. *Baker*, 31 Beav. 608.

By a marriage settlement, it was recited that the husband was absolutely entitled to a sum of 7,000*l.*,

part of the personal estate of a deceased person, then being administered by this Court. The husband settled 5,000*l.*, part of the 7,000*l.*, but the assets proved insufficient to pay even the 5,000*l.*:—Held, that this was not a representation which the husband was bound to make good, and that the deficiency did not constitute a debt payable out of his assets. *Evans* v. *Wyatt*, 32 Beav. 217.

By voluntary settlement J D conveyed freehold estates to trustees, to the use of J D and his wife, successively for their respective lives, with remainder to the use of their children, as J D should by will, or in default of appointment by him, as his wife should by will appoint, and in default of appointment to the use of trustees for 500 years, with remainder to the use of the first and other sons of J D and his wife successively in tail male; and the trusts of 500 years' term were declared to be as soon as conveniently might be after the death of the survivor of J D and his wife, in case J D should have issue by his wife one son and also two or more children then in trust to raise the sum of 6,000*l.* for the portion or portions of any child or children of J D and his wife, other than their eldest or only son, equally to be divided between them if more than one. No period was fixed for vesting the portions. J D, by a settlement made on the marriage of his daughter H D, covenanted that he would not execute any appointment or do any other act to diminish the share to which H D might become entitled under the first-mentioned settlement. Subsequently J D, by will, appointed the estates to his second son J S D, charged with 1,000*l.* in favour of H D, and 3,000*l.* in favour of another daughter:—Held, that by the covenant J D had released his testamentary power to the extent of disabling himself from affecting the share of H D by any subsequent exercise thereof (but not to any greater extent), and that H D was entitled to the same share in the 6,000*l.* that she would have taken in default of appointment. *Davies* v. *Huguenin*, 32 Law J. Rep. (N.S.) Chanc. 417; 1 Hem. & M. 730.

For the purpose of ascertaining the share H D would have taken if there had been no appointment, and in construing the settlement upon that hypothesis,—Held, (1) That the representatives of an eldest son who attained twenty-one, but died in the lifetime of J D without issue, were entitled to share in the 6,000*l.*; (2) That the second son, who but for the appointment would have taken the estate as tenant in tail, was excluded from any share; (3) That the representatives of the eldest son and of a daughter who attained twenty-one, but died unmarried in the lifetime of the tenant for life, were entitled to share in the 6,000*l.*; and (4) That the representatives of a son who died an infant in the lifetime of the tenant for life, were excluded. Ibid.

A sum of 5*l.* per cent. was held on trust to pay a number of annuities, which originally exactly exhausted the income, and the capital was given over. The fund was converted into 3*l.* per cents. and, under a proviso, the annuities abated in proportion. Afterwards, by the death of an annuitant, the income again became sufficient to pay the existing annuities in full:—Held, on the construction of the deed, that the existing annuitants were entitled to be paid in full their annuities. *In re Kenneth Mackenzie's Settlement*, 32 Beav. 253.

By a settlement, trustees were to raise 2,000*l.* for A for life, with remainder to her children, with powers for maintenance, advancement "or otherwise," and in default of children, the fund was given to C. A like sum was given to B for life, with remainder to her children, with the like provision for their maintenance "and otherwise," as before expressed in respect to the 2,000*l.* given to A and her children, "and otherwise in like manner to all intents and purposes as if such trusts and provisions were there fully repeated":—Held, that this included the gift over to C, and that, on the death of B without children, C was entitled to the second sum of 2,000*l.* *In re Shirley's Trusts*, 32 Beav. 394.

Certain estates stood settled upon A for life, with remainder to F for life, with divers remainders over for life, and in tail, with ultimate reversion to F in fee, with power to every tenant for life, either before or when he should become entitled to the actual freehold, to charge the estates with portions for younger children, but any exercise of the power by a tenant for life before becoming entitled to the actual freehold was to be ineffectual, unless he or his issue subsequently became so entitled. F, by his will, after referring to the power, "in exercise of the power and of all other powers," charged portions for his younger children, and made no disposition of the reversion. F died without issue in A's lifetime, whereby the intended exercise of the power failed. The intermediate remainders having also failed,—Held, as against F's heir, that the ultimate reversion was well charged with the portions of F's will. *Sing* v. *Leslie*, 33 Law J. Rep. (N.S.) Chanc. 549; 2 Hem. & M. 68.

A younger child becoming the eldest son, but not living to enter into possession of the estates, held to be a younger child for the purpose of receiving a portion. Ibid.

By a marriage settlement a fund was settled upon trust for the wife during her life, and subject thereto as she should appoint generally, and in default of appointment, and in case she died in the lifetime of her husband, in trust for the persons who, under the Statutes of Distribution, would have become entitled thereto at the decease of the tenant for life, if she had died possessed thereof intestate, and without having been married; and it was thereby declared that A B, the illegitimate daughter of the tenant for life, should, for the purposes of that trust, be deemed to be the lawful child of the tenant for life. The wife died in the lifetime of her husband, without exercising the power, and leaving no lawful child:—Held, reversing a decree of the Master of the Rolls, that the trust for the next-of-kin and the declaration respecting A B must be read together, and that, by virtue of the two combined, A B took the fund. *Wilson* v. *Atkinson*, 33 Law J. Rep. (N.S.) Chanc. 576; 33 Beav. 536.

A upon the occasion of his marriage, in exercise of the usual powers of jointuring, and of charging portions, executed a deed, whereby he limited a jointure to his intended wife, to commence after his own decease, and also a term of years, to commence after the decease of the survivor, to secure portions for younger children. By another deed he affected to charge other estates, of which he was merely tenant for life in remainder without any power of jointuring or of charging portions, with an additional jointure and portions, and covenanted that he would,

as soon as he should be entitled to the possession, convey the estates specified therein, and all other hereditaments to which he then was or thereafter might be entitled for any estate of freehold or inheritance to the same uses, for the purpose of securing the additional jointure and portions, as were contained in the prior settlement for securing the jointure and portions thereby already charged. A subsequently incumbered his life estate in remainder. Upon its falling into possession,—Held, by *Wood, V.C.*, and, on appeal, by the Lords Justices, that the second deed did not create a charge on the life estate, or confer any right to have the rents impounded during the life of A to satisfy the additional jointure or portions, and that the incumbrancers were entitled to priority over the jointress and younger children. *Ford* v. *Tynte*, 34 Law J. Rep. (N.S.) Chanc. 452; 2 Hem. & M. 315; 2 De Gex, J. & S. 557.

By the settlement made on the marriage of J S and E G, trustees were directed to pay the income of 10,000*l.* to J S for life, with remainder to E G for life, and after their deaths to transfer the capital to or among the child and children of the marriage, his, her or their respective executors, administrators or assigns, equally if more than one; the shares of sons, if infants at the death of the surviving parent, to be paid at twenty-one, and the shares of daughters, if infants at that time, to be paid at twenty-one or marriage; and if there should be no child, or, being such children, all of them should die before they became entitled, then over. There were six children of the marriage, of whom two died infants in the lifetime of their parents, and the other four survived both parents and attained twenty-one:—Held, affirming the decision of the Master of the Rolls, that the deceased infant children took vested interests. *Jopp* v. *Wood*, 34 Law J. Rep. (N.S.) Chanc. 625; 2 De Gex, J. & S. 323.

In marriage articles real estate was covenanted to be conveyed upon trust for the use and benefit of the intended husband for life, with remainder for the use and benefit of the intended wife for life, if she should survive him and remain his widow, with remainder for the use and benefit of the issue of the intended husband by the intended wife, their heirs and assigns for ever. The husband and wife died, leaving two daughters and a son all of whom had children:—Held, that the Court might, in marriage articles which were executory as in a will, construe "issue" to mean heirs of the body; that the words "heirs and assigns" were idle and nugatory; and the Court (the husband and wife being dead) directed a settlement to be made, giving an estate tail to the son, with remainder to the daughters as tenants in common in tail, with cross-remainders between them in tail. *Phillips* v. *James*, 2 Dr. & S. 404; 3 De Gex, J. & S. 72.

When clauses in a settlement are conflicting, the rational presumption is, that a child attaining twenty-one takes a vested interest. *Dixon* v. *Barkshire*, 34 Beav. 537.

In a settlement, the limitation was to the children "who should be living at the time of the decease of the father"; this was controlled by a gift over:—Held, that a child who died in the life of her father, having attained twenty-one, was held entitled to a share. Ibid.

Leaseholds for life were settled by deed on the parents for life, with remainder to the children of the wife equally, and the heirs of their bodies, and if but one child, then to such child and the heirs of his body, and in default of such issue, to the heirs of the wife:—Held, that there were no cross-remainders between the children, and that on the death of a child without issue, and without having made any disposition, his share went to the heir of the wife. *Bainton* v. *Bainton*, 34 Beav. 563.

### (D) COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY.

A covenant by a husband on his marriage to settle his wife's after-acquired property, does not extend to a legacy given to the wife after marriage to be at her disposal and control, and not subject to the *jus mariti* of her husband, or liable to be affected by his debts or deeds. *Grey* v. *Stuart*, 30 Law J. Rep. (N.S.) Chanc. 884.

A settlement contained a covenant by the intended husband and wife, that the wife's after-acquired property should be conveyed and transferred to the trustees when the same was of the value of 500*l.* The lady's grandmother after the settlement made her will (reciting the fact of the settlement), by which she gave the wife certain specified chattels and effects, and gave her residuary real and personal estate to trustees upon trust to sell, and to hand over the proceeds to the trustees of the settlement upon the trusts of the same:—Held, that the value of the lady's interest in the residue was not to be included in the estimate of value, because it was not so given as to be capable of settlement, according to the construction of the covenant; and as to the chattels, the question of value must depend on the result of inquiry. *Forster* v. *Davies*, 31 Law J. Rep. (N.S.) Chanc. 276.

By the settlement made on the marriage of a lady who was a minor, property was settled to her separate use without power of anticipation; and she agreed to confirm the settlement, and also to settle all her after-acquired property. She attained twenty-one, but did not confirm the settlement. Property having been afterwards bequeathed to her for her separate use,—Held, that she was bound either to bring it into settlement, or to make compensation out of the benefits given to her by the settlement, and no exemption could be claimed for jewelry or other specific chattels so bequeathed. *Willoughby* v. *Lord Middleton*, 31 Law J. Rep. (N.S.) Chanc. 683; 2 Jo. & H. 344.

By a marriage settlement 3,000*l.* was assigned by the father of the intended wife to trustees, to be held after his decease upon trusts as to 2,000*l.*, part thereof, for the wife, her husband and children, and as to the residue, upon trust for the husband absolutely; and it was covenanted that all the property which the wife, or the husband in her right, should during the coverture become seised or possessed of or entitled to, should be settled upon the trusts therein declared of the premises thereby settled:—Held, first, that property to which the wife became entitled in reversion during the coverture was bound by the covenant; and, secondly, that the sum given by the settlement, in trust for the husband absolutely, was not settled. *Hughes* v. *Young*, 32 Law J. Rep. (N.S.) Chanc. 137.

*Semble*—That a covenant to settle after-acquired property would not affect property purchased by a married woman out of the savings of her separate estate. *Hughes* v. *Jones*, 32 Law J. Rep. (N.S.) Chanc. 487; 1 Hem. & M. 765.

A testator, by his will, dated since the Wills Act, gave a legacy to his daughter, a married woman, who predeceased him, leaving issue, and also her husband, her surviving. The settlement made on her marriage contained a covenant that all property coming to her or to her husband in her right *during the coverture* should be settled:—Held, that notwithstanding the fictitious survivorship created by section 33. of the Wills Act, for the purpose of preventing a lapse, the legacy was not acquired *during the coverture* within the meaning of the covenant, and was therefore not bound by the settlement. *Pearce* v. *Graham*, 32 Law J. Rep. (N.S.) Chanc. 359.

Where a covenant to settle after-acquired property was contained in a settlement executed on the marriage of a lady, who at the time was entitled to a contingent interest liable to be divested, but which afterwards fell into possession, and who afterwards became entitled to property to her separate use, as to part of which there was a proviso against alienation,—Held, that the property to which the lady was contingently entitled at the time of her marriage came within the terms of the covenant, but that the property settled to her separate use and as to which there was a proviso against alienation was not included in it. *Brooks* v. *Keith*, 1 Dr. & S. 462.

A marriage settlement contained a covenant that if at any time during the coverture the husband or wife or either of them in her right should by gift, descent, succession or otherwise become entitled to any real or personal estate of the value of 100*l.* or upwards at any one time (other than interests which should be restricted to the life of the wife, or which whether so restricted or not should be settled to her separate use), then that the same should be settled upon the trusts of the settlement. *Edye* v. *Addison*, 33 Law J. Rep. (N.S.) Chanc. 132; 1 Hem. & M. 781.

After the marriage real and personal estate was given by will unto and to the use of the wife and her husband, their heirs, executors, administrators and assigns, as joint tenants:—Held, that the property given by the will was neither within the terms of the covenant nor within the general scope and object thereof, which was to protect the wife's property falling into possession during coverture against the marital right. Ibid.

A covenant by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but such a covenant of the husband and wife does. Such a covenant to settle does not bind property over which a wife is deprived of the power of disposition. *Coventry* v. *Coventry*, 32 Beav. 612.

Covenant by husband and wife to settle all after-acquired property, "not being already settled for her separate use,"—Held, not to bind property subsequently bequeathed to the wife for her separate use. Ibid.

The five children of a testator were absolutely entitled to his residue. One of them, on her marriage, settled her fifth of such residue, and all other her share by survivorship or otherwise, and all her right, contingent, reversionary or otherwise, possibility, &c., therein. She afterwards became entitled to a further share by the death of a brother intestate:—Held, that it was not included in the settlement. *Edwards* v. *Broughton*, 32 Beav. 667.

By a settlement made in June, 1842, property of the wife was settled, and the husband covenanted that if during the coverture any real or personal estate should "descend or devolve to or vest" in his wife, or in him in her right, he would settle it. In August, 1842, a sum, part of the distributive share of the wife in the estate of her father, who died in 1821, and which had been overlooked, was recovered, and paid to the trustees of the settlement, and the husband received the income for twelve years:—Held, that it was not within the covenant to settle, and that the husband had not so acquiesced as to make it subject to the trusts of the settlement. *Churchill* v. *Shepherd*, 33 Beav. 107.

Covenant in a marriage settlement to settle the wife's after-acquired property ("save and except any estate or effects already settled to her separate use"):—Held, that a legacy afterwards bequeathed to her for her separate use was not included in the covenant. *Whitgreave* v. *Whitgreave*, 33 Beav. 532.

Where the draft of a proposed settlement in contemplation of the marriage of an infant ward of Court, containing a covenant to settle after-acquired property, but no provision as to second marriage, was approved by the intended husband, but never executed, though a post-nuptial settlement in different terms was executed, the Court varied the latter settlement by adding the covenant as to after-acquired property. *In re Hoare's Trusts*, 4 Giff. 254.

Covenant by husband and wife to settle all real or personal estate, property or effects, to which the wife or the husband in her right shall by gift, descent, succession or otherwise become entitled,—Held, to include reversionary interests in consols which fell in by the death of a tenant for life after the decease of both husband and wife. *Grafftey* v. *Humpage* (1 Beav. 46) followed. *In re Hughes's Trusts*, 4 Giff. 432.

### (E) BY THE COURT OF CHANCERY.

The reported decisions in which the Court has directed the limitation of life estates without impeachment of waste, must be considered as resting, either upon the circumstance that the Court felt itself bound by the terms of the instrument directing the settlement to confer the largest possible ownership consistently with keeping the estates in settlement, or upon the existence of a direction to settle "in strict settlement." *Davenport* v. *Davenport*, 33 Law J. Rep. (N.S.) Chanc. 33; 1 Hem. & M. 775.

### (F) PORTIONS.

An estate was charged with portions for younger children "to be raised and levied" after the decease of the tenant for life, "and to be forthwith paid and payable":—Held, by the Master of the Rolls, and affirmed on appeal, that a younger child, who attained twenty-one, but died in the lifetime of the tenant for life, took a vested interest. *Remnant* v. *Hood*, 30 Law J. Rep. (N.S.) Chanc. 71.

Legacies or portions charged on real estate, and payable at a future time, do not vest until the time

appointed for payment. Upon the death of the legatee or portioner before the time appointed for payment, they lapse, or sink into the inheritance. Ibid.

If, however, the payment of the legacy or portion is postponed, not from any consideration personal to the legatee or portioner, but for the convenience of the estate, the legacy or portion will, notwithstanding, vest in the legatee or portioner before the time of payment. Ibid.

The payment of a portion by a father on the marriage of a daughter will not, in the absence of any evidence of intention, be considered either as a purchase or in lieu of such reversionary interests as she was or might become entitled to under the settlement made on his marriage; and a bill filed to apply such interests, as far as they would extend, in reimbursing his estate so much as he had advanced, was dismissed. *The Earl of Bradford* v. *the Earl of Romney*, 31 Law J. Rep. (N.S.) Chanc. 497; 30 Beav. 431.

By a settlement, a sum of money was to be raised after the death of the settlor and another person for all the children of the settlor's son, other than an eldest or only son, for the time being entitled to certain other property. The eldest grandson died before the period when the amount could be raised or he became entitled to the other property:—Held (reversing the decision of one of the Vice Chancellors), that his representative was entitled to share in the fund to be raised for the younger children. *Ellison* v. *Thomas*, 32 Law J. Rep. (N.S.) Chanc. 32; 1 De Gex, J. & S. 18; 2 Dr. & S. 111.

H B, by the settlement made on the marriage of his daughter C, covenanted to pay 10,000*l.* to trustees, with interest in the mean time; and the trusts declared were for C for life, then for the husband for life, then for the children of the marriage as they jointly, or the survivor, should appoint; and in default of appointment, equally, with remainder as C should appoint, and, in default, to her next-of-kin. The 10,000*l.* was not paid in the lifetime of H B. By a will made subsequently to the settlement, H B, after specific devises and bequests, gave the residue of his property to trustees, upon trust to convert the same, and pay debts and legacies, and then, as to one moiety, for C for life, for her separate use, remainder as she should appoint (but excluding her husband); in default of appointment, to the testator's daughter L, for her separate use for life, and, after the decease of the survivor of C and L, as L should appoint (but excluding her husband), and in default of appointment to C B, the testator's nephew, absolutely. The other moiety was given on similar trusts, *mutatis mutandis*, in favour of L:—Held, (by *Knight Bruce, L.J.*, affirming the decision of *Wood, V.C.*, but *Turner, L.J.*, *dissentiente*) that the differences between the trusts of the 10,000*l.* secured to C by the covenant in the settlement and those of her moiety of the residue were, according to the authorities, not so material as to prevent the application of the rule against double portions, and that the 10,000*l.* secured by the settlement must be deducted from her moiety of residue. *Coventry* v. *Chichester*, 33 Law J. Rep. (N.S.) Chanc. 361, 676; 2 Hem. & M. 149; 2 De Gex, J. & S. 336.

By *Turner, L.J.*, the differences between the limitations of the gifts under the old settlement and under the will respectively were not slight but substantial; and, there being also a trust for the payment of debts, the presumption against double portions was rebutted. Ibid.

The doctrine of satisfaction, so called, as applied to the case of double portions, rests upon the same general principle, whether there be first a will made and then a settlement, or first a settlement and then a will, viz., that the child shall not be doubly provided for, and shall take nothing under the will, whether prior or subsequent in date, without bringing into hotchpot the provision made by the settlement. Ibid.

In order that the doctrine may be applicable, all that is needed is that in each case the property given should be given or settled in some one of the usual modes of dealing with a child's portion. Ibid.

## (G) RECTIFYING.

In a suit for the rectification of a settlement on the ground that the instructions have been exceeded, the Court will give relief upon parol evidence of the intention of the parties, on being satisfied that no written instructions are in existence. *Lackersteen* v. *Lackersteen*, 30 Law J. Rep. (N.S.) Chanc. 5.

By a marriage settlement, dated in 1824, estates were limited to the use of A (the husband) for life, remainder to the first and other sons of the marriage, successively in tail. A jointure of 1,000*l.* per annum was charged on the estates in favour of the wife of A, and A was empowered to increase this to 1,500*l.* per annum, and to charge the estates with 20,000*l.* as portions for younger children of the marriage, and also to charge the estates with 20,000*l.* for his own purposes. In 1849, B, the eldest son of the marriage, being twenty-three years of age, was applied to by his father, A, to assist him in raising money for the father's debts, by opening the entail and letting in a charge upon the inheritance prior to B's estate. To this B agreed; and after some correspondence and interviews with the solicitors, the estates were, in January, 1850, after the execution of a disentailing assurance, re-settled to the use of A for life, remainder to B for life, remainder to the first and other sons of B in tail. A gave up his power of increasing his wife's jointure, and charging portions for children of a future marriage, and also limited the jointure of any future wife to 700*l.* per annum. A bill was filed by B some years afterwards to have the settlement rectified, so far as it reduced his estate tail to an estate for life, on the ground of his never having assented to such an alteration, and being entirely ignorant of its having been effected. The evidence, however, of the solicitor who acted on the occasion for father and son, and of his clerk, rebutted the allegation of ignorance on the part of B, and shewed that the whole arrangement was fully explained to him and received his assent. One of the Vice Chancellors dismissed the bill with costs, and, upon appeal, this decision was affirmed. *Jenner* v. *Jenner*, 30 Law J. Rep. (N.S.) Chanc. 201.

No order will be made on petition to reform a settlement, though, by mistake, it included a fund not intended to be settled. Neither can any order be made in contravention of its provisions so long as the settlement is unreformed. *In re Malet*, 31 Law J. Rep. (N.S.) Chanc. 455; 30 Beav. 407.

A volunteer under a settlement declaring the trusts of property, placed in the hands of trustees, is

entitled to file a bill to have an error rectified, even though the effect of the error should be to carry back the fund to the original settlor. *Thompson* v. *Whitmore*, 1 Jo. & H. 268.

Where a clause in a marriage settlement was framed in a form which did not carry out correctly the intention of the intended wife, and the whole clause was objected to by the intended husband, but the objection ultimately waived, and it appeared that the husband's attention had not been called to the variance between the form of the clause and the intention of the wife,—Held, that this was not a case of mutual error, and a bill for rectification dismissed. Ibid.

The principle on which the Court reforms a settlement is to make it conform to what was the real agreement. But the Court will not interfere to alter or reform a settlement, on the ground that a stipulation or limitation which was wished for and intended by one of the contracting parties, but never agreed to or mentioned to the other, has been omitted from the settlement. *Elwes* v. *Elwes*, 2 Giff. 545.

Power of sale in a settlement rectified on proof that it was not conformable with the contract. *The Earl of Malmesbury* v. *the Countess of Malmesbury; Phillipson* v. *Turner*, 31 Beav. 407.

As to the necessity of a reconveyance in cases of rectification of a settlement, and as to its retrospective operation. Form of decree in such a case. Ibid.

In a settlement a mortgage on the estate was erroneously stated to be for 1,200*l.* (instead of 1,400*l.*), but in subsequent deeds executed by the parties and proved in evidence, the mortgage was recognized as being for 1,400*l.*:—Held, by the Master of the Rolls, that the Court might treat the settlement as having, in fact, been made subject to a mortgage for 1,400*l.* without any suit to rectify it. *Scholefield* v. *Lockwood*, 33 Law J. Rep. (N.S.) Chanc. 106; 32 Beav. 436.

A marriage settlement was drawn, as the intended husband alleged, in a manner contrary to the agreement, but, before the marriage, he knew its contents, and executed it under protest, and reserving his right to set it aside:—Held, that he could not after marriage sustain a suit to rectify the settlement. *Eaton* v. *Bennett*, 34 Beav. 196.

(H) Effect of Divorce upon.

Whether, after a dissolution of marriage, a re-marriage between the same parties would be lawful —*quære*. But children born of such re-marriage would not be entitled to the benefit of a settlement made on the former marriage upon the children of the same parties. *Bond* v. *Taylor*, 31 Law J. Rep. (N.S.) Chanc. 784; 2 Jo. & H. 473.

Bill by a divorced wife, who had married again, to set aside a post-nuptial settlement executed by her while a minor, but subsequently confirmed, for the benefit of the wife for life for her separate use, remainder to her (first) husband for life, remainder among the children of the marriage, in default of children who attained twenty-one, as the wife should appoint, with a proviso if the husband and wife should live separate and the wife should require alimony, that the wife's interest under the settlement should cease,—Dismissed with costs as far as it sought to set aside the whole settlement; but the Court declared the proviso void. *Merryweather* v. *Jones*, 4 Giff. 509.

## SEWERS.

[Application of sewage in Great Britain and Ireland regulated by 28 & 29 Vict. c. 75. See Public Health and Local Government.]

*Jurisdiction of Commissioners.*

The 13th section of the 3 & 4 Will. 4. c. 22, after reciting that doubts had arisen whether a presentment of a jury is not necessary on every occasion to repair defences within the jurisdiction of Commissioners of Sewers, enacts "that whenever under any commission a jury shall have presented that any person, body politic or corporate, is liable to repair or contribute to the repair of any defences, sea-walls, &c. within the jurisdiction of the commission, in respect of any lands or tenements, &c., it shall not afterwards, during the continuance of the same commission, be necessary to obtain a presentment of a jury upon any subsequent want of reparation of the defences, walls, &c.; but such person, body politic or corporate, so presented as aforesaid, and the owners and occupiers for the time being of such lands, &c., shall be liable from time to time to repair such defences, walls, &c., according to such presentment; and it shall be lawful for the Commissioners to decree, order, and direct the same to be repaired by such person, body politic or corporate, from time to time during the continuance of such commission accordingly." S A, having been presented by a jury, summoned under a Commission of Sewers, to be liable to do certain repairs as owner of certain lands,—Held, that the section did not authorize the Commissioners, during the continuance of the same commission, to make an order for the repairs upon a person who, it was alleged, had become owner since the presentment; and that such order was void. *R.* v. *Warton*, 31 Law J. Rep. (N.S.) Q.B. 265; 2 Best & S. 719.

*Quære*—Whether Commissioners of Sewers have jurisdiction to order repairs on the evidence of persons (neither of whom is their official surveyor) that the repairs are necessary, without the intervention of a jury or a personal survey by themselves. *Semble*—That they have not. Ibid.

## SHERIFF.

[See Trespass.]



(A) Liability of the Sheriff.

(*a*) *Taking wrong Person in Execution.*

A writ of summons issued by A against his debtor I W K was by mistake served on M K, who stated that he was not I W K. M K did not appear to

the writ, and took no notice of the summons, but judgment was entered up in the action against I W K and a *ca. sa.* issued on the judgment commanding the sheriff to take I W K. The sheriff thereupon arrested M K:—Held, that the sheriff was liable to an action for false imprisonment at the suit of M K, and that the facts would not warrant the sheriff in alleging by way of justification that the *ca. sa.* directed him to arrest M K by the name of I W K. *Kelly* v. *Lawrence* (Ex. Ch.), 33 Law J. Rep. (N.S.) Exch. 197; 3 Hurls. & C. 1.

(*b*) *Sale of Chattels let to Execution Debtor.*

The mere sale by the sheriff (not in market overt), under a *fi. fa.*, of a chattel let to the execution debtor, without notice of the owner's interest in it, is not a conversion or ground of action against the sheriff, but an absolute sale, and delivery of the chattel under the sale, to a purchaser; and a user by the purchaser, causing damage to the chattel, constitutes a cause of action. *The Lancashire Waggon Co.* v. *Fitzhugh*, 30 Law J. Rep. (N.S.) Exch. 231; 6 Hurls. & N. 502.

To a declaration alleging that the plaintiffs having bailed and let to one P railway waggons for a term, and being the owners, subject to the interest of P, the defendant converted them and sold them to some persons unknown, whereby the plaintiffs were injured in their title and interest to and in the waggons, and the same had become lost to the plaintiffs,—the defendant pleaded that he sold the waggons not in market overt and converted them to his use as and being sheriff, under a writ of *fi. fa.* against P, and that at the time of such sale and conversion the defendant had not any notice of the plaintiffs' title to or interest in the waggons:—Held, that the plea was an answer to the action. Ibid.

The plaintiffs new assigned for a conversion further than in the plea admitted, to wit, by absolutely selling the plaintiffs' interest, and delivering the waggons to divers persons in pursuance of the sale, and thereby causing them to be used by the said persons, and worn by such user, and also that the defendant damaged the waggons by causing them to be used, whereby they were worn; and that the waggons were lost to the plaintiffs by reason of the matters mentioned in the declaration, and that by reason of the newly-assigned matters the plaintiffs were injured in their said title and interest:—Held, that the new assignment was good, and was not a departure from the declaration. Ibid.

*Quære*—Whether the interest of a bailee or lessee of chattels can be taken in execution. Ibid.

(*c*) *Escape.*

The production of an interim protection order given to an insolvent petitioner under 5 & 6 Vict. c. 116. and 7 & 8 Vict. c. 96. is a justification to the sheriff for discharging the insolvent out of his custody, under a writ of execution, although the debt for which the execution creditor had recovered judgment did not exist till after the insolvent petition had been filed. *Wallinger* v. *Gurney*, 31 Law J. Rep. (N.S.) C.P. 55; 11 Com. B. Rep. N.S. 182.

*Semble*—The sheriff may give evidence of the production of such an order under the plea of not guilty to an action against him for a wrongful discharge. Ibid.

The plaintiff having recovered judgment against B sued out a *ca. sa.*, and delivered it to the sheriff. B had previously entered into a deed (to which the plaintiff had not assented), which purported to be a deed of assignment for the benefit of his creditors, but which was in fact an invalid deed under the Bankruptcy Act, 1861. It was nevertheless duly registered, and the Chief Registrar gave a certificate of registration to B, having a note that the certificate was available as a protection in Bankruptcy. The sheriff, on the production of this certificate, allowed B to go at large, and made a return that B was entitled to protection from arrest, and that he was not found in his bailiwick. An action being brought against the sheriff for a false return, and escape,—Held, by *Crompton, J.*, *Mellor, J.* and *Shee, J.*, that, under the 198th section of the Bankruptcy Act, 1861, the certificate was an answer to the action; by *Cockburn, C.J.*, that the deed being invalid, the sheriff was liable. *Lloyd* v. *Harrison*, 34 Law J. Rep. (N.S.) Q.B. 97—affirmed in Ex. Ch. Ibid. 153; 6 Best & S. 36.

(B) Rights of the Sheriff.

(*a*) *Expenses of Sale.*

The sheriff, previous to a sale by public auction of the goods of a debtor under a writ of *fi. fa.* having issued three advertisements of such sale, claimed to deduct from the proceeds of the sale the sum of 15*s.* as the costs of these advertisements, under the 24 & 25 Vict. c. 134. ss. 73, 74:—Held, that he was not entitled to do so, and that his charges were regulated by 1 Vict. c. 55. *Braithwaite* v. *Marriott*, 32 Law J. Rep. (N.S.) Exch. 24; 1 Hurls. & C. 591.

The sheriff having seized under a *fi. fa.*, notice was given of a prior act of bankruptcy by the debtor, and a petition was filed under which he was adjudicated bankrupt, the goods remaining unsold; and the messenger took possession of them:—Held, that the sheriff was not entitled to a rule calling upon the assignees to pay him the expenses of preparing for a sale of the goods. *Searle* v. *Blaise*, 14 Com. B. Rep. N.S. 856.

(*b*) *Poundage.*

Where, after seizure of goods under a writ of execution, but before sale, the judgment and subsequent proceedings are set aside for irregularity, and the goods are therefore not sold, the sheriff is not entitled to poundage. *Miles* v. *Harris*, 31 Law J. Rep. (N.S.) C.P. 361; 12 Com. B. Rep. N.S. 550.

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## SHIP AND SHIPPING.

[The jurisdiction of the High Court of Admiralty extended and the practice of the Court improved by 24 Vict. c. 10.—"The Merchant Shipping Act, 1854," "The Merchant Shipping Act Amendment Act, 1855," and "The Customs Consolidation Act, 1853," amended by 25 & 26 Vict. c. 63.—"The Passengers Act, 1855," amended by "The Passengers Act Amendment Act, 1863" (26 & 27 Vict. c. 51).—The distribution of salvage, bounty, prize, and other money among the officers and crews of ships of war provided for by 27 & 28 Vict. c. 24.—Naval prize of war regulated by 27 & 28 Vict. c. 25.—The acquisition of lands by the Admiralty for the public service,

and the execution of works thereon, provided for by 27 & 28 Vict. c. 57.—The disposal of effects under the control of the Admiralty, belonging to deceased officers, seamen, &c. regulated by 28 & 29 Vict. c. 111.]



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## (A) CHARTER-PARTY.

The defendants chartered in London the ship *Planter*, to bring a cargo of guano from Callao, in South America, to England, at 70*s.* per ton. At Callao advances were made on account of freight to the captain by the defendants' agents, pursuant to the charter-party. After the *Planter* had sailed with her cargo she was compelled by sea damage to put back to Callao, and became unable to proceed on her voyage. The defendants' agents declining to interfere, the captain chartered the *Alarm*, of which the plaintiff was captain and apparent owner, to bring the cargo to its destination, and it was accordingly trans-shipped. The captain of the *Planter* chartered the *Alarm* in his own name, and bills of lading were made out to him as shipper, the defendants being named as the consignees. In the charter-party of the *Alarm* the freight named was 70*s.*, the then current freight at Callao being only 40*s.*; and by private arrangement between them the plaintiff was to pay over to the captain of the *Planter* the difference between the two rates. On the arrival of the *Alarm* in England, the plaintiff demanded the whole of the freight at 70*s.*; but the defendants refused to pay more than the balance, after deducting the advances to the *Planter*:—Held, on the above facts, the Court having liberty to draw inferences of fact, first, that the charter-party of the *Alarm* must be taken to have been made by the captain of the *Planter* on behalf of his owners, and not on behalf of the defendants; as the contract with the plaintiff would be a legitimate transaction if made on behalf of the shipowner, but not if made on behalf of the owner of the cargo. Secondly, that, assuming the captain of the *Planter* to have been acting on behalf of the defendants, he could not bind them by the contract, it being a fraud upon them to the knowledge of the plaintiff, and also being beyond the limits of the authority conferred by the necessity of the case upon the captain to act as the agent of the owner of the cargo. Thirdly (there being no contract to bind the defendants), that, assuming the original shipowner to be able to transfer his lien for freight to the new shipowner, when compelled by necessity to trans-ship the cargo in order to carry it to its destination, he could transfer only the same right as he himself possessed; and that therefore the plaintiff had no lien on the guano for more than the balance due on the original charter-party, after deducting the advances to the *Planter*. *Matthews* v. *Gibbs*, 30 Law J. Rep. (N.S.) Q.B. 55; 3 E. & E. 282.

By a charter-party, entered into between the plaintiffs as owners of a ship, and the defendants as agents for the charterers, who were persons resident in Spain, it was agreed that the ship should proceed to J, and there load in regular turn from the agents of the said charterers a full and complete cargo. It was also agreed that all liability of the defendants "in every respect and as to all matters and things, as well before and during as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo." The cargo was loaded and shipped, but not in regular turn:—Held, in an action brought for not so loading in regular turn, that the defendants were protected by the clause above set out from liability in that respect, their liability being limited to the actual shipment. *Milvain* v. *Perez*, 30 Law J. Rep. (N.S.) Q.B. 90; 3 E. & E. 495.

It was agreed by a charter-party between the plaintiff, as captain of the vessel, and the defendants, as charterers, that the vessel should take on board all such lawful goods as might be required by the defendants, and being so loaded, should proceed to Geelong, in Australia; that the captain should attend daily at the broker's office to sign bills of lading. In consideration whereof the defendants agreed to pay freight for the use and hire of the ship

1,400*l.*, to be paid 800*l.* by bills of lading, payable in the colony, and 600*l.* in cash, less seventy days' discount from the date of clearing from London; forty running days to be allowed. The owners agreed that the ship should be ready to sail at the expiration of the laying days. If the ship were not ready either on the owner's or charterers' part at the above-mentioned date, then demurrage was to be paid by the party in default at the rate of 7*l.* a day. The captain attended several times at the broker's office to sign bills of lading, but not daily. When the ship was ready to sail and had received nearly a full cargo, the defendants tendered the plaintiff some tons of acids and gunpowder to take on board. The plaintiff refused to receive them for many days, alleging that he could not safely carry more cargo than he then had. The plaintiff gave the defendants notice that he was ready to sail, and demanded the ship's papers. The defendants refused to deliver them to him until he took the acids and gunpowder on board, which he did at last and sailed. The dispute about these goods delayed the ship several days beyond the laying days. The plaintiff during the voyage brought an action for the 600*l.*:—Held, that he was entitled to recover; that his contract to receive all lawful goods on board and to attend daily at the broker's office were independent covenants, and not conditions precedent to his right to sue for his freight. Held, further, that the defendants were not entitled to a deduction in respect of demurrage; for assuming that the plaintiff was wrong in refusing so long to receive the acids and gunpowder on board, his default was not a want of readiness to sail, on which default alone demurrage was payable. *Seeger* v. *Duthie* (Ex. Ch.), 30 Law J. Rep. (N.S.) C.P. 65; 8 Com. B. Rep. N.S. 72.

An appeal will lie from the decision of the Court below on a rule to reduce the damages moved for pursuant to leave reserved. Ibid.

In an action on a charter-party, by which the defendant's ship was to proceed with her cargo to F for orders, and then, if so ordered, to proceed to C, the declaration alleged, as a breach, that the ship did not, when so ordered by the charterers (the plaintiffs), proceed to C. The defendant pleaded, that he did not make such default; and, also a plea that before default the plaintiffs revoked the said order, and ordered the ship to proceed elsewhere than to C, to wit, to P. At the trial, the evidence was, that after the arrival of the defendant's ship at F, the plaintiff ordered her to C without delay, but that, as war had then broken out between France and Austria, and the defendant's ship was an Austrian vessel, the captain feared that if he proceeded in obedience to the order, the ship and cargo would be captured by the French cruizers, and he accordingly remonstrated against going to C, and a correspondence in writing between him and the plaintiffs took place on the subject. Eventually the plaintiffs sent an agent to F, and requested the captain to follow his instructions as to the final port of destination; and the agent ordered the captain to go with the vessel to P. The captain accordingly proceeded to P, and there discharged the cargo, having previously consented to go there only on receiving the order from the agent as a clean order, and without protest:—Held, that on this evidence the Judge properly left it to the jury to say whether there had been a breach of contract, and whether the plaintiff's agent had given the captain a clean order to sail to P, telling the jury, that if they thought the captain was justified in pausing and making a stay until he received further definite orders, and that before breach the plaintiffs' agent had given the captain a clean order to go to P, the defendant would be entitled to a verdict. *Pole* v. *Cetcovich*, 30 Law J. Rep. (N.S.) C.P. 102; 9 Com. B. Rep. N.S. 430.

A ship was chartered to proceed with a cargo from England "to a safe port in Chili." On her arrival off the coast of Chili, the charterers directed the captain to proceed to C, which was by nature a safe port, but which was then closed by the Chilian government, and into which a ship entering without a permit would have been liable to confiscation. The ship was detained many days until, the interdict being removed, a permit was procured. The charterers acted *bona fide* in naming C; and both they and the shipowner were ignorant when they entered into the charter-party that any of the ports of Chili were closed:—Held, that in naming a port which was then closed the charterers had not named "a safe port" within the terms of the charter-party; and they were, therefore, liable to the shipowner for a breach of the contract implied on their part, that they would name a safe port within a reasonable time. *Ogden* v. *Graham*, 31 Law J. Rep. (N.S.) Q.B. 26; 1 Best & S. 773.

The plaintiffs, by a charter-party, agreed that their ship, which the defendant had selected for the purpose, should go to H, or so near thereto as she might safely get, to be there ready to load a cargo, by the 10th of April; and being so loaded, to proceed therewith to London, where they were to deliver the same on being paid a lump sum for freight. The ship arrived alongside the jetty at H on the 10th of April, and there received the cargo from the defendant's agent, for which the master signed and delivered bills of lading. She afterwards left the jetty with such cargo on her voyage to London; but, owing to her draught of water, she was unable to pass, when loaded, over the inner bar at H, and she therefore returned to the jetty, where she landed the greater part of her cargo on the 21st of April. The captain then proposed to the defendant's agent to take on board from the jetty so much only of the cargo as the vessel could pass over the bar with, and to receive the rest of the cargo outside the outer bar from lighters, in which it was to be brought to the vessel, at the defendant's risk and expense. This the defendant's agent refused to do; and the ship thereupon left the jetty, and proceeded with only a small portion of the cargo to London:—Held, that the defendant having loaded the vessel with a cargo at the jetty, with the captain's consent, could not be required to load a second time, and that the plaintiffs were, under the circumstances, unable to sue either for freight or for damages arising from the defendant's refusal to re-ship the cargo. *General Steam Navigation Co.* v. *Slipper*, 31 Law J. Rep. (N.S.) C.P. 185; 11 Com. B. Rep. N.S. 493.

L, a ship-broker, informed S & Co., ship-brokers, of two steamships belonging to the G & N Y Co. as available for the purposes of a foreign government. S & Co. communicated this information to P, the authorized agent of the foreign government, and P, in the first instance, chartered one of the

ships for his government for six months. This charter was continued for another six months without communication with L, at the expiration of which time a renewed charter-party was entered into for another six months, S & Co. receiving their commission on these transactions; the original charter-party containing no provision as to renewal. P subsequently, and without communication with L, chartered the other ship also on behalf of his government, S & Co. receiving their commission, and they paid to L his commission according to agreement between them, on the charter of the first ship for the first six months. In an action by the assignees of L against S & Co. for broker's commission on the charter of both these ships, L gave evidence, written and verbal, of an agreement between himself and S & Co., under which he claimed to be entitled to half of the commission to be received by S. & Co. on the charter of both ships, and tendered evidence of a custom among brokers by which he, as "introducing broker," would be entitled to share commission on a renewal of the charter, without any special agreement to that effect. The Judge at Nisi Prius ruled that the contract was contained in a particular written document, constituting a special agreement applicable only to the charter of the first ship, and in which no reference was made to any renewal of the charter, and refused to allow oral evidence to vary or explain this document; and also refused to allow evidence to be given of the custom relied on by the plaintiffs, holding it not to be applicable to the special agreement entered into between the parties:—Held, per *Martin, B.* and *Bramwell, B.*, *dissentiente Pollock, C.B.*, that there was evidence for the jury that the agreement made respecting the first ship applied to the other also, and that the question whether it did so apply ought to have been left to the jury; and that the evidence as to the alleged custom ought not to have been rejected. Per *Pollock, C.B.*, that when parties enter into a special agreement, or one out of the ordinary course of business, a custom to control or vary such agreement does not attach. *Allan* v. *Sundius*, 31 Law J. Rep. (N.S.) Exch. 307; 1 Hurls. & C. 123.

The defendants chartered the plaintiff's ship on a voyage from London to San Francisco and Victoria. By the charter-party the cargo was "to be brought to and taken from alongside at merchant's risk and expense; the freight was to be 1,650*l.*, to be paid 1,000*l.* on sailing and the remainder on right delivery of cargo, say, if the captain so require, one moiety at each of the ports of discharge. Ship to be consigned to the charterers' agent at port of discharge. The stevedore recommended by charterers to be employed at ship's expense at usual charge." At San Francisco an expense of 70*l.* was incurred in removing and re-stowing the rest of the cargo, in order to arrive at the part destined for that port, owing to improper stowage by the stevedore employed in London pursuant to the terms of the charter. W & Co., the charterers' agent at San Francisco, to whom also the ship was consigned, having paid the 70*l.*, submitted to the captain an account as between themselves and the plaintiff, charging the 70*l.* amongst other ship's disbursements to the plaintiff, the whole amounting to more than the moiety of the remaining freight payable at San Francisco; and the captain, in order to get his ship free, signed the account under protest. The plaintiff having brought an action against the defendants to recover the 70*l.* as the balance of freight due under the charter-party,—Held, that this expense of 70*l.* was a ship's disbursement which the owner was bound, at all events in the first instance, to pay in order to deliver the cargo, and that W & Co. advanced the money as agents for the plaintiff and not as agents for the defendants; and that there was under the circumstances no such settlement in account as to amount, as between the plaintiff and the defendant, to a payment *pro tanto* of freight. *Roberts* v. *Shaw*, 32 Law J. Rep. (N.S.) Q.B. 308; 4 Best & S. 44.

*Quære*—Under the circumstances whose servant the stevedore was. Ibid.

The plaintiff was charterer of a ship under a charter-party, by which the ship was placed at the disposal of the plaintiff for a certain time; the owners to appoint, victual and pay the master and officers of the ship; the cargo "to be taken on board and discharged by the charterers, the crew of the vessel rendering customary assistance so far as they may be under the orders of the master, and the charterers are to have liberty to appoint stevedores and labourers to assist in the loading, stowage, and discharge thereof; but such stevedores and labourers being under the control and direction of the master, the charterers are not in any case to be responsible to the owners for damage or improper stowage." And by another clause, "the master and the owners of the ship shall devote the same attention to the cargo, shall use the same endeavours to promote despatch, and shall in every respect be and remain responsible to all whom it may concern, as if the said ship was loading and discharging her cargoes and performing her voyages for account of the said owners and independently of this charter-party":—Held, that under this charter-party the owners were responsible for improper stowage. *Sack* v. *Ford*, 32 Law J. Rep. (N.S.) C.P. 12; 13 Com. B. Rep. N.S. 90.

The words "now in the port of Amsterdam," in a charter-party, import a warranty. *Behn* v. *Burness* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 204; 3 Best & S. 751—reversing the judgment below, 11 Law J. Rep. (N.S.) Q.B. 73; 1 Best & S. 877.

In a charter-party made at New York between British subjects, a vessel was described as "the A 1 Br. brig Hannah Eastee, of Liverpool":—Held, that this description was a warranty by the owners that the vessel was at the time classed A 1 at Lloyd's in London. *Routh* v. *Macmillan*, 33 Law J. Rep. (N.S.) Exch. 38; 2 Hurls. & C. 750.

The owners of a vessel which had once been classed A 1 at Lloyd's, authorized their agent, by power of attorney, to charter the vessel or to employ her as a general ship on any voyage, on such terms and in such manner and in all respects as he should think proper, and generally to represent the owners in relation thereto and in relation to her management or sale as fully as if the owners were personally present, and to do all things necessary for that purpose though the same were not specially mentioned:—Held, that the agent had authority to enter into a charter-party with a warranty that the ship was at the time of the charter-party A 1 at

Lloyd's, though she was not so described in the power of attorney, and though she had ceased to be so classed when the power was given. Ibid.

The defendant chartered the plaintiff's vessel to Puerto Cabello and home from Maracaibo at a fixed freight, and an additional clause was subsequently inserted in the charter-party, giving the charterers the option of sending a part of the outward cargo on to Maracaibo, and stipulating that "any and every expense the vessel may incur in consequence of this additional clause shall be borne by the charterers." The defendant loaded the vessel by a cargo, part for P. Cabello and part for Maracaibo, and made out two manifests. On arriving at P. Cabello, the custom-house authorities insisted on seeing both manifests, and prohibited the discharge of the part of the cargo intended for P. Cabello on the false ground that there were contraband goods on board, by which the cargo was confiscated, and they also imposed a fine of 500 dollars on the master for having two manifests, and prohibited the discharge of the cargo or the clearing out until the fine was paid. The master appealed to the tribunals of the country, and made counter-claims for delay. A revolution occurred in Venezuela about the same time, which prevented all commercial and legal proceedings; but eventually the government agreed with the master to pay him 5,000 dollars as compensation for the detention of the ship; and after a further delay, she proceeded to Maracaibo. The 5,000 dollars were not paid:—Held, that the plaintiff was not entitled to recover from the defendant the damages or expenses he had been put to, either in repairing damage to the vessel occasioned by the delay, or the costs attendant upon the proceedings, or otherwise, such damages not being contemplated by the additional clause. *Sully* v. *Duranty*, 33 Law J. Rep. (N.S.) Exch. 319; 3 Hurls. & C. 270.

A charter-party stipulated that a certain steamer then at N, being tight, staunch, and in every way fitted for the voyage, should proceed to the usual place of loading at N, or as near thereunto as she could safely get (guaranteed for cargo in a certain month), there load and then proceed to A. It contained the usual exception of dangers and accidents of seas, rivers and navigation during the voyage:—Held, that the voyage commenced from her starting from her then berth for the loading place, and that the exception applied to that portion of the voyage. *Barker* v. *M'Andrew*, 34 Law J. Rep. (N.S.) C.P. 191; 18 Com. B. Rep. N.S. 759.

A ship was chartered on the 12th of September, 1861, for the conveyance of a cargo of wheat from Harwich to St. Malo; ten days to be allowed for loading. The usual course was to load a portion of the cargo at a quay in the river Orwell, and to proceed lower down the river to take in the residue. The vessel having arrived on the 14th of September, and taken in 900 quarters (which was about three-fourths of the whole cargo), was proceeding down the river in charge of a pilot, when she got aground. The master, finding it necessary to take out the cargo in order to examine and repair the ship, gave notice to the charterer's agent, who accordingly, at the request of the master, and at the expense of the charterers, unloaded the 900 quarters, and despatched the whole quantity to its destination by other vessels. On the 4th of October, the master gave notice that he was ready to receive the cargo, and demanded it. The agent had none to ship:—Held, that the owner could not, under the circumstances, maintain an action against the charterers for not supplying a cargo. *Strugnell* v. *Friedrichsen*, 12 Com. B. Rep. N.S. 452.

### (B) Bill of Lading.

The defendant, a merchant at L, chartered a ship from the plaintiffs at a lump sum and put it up as a general ship. The shippers of goods in the vessel, according to the custom of L, made out and delivered to the defendant for the captain copies of the respective bills of lading, which were eight in number. It was necessary, as the defendant knew, that a document called a consular manifest should be made at L before the ship sailed, containing an accurate account of the goods on board the ship, and that for that purpose the person employed to make it out should have all the bills of lading or copies of them before him. On application for the copies by the plaintiffs, the defendant delivered over only six out of the eight copies as the whole number. An imperfect consular manifest was drawn up from these, and the plaintiffs were in consequence subjected to fines and expense at the end of the voyage:—Held (affirming the decision below, 30 Law J. Rep. (N.S.) Q.B. 169; 2 Best & S. 174), that in the absence of express contract or mercantile usage, there was no legal duty making it incumbent on the defendant to deliver over the copies to the plaintiffs, and therefore that no action could be maintained against him for the omission. *Dutton* v. *Powles* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 191; 2 Best & S. 174: in Ex. Ch. 191.

Bags of meal, 1670 in number, all marked SSCM, some weighing 12 stones, some 8 stones, were shipped on board the defendant's ship, and stowed indiscriminately. The defendant, the master, signed two bills of lading in respect of two different portions of this cargo, one of which described the property intended to pass under it thus: "467 bags meal, gross 35 tons 9 cwt., under the subjoined marks, S S C M." It also added, "Contents unknown, and not responsible for weight," &c.:—Held, that under this bill of lading the defendant was bound to deliver 467 of the 12-stone bags, as the description of the weight given in the bill of lading could only be satisfied by all the bags delivered being of the larger size. *Bradley* v. *Dunipace* (Ex. Ch.), 32 Law J. Rep. (N.S.) Exch. 22; 1 Hurls. & C. 521.

An exception in a bill of lading of "accidents or damage of the seas, rivers and steam navigation of whatever nature or kind soever," does not protect the shipowner from liability for damage arising from a collision caused by the gross negligence of the ship's master and crew. *Lloyd* v. *the General Iron Screw Collier Co. (Lim.)*, 33 Law J. Rep. (N.S.) Exch. 269; 3 Hurls. & C. 284.

Goods were consigned under a bill of lading by which it was stipulated that the vessel should take her regular turn in unloading. The vessel having been prevented from unloading within a reasonable time, in consequence of not being allowed to take her regular turn in unloading,—Held, that the master could sue the consignor for damages for such detention, the above stipulation in the bill of lading amounting to a contract by the consignor with the

master that the vessel should take her regular turn in unloading. *Cawthron* v. *Trickett*, 33 Law J. Rep. (N.S.) C.P. 182; 15 Com. B. Rep. N.S. 754.

Where the master of the ship is part owner, but has the entire control of the ship, he may sue in his own name. Ibid.

The defendant hy his bill of lading, signed at Odessa, undertook to convey a cargo from thence to the United Kingdom, to call at Cork or Falmouth for orders, for the plaintiffs, merchants residing at Odessa. The ship was a Mecklenburg ship, and the bill of lading contained the following clause, "the act of God, the king's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of what nature and kind soever excepted, unto order and assigns, paying freight for the said goods and all other conditions as per charter-party." In the charter-party the exception was for "the act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers and navigation of what nature or kind soever during the said voyage":—Held, that the words "the king's enemies" in the bill of lading must be understoud to include at least the enemies of the sovereign of the carrier, namely, the Duke of Mecklenburg:—Held, also, that, if the defendant required any further protection, he was not entitled to rely on the words "restraint of princes" in the charter-party, for that these words were not incorporated in the bill of lading, by reason of the reference to the charter-party therein contained. *Russell* v. *Niemann*, 34 Law J. Rep. (N.S.) C.P. 10; 17 Com. B. Rep. N.S. 163.

By a bill of lading of wool from Odessa, freight was to be paid in London, on delivery, "at the rate of 80*s.* per cwt., gross weight, tallow, and other goods, grain, or seed, in proportion, as per London Baltic printed rates":—Held, that extrinsic evidence was admissible to shew, that, by the usage of the trade, the meaning of the bill of lading was, that 80*s.* per cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured. *Russian Steam Navigation Co.* v. *Silva*, 13 Com. B. Rep. N.S. 610.

### (C) POLICY OF INSURANCE.

#### (*a*) *When Void by reason of Concealment.*

After the plaintiff and his brokers knew by letter from the captain that the plaintiff's steamer had been aground, and was seriously injured, and was in a sinking state in a foreign port, the plaintiff's brokers, by his direction, induced the defendant to insure her for a year, "lost or not lost," not communicating to him their information as to the state of the ship. The defendant, afterwards hearing of it, wrote to the plaintiff's brokers: "Understanding that the steamer has been ashore, I do not consider that my risk commences until the vessel has been surveyed and repaired." The broker did not communicate this letter to the plaintiff or give any answer to the defendant:—Held, that the policy was void from the concealment of a material fact, and that the defendant's letter was no evidence of a waiver on his part of the objection to the validity of the policy which existed from the failure to give the information; nor was it evidence of a new contract as to the risk, for even if it were an offer by the defendant it was never accepted by the plaintiff. *Russell* v. *Thornton* (Ex. Ch.), 30 Law J. Rep. (N.S.) Exch. 69; 6 Hurls. & N. 140.

#### (*b*) *Construction of in general.*

##### (1) *Perils insured against.*

The purpose of insurance is to afford protection against contingencies and dangers which may or may not occur: it cannot properly apply to a case in which the loss or injury must inevitably take place in the ordinary course of things; and an insurance against "perils of the seas" does not cover an injury resulting from the ordinary action of the sea-water upon an article exposed to that action in such a state as inevitably to receive injury from it. *Paterson* v. *Harris*, 30 Law J. Rep. (N.S.) Q.B. 354; 1 Best & S. 336.

The plaintiff, being the owner of a share in the Atlantic Telegraph Company, a company formed for laying down a telegraphic cable between Great Britain and America, caused himself to be insured by a policy "from the United Kingdom, wheresoever the risk may commence, to the Atlantic Ocean, and thence by one or more ships, to the places of destination in the United Kingdom and America, including every accident and risk that may be incurred at sea or on land, in all or any boats, ships and crafts whatsoever and wheresoever, until the final and successful laying down of the cable from shore to shore, upon any kind of goods, &c., on any ship or ships, &c., as above, beginning the adventure on the loading of the said goods." In the valuation clause the subject of insurance was to be taken as "on one 1,000*l.* share in the Atlantic Telegraph Company, the said share valued at 1,100*l.*; in case of loss, the part saved to be sold or appraised for the benefit of the underwriters." The perils insured against were, *inter alia*, "of the seas." "All goods" were "warranted free from average under 3*l.* per cent. unless general." A memorandum was attached to the policy: "It is understood and agreed that this insurance shall cover and include the successful working of the cable when laid down." In attempting to lay down the cable, 373 miles of it were lost by perils of the seas. The cable was ultimately laid from the Irish to the American coast, but proved unworkable owing to the insulation of the electric wires being imperfect; this was caused by a defect in the outer covering of the cable, occasioned by an accident prior to loading, aggravated by the chemical action of the sea-water on the interior of the cable, to which, by the defect in the outer covering, the water was enabled to penetrate. The plaintiff having brought an action to recover damages for the depreciation in his share consequent on the failure, and also in respect of the loss of the 373 miles of cable,—Held, first, that the injury to the cable laid down was not caused by "perils of the seas"; secondly, that the insurance was in effect on the plaintiff's interest in the cable itself, and that the plaintiff might, therefore, recover in respect of the loss of the 373 miles; but that the warranty clause applied, and he could only recover if the proportion of the value of the part lost to that of the whole length, when shipped free on board, amounted to 3*l.* per cent. Ibid.

In an insurance, in the usual form, against the restraints of all princes, &c., is included a loss consequent on a seizure under an embargo, for a tem-

porary purpose, by the government of the country of the assured, that country and the country of the insurer being at peace, and the embargo being unconnected with any hostility existing or expected between the countries. *Conway* v. *Gray* overruled. *Aubert* v. *Gray* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 50; 3 Best & S. 163, 169.

*Quære*—If the seizure were a lawful act by the municipal law of the country of the assured, whether as against him the seizure would be within the insurance. Ibid.

The declaration was on a policy of insurance on goods from London to a port not alleged to be neutral. It was in the usual form, and alleged a loss by a peril insured against. The defendant pleaded that the goods were contraband of war, and were shipped for the purpose of being sent to and imported into a belligerent port, and also that the ship was carrying goods and papers which rendered her liable to be seized, and that she was seized accordingly, which was the loss complained of; of all which the defendant, at the time of signing the policy, was ignorant:—Held, a bad plea, as, upon the true interpretation of the first allegation, it was consistent therewith that the ship was on her voyage to a neutral port, in which case there was no breach of neutrality; and that the allegation that the ship was carrying goods and papers which rendered her liable to be seized was insufficient, because it was not shewn that the goods were the plaintiff's goods, or that he was responsible for the state of the ship's papers. *Hobbs* v. *Henning*, 34 Law J. Rep. (N.S.) C.P. 117.

(2) *Collision Clauses.*

A clause in a policy of insurance on a ship, that "in case the ship shall by accident or negligence of the master or crew run down or damage any other ship, and the assured shall thereby become liable and pay as damages any sum not exceeding the value of the ship insured and her freight by any judgment of any Court of law or equity, the assurers shall pay such proportion of three-fourths of the sum so paid as the sum assured bears to the value of the ship and her freight," does not extend to damages recovered against the shipowner for personal injury caused to persons on board a ship with which the ship assured had come in collision. *Taylor* v. *Dewar*, 33 Law J. Rep. (N.S.) Q.B. 141; 5 Best & S. 58.

(3) *Warranty of Seaworthiness.*

The "seaworthiness," of which, in the absence of express stipulations, there is an implied warranty in every voyage policy, is a relative term, depending on the nature of the ship as well as of the voyage insured for; and in an action on a policy (in the usual form) parol evidence as to these facts is admissible to shew the amount of seaworthiness implied. Therefore, on a policy "on the Ganges, steamer, from the Clyde to Calcutta," it being shewn that the vessel was a steamer of very light draught of water, constructed for river navigation, that this was disclosed when the policy was effected, and that (though it was impossible to make her absolutely fit for ocean navigation) the ship had been made as seaworthy as her size and construction would admit, the underwriters are liable on her being lost by perils insured against. *Burges* v. *Wickham*, 33 Law J. Rep. (N.S.) Q.B. 17; 3 Best & S. 669.

In a voyage policy on goods there is no implied warranty that the goods are seaworthy for such voyage. *Koebel* v. *Saunders*, 33 Law J. Rep. (N.S.) C.P. 310; 17 Com. B. Rep. N.S. 71.

In the contract of a shipowner to carry goods shipped on board his vessel there is no implied condition that the vessel shall be seaworthy. But to an action by the shipowner against the merchant who shipped goods on board, for the latter's share of an average loss, it is a good plea on the ground of avoiding circuity of action, to plead that the ship was not seaworthy at the commencement of the voyage, and that the said average loss was caused and arose from and in consequence of such unseaworthiness. *Schloss* v. *Heriot*, 32 Law J. Rep. (N.S.) C.P. 211; 14 Com. B. Rep. N.S. 59.

The "seaworthiness" of which, in the absence of express stipulation, there is an implied warranty in every voyage policy, is a relative term depending on the nature of the ship as well as of the voyage insured. Therefore, on a policy "on a voyage from the Tyne to Odessa," it being shewn that the vessel was an iron steamer of very light draught of water, constructed for river navigation only, that this was disclosed to the underwriters before the policy was effected and the dimensions of the vessel then stated to them, and that (though it was impossible to make her fit to encounter the ordinary perils of ocean navigation) the ship had been made as seaworthy as her size and construction would admit, the underwriters were held liable on her being lost by the perils insured against. *Clapham* v. *Langton* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 46; 5 Best & S. 729.

A policy of insurance was effected on a ship from Lyons to Galatz, warranted to sail on or before a certain day. The ship left Lyons before the day in question fully equipped for the river voyage, but with only a river captain and crew, and without her masts, anchors and other portions of her tackle which were necessary for her sea voyage. She could not possibly have made the river voyage with her masts up and her heavy tackle on board, and it was usual in similar adventures to take these and other things necessary for the sea voyage on board at Marseilles. The required additions were, in this case, made at Marseilles without unreasonable delay, but the ship did not leave Marseilles until after the day appointed:—Held, looking to the nature of the voyage and to mercantile usage, that the ship had complied with the warranty to sail on a certain day, and with the implied warranty of seaworthiness. *Bouillon* v. *Lupton*, 33 Law J. Rep. (N.S.) C.P. 37; 15 Com. B. Rep. N.S. 113.

A vessel, having a reasonable excuse for delay in the course of her voyage in order to make certain alterations in her equipment, increased the delay by waiting for other ships which were about to perform the same voyage, in order that she might sail in company with them. The jury found that a prudent captain would have followed this course:—Held, that the delay was justifiable on this ground. Ibid.

(4) *Computation of Time.*

By a policy of insurance a ship was insured from Liverpool to any port in the Pacific Ocean, "and during thirty days' stay in her last port of discharge." In another part of the policy there was the usual

printed clause, by which she was to be insured "until she hath moored at anchor twenty-four hours in good safety." She arrived at M, her port of discharge, at 7 p.m. on the 25th of May, and anchored there, and at 3·45 a.m. on the 24th of June she was driven ashore and lost:—Held, that the loss was covered by the policy, as the thirty days had not expired when she was so lost. *The Mercantile Marine Insur. Co.* v. *Titherington*, 34 Law J. Rep. (N.S.) Q.B. 11; 5 Best & S. 765.

(c) *What constitutes the Contract of Insurance.*

The fact of giving instructions for an insurance of a ship and obtaining a slip from the intended insurers, does not amount in law to an insurance. *Parry* v. *the Great Ship Co.*, 33 Law J. Rep. (N.S.) Q.B. 41; 4 Best & S. 556.

Whilst an action was pending, the parties agreed that no judgment should be signed if a mortgage upon a certain ship was delivered to the plaintiff, and the ship was kept insured to the amount secured by the mortgage. The defendants failed to keep the ship actually insured for three days, although they had given instructions for the insurance, and had received the usual slip from the underwriters, in accordance with which the policy was afterwards executed:—Held, that the plaintiff had a right to sign judgment and sue out execution. Ibid.

(d) *Parties.*

S, a shipbroker, was directed by the plaintiff, a shipowner, who was liable for loss by jettison, to take out an open policy against jettison on deck goods, and S, shortly afterwards, received from the plaintiff a notice declaring the shipment to be on deck per *La Plata*, from Grimsby to Ostend, of certain specified goods. S not being then able to effect such a policy as the plaintiff required, caused a declaration as to the risk insured against, similar to the notice which he had so received from the plaintiff, to be indorsed on a general policy, which had been effected a month previously by S's agents in their own names, and in that of any other person to whom it might appertain from any port on the east coast of Great Britain to any port on the Continent between Hamburg and Havre, upon any kind of goods, "to be valued and declared as interest might appear." The defendant underwrote this policy, and also put his initials to such declaration. There were other goods in other vessels belonging to other persons, in which the plaintiff had no interest, also declared by indorsement on the policy. The plaintiff was duly informed by S that the risk by the *La Plata* had been covered not upon the plaintiff's own policy, but on S's general one:—Held, that the plaintiff could not sue the defendant on such policy, as it had never been made with the plaintiff, nor with any one on his behalf, nor had it ever been ratified by him. *Watson* v. *Swann*, 31 Law J. Rep. (N.S.) C.P. 210; 11 Com. B. Rep. N.S. 756.

*Quære*—Whether S could sue on it as trustee for the plaintiff. Ibid.

(e) *Delivery.*

L, the insurance-broker of the plaintiffs, by their direction, applied to the V. Insurance Company to insure a vessel of the plaintiffs for a year. The agent of the company initialed the slip for 1,000*l.* on certain terms. The company debited L with the amount of the premium, and the plaintiffs paid L the amount. The policy was afterwards, in accordance with the terms agreed upon, filled up by the company in their office in the absence of L and of the plaintiffs, and was signed and sealed by two of the directors of the company, and was retained in the office, according to their usual practice, until the assured or his broker should send for it. When the time came for paying the premium, the company sent a debit note to L containing the premium on this policy charged against him. The clerk of L who received the debit note stated that no premium was due. The company then sent the policy to L's clerk, who stated that it had been put forward in error, and requested that it should be cancelled. Thereupon, a memorandum of cancellation was indorsed on the policy by the company. L was charged by the company with the stamp and nothing else, and the policy was handed to L's clerk that he might get a return of the stamp-duty upon it. The plaintiffs had never authorized L to cancel the policy, nor did they know that he had done so. The ship afterwards being lost, the plaintiffs brought an action against the defendant, the chairman of the company, on the policy:—Held, by the Court of Exchequer Chamber (*Blackburn, J.* and *Mellor, J. dissentientibus*), that the action was not maintainable, as, on the facts stated, the policy never was perfectly delivered as a deed, so as to constitute a binding instrument between the parties. *Xenos* v. *Wickham* (Ex. Ch.), 33 Law J. Rep. (N.S.) C.P. 13; 14 Com. B. Rep. N.S. 435—affirming the judgment below, 31 Law J. Rep. (N.S.) C.P. 364; 13 Com. B. Rep. N.S. 381.

(f) *Abandonment.*

The person, with whom a policy of insurance on a ship has been simply deposited as a security for a loan to the owner of the ship, has no implied authority to give a notice of abandonment to the underwriters. *Jardine* v. *Leathley*, 32 Law J. Rep. (N.S.) Q.B. 132; 3 Best & S. 700.

*Quære*—If there were a mortgage of the ship. Ibid.

(g) *Underwriters.*

S entered into an arrangement with F, whereby F was to manage an underwriting business in the name of S, S finding the funds. The defendant guaranteed S to a certain amount; and in consideration thereof S agreed to pay him an annuity, which, on a given state of the profits, was to be increased to a yearly sum equal to one-fourth of the profits; the defendant, however, not to be considered as a partner. S afterwards married, and by the marriage settlement all the profits were assigned to the defendant and D on certain trusts, the first trust being to pay out of the profits the said annuity:—Held, that the defendant was liable as partner on a policy underwritten in the name of S. *Bullen* v. *Sharp*, 34 Law J. Rep. (N.S.) C.P. 174; 18 Com. B. Rep. N.S. 614.

(h) *Risks insured against.*

(1) *Declaration of Risks.*

The plaintiffs were the London agents of an insurance company having an agent also in Calcutta: the defendants were a London insurance company.

By a course of dealing between the plaintiffs' company and the defendants, an open policy was from time to time effected by the plaintiffs with the defendants, "lost or not lost, from Calcutta to the United Kingdom, on goods, to cover the excess over 5,000*l.* which might be taken by the Calcutta agent of the plaintiffs' company in any one ship, on first-class ship or ships as may be cleared." As soon as the Calcutta agent had ascertained that there was an excess of 5,000*l.* in any one ship on a policy granted by the plaintiffs' company, he wrote to the plaintiffs to appropriate such excess to the current open policy effected with the defendants, and the plaintiffs, as soon as the letter reached London, declared to the defendants the name of the ship and the amount of excess, which were indorsed on the back of the policy. On the 15th of February, 1860, the Calcutta agent wrote to the plaintiffs notifying an excess in the ship R G. On the 16th of March, 1860, a telegram was made known to the plaintiffs and the defendants: "Calcutta, March 10, Ship R G burnt, some cargo will be saved." On the 17th of March the plaintiffs appropriated the whole of the amount remaining on the then current policy of the defendants to other ships. On the 19th of March a policy in the usual terms, which was expressed "to succeed" the last current policy, was effected by the plaintiffs with the defendants. On the 21st of March the plaintiffs in due course received the letter from Calcutta of the 15th of February, and immediately notified to the defendants that the excess of 5,000*l.* on the R G would be appropriated to the policy of the 19th of March; and on the 26th of March, on receiving the full particulars from Calcutta, they indorsed the amount of excess on the policy, which the defendants disputed their right to do:—Held, that the plaintiffs could recover the excess in the R G on the policy of the 19th of March, as the appropriation and declaration were sufficient; and that the fact of the loss of the R G being known to both parties at the time the policy was granted did not affect it, as it was *not* then known to the plaintiffs or the defendants that the plaintiffs' company had any excess of insurance on board. *Semble*—That if this had been then known, the plaintiffs could still have recovered. *Gledstanes* v. *the Royal Exchange Assurance*, 34 Law J. Rep. (N.S.) Q.B. 30; 5 Best & S. 797.

(2) *Commencement and Duration of Risk.*

A policy was effected on guano on board the ship *Dos Hermanos*, "at and from port or ports in the River Plate to the United Kingdom," &c., "beginning the adventure from the loading thereof aboard the said ship at as above." The guano had been loaded on board at Patagonia before the ship went to the River Plate. When she arrived at Monte Video (in the River Plate) a portion of the guano was taken out, to allow of a leak being got at in the fore part of the ship and of the necessary repairs being done. The guano so taken out was then replaced in the vessel, and the ship sailed from Monte Video for England with the guano on board. Before the policy was effected the underwriter was informed that the guano had been loaded in Patagonia and taken to Monte Video in the vessel, and that the vessel had sailed from Monte Video for England. A loss occurring on the voyage, the question was whether the policy ever attached on the guano:—Held, on the authority of *Nonnen* v. *Kettlewell*, that there was a sufficient constructive loading of the cargo at Monte Video to satisfy the terms of the policy, and to entitle the plaintiff to recover. *Carr* v. *Montefiore* (Ex. Ch.), 33 Law J. Rep. (N.S.) Q.B. 256; 5 Best & S. 425—affirming the judgment below, 33 Law J. Rep. (N.S.) Q.B. 57.

*Semble*—Per *Erle, C.J.*, that construing the contract with reference to the circumstances of the case, the expression "beginning the adventure from the loading thereof at as above," was mere matter of description, and not a condition or stipulation in the policy. Ibid.

(3) *Excepted Risks.*

The plaintiff effected a policy of insurance on 6,500 bags of coffee, "warranted free from capture, seizure and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots or commotions." At the time the vessel set out on her voyage from Rio de Janeiro to New York, a war was raging between the Northern and Southern States of the United States of America, and as an act of hostility, persons in the military service of the Southern States had extinguished a light which had up to that time been kept burning at a lighthouse at Cape Hatteras. The captain, from ordinary causes, got out of his reckoning, and, in consequence, ran ashore on Cape Hatteras. If the light had been burning, the captain could have seen it, and could have avoided the damage. When the ship went aground she was boarded by two officers in the military service of the Southern States, with some shew of taking possession of her and her cargo. Certain persons acting in the employ of the Northern States as salvors then commenced taking the cargo out of the ship; they took out 120 bags, when the soldiers of the Southern States again interfered, and prevented more being taken out. If this interference had not taken place, 1,000 bags, in addition to the 120, but not more, could have been saved. From the first there was no hope that the ship could be got off:—Held, that the insurers were liable as for a partial loss. That as the 1,000 bags would have been saved but for the direct act of the soldiers, the loss of these was covered by the exception. But that for the loss of the remainder the insurers were liable, as they were lost by the perils of the sea; and the putting out the light, though an act of hostility, was too remotely connected with the loss to be considered as the cause of it, and so bring it within the exception. *Ionides* v. *the Universal Marine Association*, 32 Law J. Rep. (N.S.) C.P. 170; 14 Com. B. Rep. N.S. 259.

Held, also, that if a ship and cargo be reduced to such a state by the perils of the sea, as that there is no hope of recovery, but, while they still exist in specie, they are nominally taken possession of by persons in the military service of a belligerent State, this is a loss by perils of the sea, and not by capture. Ibid.

(*i*) *Partial and Total Loss.*

[See *ante*, (3) *Excepted Risks.*]

A vessel chartered for a voyage from the Cape to Hondeklip Bay, there to load a cargo of copper ore, and proceed therewith to Swansea, having loaded

part of her cargo, received damage to her capstan in a storm, such that she was unable to load the rest of her cargo, 120 tons, which was ready, until the damage was repaired. The master, instead of running for the Cape, 180 miles distant, where the damage could have been repaired, proceeded to St. Helena, 1,800 miles distant, expecting to be able to repair there, and intending to return for the rest of the cargo; but not being able to get repairs at St. Helena, he proceeded to Swansea with a cargo short of the 120 tons. The shipowner having sued the underwriter upon a policy of insurance upon chartered freight, as for a total loss of freight upon the 120 tons by perils of the seas, the jury found that the master acted throughout as a prudent owner, uninsured, would have acted:—Held, that the shipowner could not recover; for that the master was not prevented by perils of the seas from procuring repairs and earning the freight. *Mordy* v. *Jones* explained and approved. *Philpot* v. *Swann*, 30 Law J. Rep. (N.S.) C.P. 358; 11 Com. B. Rep. N.S. 270.

The owner of a ship caused her to be insured, valued at 17,000*l.*, by the usual form of policy, for a voyage from B to L. During the voyage she was compelled by perils of the sea to put into the nearest port, and was found so much damaged that the captain sent on the cargo by other ships, and afterwards sold the ship, thinking it best for all concerned. The ship cost the plaintiffs 20,000*l.*, and it would cost 20,000*l.* to build another like her. At the time the policy attached her value (allowing for wear and tear) was depreciated to 16,000*l.* The cost of repairing her would have been 10,500*l.*, and her value to sell, when the risk commenced and at the time her repairs could have been properly executed, would have been only 7,500*l.*, she being a ship of an exceptional size and class for which there was no demand; but an owner wanting such a ship for the particular purposes of his trade, and having the option to sell her and purchase another or to repair her, would have repaired her, as he could not have purchased or built another for so small a sum as 10,500*l.* On a case stated between the assured and the underwriters, in which the question was total or average loss, and in which the Court were to draw inferences of fact,—Held, that it was an average loss only, for that the assured, on whom it lay to make out the loss total, had not done so; that in order to do so he must shew affirmatively that the cost of repair would have exceeded the value of the ship when repaired; and the inference from the facts was that it would not, inasmuch as the price of such a ship in the market was not the test of her real value, which must be gathered from all the circumstances of the case. *Grainger* v. *Martin*, 31 Law J. Rep. (N.S.) Q.B. 186; 2 Best & S. 456.

A policy of insurance on a ship contained a clause that the insurance was against "total loss only." The ship went aground, and her owners gave to the underwriters notice of abandonment. The jury found that there was a constructive total loss:—Held, that the owners were not excluded by the terms of the policy from recovering upon it. *Adams* v. *M'Kenzie*, 32 Law J. Rep. (N.S.) C.P. 92; 13 Com. B. Rep. N.S. 442.

Per *Willes, J.*, what is usually termed a constructive total loss, is, in law, as much a total loss as if the ship had actually ceased to exist. Ibid.

By not traversing an averment of a total loss, in a declaration on a policy of insurance of a ship, the defendant admits no more than that there is some partial loss. *King* v. *Walker* (Ex. Ch.), 33 Law J. Rep. (N.S.) Exch. 325; 3 Hurls. & C. 209—reversing the judgment below, 33 Law J. Rep. (N.S.) Exch. 167; 2 Hurls. & C. 384.

The ship, by peril of sea, having become disabled, put into a bay near the Cape of Good Hope; and on a survey being had, the surveyor reported that the ship could not go home without repair, and that the ship, if repaired, would not be worth the amount it would cost to repair her. The captain communicated these facts by letter to the plaintiffs, the co-owners with himself of the vessel, adding that he agreed that it would be advisable to sell the ship. The captain thereon took the advice of the Attorney General at the Cape as to the course which he ought to pursue, and by the next month's mail, by a letter of the 20th of December, informed the plaintiffs (as was the case) that, acting on the opinion he had obtained, he had abandoned and sold the vessel, and he put in the postscript the words "Give the underwriters due notice." The plaintiffs had from time to time communicated every letter which they received from the captain to the underwriters:—Held, that this letter of the 20th of December was a sufficient notice of abandonment, and given in due time; since the delay of the captain till the next monthly mail, for the purpose of getting legal advice before he acted, was not, under the circumstances, an unreasonable delay. Ibid.

If a ship is submerged in deep water with cargo on board so that it cannot be got out without raising the ship, the cost of raising is general average, to which the cargo must contribute. In such a case, in order to ascertain whether a ship is a constructive total loss, the sum to be contributed by the cargo as general average must be taken into consideration; and if, after deducting that sum, the remaining cost of raising together with the cost of repairs of the ship is less than her value when repaired, the ship is not a total loss. So held by *Blackburn, J.; Shee, J.* dissenting. *Kemp* v. *Halliday*, 34 Law J. Rep. (N.S.) Q.B. 233: in Ex. Ch. 35 Law J. Rep. (N.S.) Q.B. 156; 6 Best & S. 723, 757.

To a declaration on a policy upon freight from R to Liverpool, averring a total loss by perils of the sea, the defendant pleaded, fourthly, that the cargo consisted of timber and wood, that R is a port in British North America, that the voyage commenced after the 1st of September and before the 1st of May, and the master stowed a portion of the cargo on deck, contrary to the 16 & 17 Vict. c. 107. ss. 170-2, and sailed without the certificate required by that statute, and that the plaintiff was the owner of the ship. Fifth plea, the same as the fourth, with a further averment that the plaintiff intended that the vessel should sail so loaded, and made the policy for the express purpose of protecting the adventure. At the trial the following facts appeared: The whole of the cargo that was on freight was properly stowed below deck; but the master placed some spars on deck to be carried to Liverpool for the owner, having no instructions from the owner to do so. The vessel was not made unseaworthy by the mode of loading, nor did the owner know of it till after the policy was made and the ship had sailed:—Held, first, that

these spars were within the meaning of the Customs Act, 16 & 17 Vict. c. 107. s. 171. Secondly, that the fifth plea was good, but not proved. Thirdly, that no authority from the owner to the master could be implied to do that which was unlawful, though the act might be otherwise within the ordinary scope of the master's authority, and though it might be done for the benefit of the owner; that the master, therefore, in stowing the cargo on deck, contrary to the statute, could not be taken to be acting by the authority of the owner, nor was the owner bound by the knowledge of the master; and that consequently, on the authority of *Cunard* v. *Hyde*, the fourth plea was bad, and the plaintiff entitled to recover on the policy. *Wilson* v. *Rankin*, 34 Law J. Rep. (N.S.) Q.B. 62; 6 Best & S. 208.

A declaration contained a count upon a policy of insurance upon a ship and cargo, and also the usual money counts. The defendants, as to the first count, pleaded that they had not broken their covenants, and they also paid into court, under the money counts, the amount of the premiums, and the plaintiffs took the money out of court. The cause was referred to arbitrators, to fix the amount of the loss, which they did, irrespective of the amount which had been paid into court:—Held, that the Court had power to prevent injustice being done to the defendants, and that the plaintiffs were only entitled to judgment for the balance which remained after deducting the amount of premiums paid into court. *Carr* v. *the Royal Exchange Assur. Corp.*; *Carr* v. *Montefiore*, 34 Law J. Rep. (N.S.) Q.B. 21; 5 Best & S. 941.

A policy of insurance for twelve months on ship and cargo, the ship being intended for the barter trade on the coast of Africa, contained a stipulation that "outward cargo should be considered homeward interest twenty-four hours after arrival at the first port or place of trade." By a subsequent clause the policy was declared to be "on the ship valued at 2,000*l.*, cargo valued at 8,000*l.*" There was liberty given to the insured "to discharge, load, unload, reload, sell, barter, exchange and trade" any part of the cargo. The ship arrived at a place on the coast of Africa and there discharged a large part of her cargo, and after a stay of more than twenty-four hours proceeded towards other ports in order to take in other cargo; before arriving at her next port of destination she was totally lost:—Held, that the insurers were not liable to pay the whole 8,000*l.*, but a proportion only; that the valuation in the policy was applicable to what was substantially a full cargo, whereas here there was not substantially a full cargo.—Held, also, that the proportion of the 8,000*l.* which the underwriters were liable to pay, was to be ascertained by finding the proportion which the goods on board at the time of the loss bore to a full cargo, and if this proportion could not be found, that then the underwriters would be liable as upon an open policy underwritten for 8,000*l.* *Tobin* v. *Harford* (Ex. Ch.), 34 Law J. Rep. (N.S.) C.P. 37; 17 Com. B. Rep. N.S. 528—affirming the decision below, 32 Law J. Rep. (N.S.) C.P. 134; 13 Com. B. Rep. N.S. 791.

Where a stranded vessel was in danger of falling to pieces, and the captain sold her cargo consisting of timber, because the expense of forwarding it to its destination would have exceeded its value there, when so forwarded, the assured was held entitled to recover against the underwriter on a policy on such cargo, for a total loss without having given notice of abandonment. *Farnworth* v. *Hyde*, 34 Law J. Rep. (N.S.) C.P. 207; 18 Com. B. Rep. N.S. 835—reversed in Ex. Ch. 36 Law J. Rep. (N.S.) C.P. 33.

By a policy of insurance on a vessel against capture and detention, the assurers contracted "to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." The vessel having been detained under an embargo within the meaning of the policy,—Held, that when the thirty days after receipt of official news of such embargo had expired, the assured was entitled to recover for a total loss, although before action, but subsequently to such thirty days, the embargo was taken off, and the vessel was restored to the assured. *Fowler* v. *the English and Scottish Marine Insur. Co.*, 34 Law J. Rep. (N.S.) C.P. 253; 18 Com. B. Rep. N.S. 818.

### (*k*) *General and Particular Average.*

The plaintiffs shipped at London for Bombay certain iron rails, "freight to be paid here, ship lost or not lost." They paid the freight; and by a policy in the common form insured for the voyage the rails "valued at 4,500*l.*, &c. "warranted free from particular average unless the ship be stranded, wrecked, or burnt." The policy contained the usual clause, that the assured might sue, labour and travail for and about the defence, safety, and recovery of the goods insured at the charge of the underwriters. The ship sailed, but owing to storms at sea was forced to put into Plymouth, so much injured as to be unable to continue her voyage, and to be not worth repairing; but she was neither "stranded, sunk, nor burnt." The rails were landed safe and uninjured, and the plaintiffs then sent them on to Bombay in other ships, for the freight of which they had to pay 825*l.*:—Held, that the underwriters were not liable to pay this sum, as by the policy they were exempt from particular average, which included it; and that it could not be recovered under the labour and travail clause as that was limited in its application to expenses incurred when the goods insured were in peril to save them from loss, and the expenses in question were incurred when the goods were in no peril at all, but safe in the owner's hands. *The Great Indian Peninsular Rail. Co.* v. *Saunders* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 206; 2 Best & S. 266—affirming the decision below, 30 Law J. Rep. (N.S.) Q.B. 218; 1 Best & S. 841.

*Quære*—Whether the underwriters, on a policy against total loss only, would be liable under the above clause for expenses incurred by the assured for the purpose of rescuing the subject of the insurance from a state of peril, which might have resulted in a total loss, but did not. Ibid.

By a policy of insurance on a ship and the machinery in it, the hull was valued at 14,000*l.* and the machinery at 8,000*l.* There was a clause, "average payable on the whole or on each as if separately insured." The policy contained the usual memorandum, warranting the ship and freight free from average under 3*l.* per cent., unless general or the ship be stranded. The ship caught fire and was damaged. The machinery was not hurt. An expense was incurred in putting the fire out:—Held (on

appeal, affirming the judgment of the Queen's Bench), that such expense was not a particular average on the hull, but ought to be apportioned between the hull and the machinery, it being an expenditure for the benefit of both equally. *Oppenheim* v. *Fry* (Ex. Ch.), 33 Law J. Rep. (N.S.) Q.B. 267; 5 Best & S. 348.

A cargo of bacon was insured from L to N by a policy containing the exception "warranted free from average, unless general or the ship be stranded, sunk or burnt," and the suing and labouring clause in its ordinary form. The ship in the course of its voyage was disabled and the cargo discharged. Part of the bacon was condemned and sold, and the remainder sent on in two vessels; all which was proper under the circumstances:—Held, that neither the extra freight incurred by reason of the transhipment, nor the cost of warehousing, surveying and cooperage of the goods, could be recovered under the policy. *Booth* v. *Gair*, 33 Law J. Rep. (N.S.) C.P. 99; 15 Com. B. Rep. N.S. 291.

The defendant chartered a vessel, freight to be paid in bills at six months' date from date of sailing or in cash (less discount equal thereto), less, in either case, the cost of insurance, to be effected by charterers at ship's expense, and also 800*l.* to be paid on delivery of cargo:—Held, that such advanced freight was not to be returned, and that the defendant was liable to contribute to general average in respect thereof. *Trayes* v. *Worms*, 34 Law J. Rep. (N.S.) C.P. 274; *nom. Frayes* v. *Worms*, 19 Com. B. Rep. N.S. 159.

A ship and her cargo of guano were insured by the defendants for a voyage from M to England in a policy which contained the following: "free from all average or claim arising from jettison or leakage unless consequent upon stranding, sinking or fire. The value of ——*l.* to be mutually admitted in adjusting or deciding all claim for loss or particular average." In the course of the voyage the ship and cargo were damaged by rough weather, and it became necessary to put into a port, where the ship and such part of the guano as was not rendered useless by sea-damage were sold:—Held, in an action upon the policy, that the assured was not precluded from recovering in the action by reason of the words above set out. *Carr* v. *the Royal Exchange Insur. Co.*, 33 Law J. Rep. (N.S.) Q.B. 63; 5 Best & S. 433.

A custom or usage of a port that underwriters on an ordinary policy made there are not responsible for general average arising from the jettison of timber stowed on deck, is imported into the policy, and relieves the underwriters from liability, though by the terms of the policy the underwriters agree to insure against the perils of jettisons. *Miller* v. *Titherington* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 363; 7 Hurls. & N. 954—affirming the judgment below, 30 Law J. Rep. (N.S.) Exch. 217; 6 Hurls. & N. 278.

Deck-cargo (timber), lawfully laden pursuant to charter-party, having broken adrift in consequence of stormy weather, and impeding the navigation and endangering the safety of the vessel, was necessarily thrown overboard:—Held, that the shipper was entitled to claim general average in respect thereof, as against the shipowner. *Johnson* v. *Chapman*, 19 Com. B. Rep. N.S. 563.

### (*l*) *Valued Policy.*

A valued policy of insurance on a ship against a total loss is a contract of indemnity to the shipowner to the amount at which the ship is valued in the policy. *Bruce* v. *Jones*, 32 Law J. Rep. (N.S.) Exch. 132; 1 Hurls. & C. 769.

Plaintiff, a shipowner, brought an action against the defendant, one of the underwriters to a policy of insurance on a ship valued at 3,200*l.* in the policy, to recover the defendant's share for a total loss. At the trial, it appeared that the plaintiff had effected three other policies of assurance on the same ship, in which she was valued at 3,000*l.*, 3,000*l.* and 5,000*l.* respectively, and had received on the three last-mentioned policies the sum of 3,126*l.* 13*s.* 6*d.*:—Held, that as between the plaintiff and the defendant the value of the ship must be taken to be its value stated in the policy sued on, viz., 3,200*l.*, and that the plaintiff was entitled to recover on this policy the difference between 3,200*l.* and 3,126*l.* 13*s.* 6*d.*, the sum already recovered on the other three policies. Ibid.

In a policy of marine insurance, effected on a printed form, on ship, merchandise, &c. on board the said ship, there was a clause, "the said ship, &c., goods, merchandise, &c., for so much as concerns the assured by agreement between the assured and assurers in the policy are and shall be valued at as under," the two last words being added in writing; and some way further down the policy, in the margin, was written "1,300*l.*," and in the body "on freight warranted free of caption, seizure," &c.:—Held, that this was not a valued policy. *Wilson* v. *Nelson*, 33 Law J. Rep. (N.S.) Q.B. 220; 5 Best & S. 354.

## (D) OWNERS.

An express authority is necessary from a part-owner of a ship to the ship's husband to order works not necessary as repairs; but such authority once given cannot be revoked after it has been acted upon, and it is for the part-owner when sued for contribution to prove that it was revoked before the works were commenced or a contract for them entered into. *Chappell* v. *Bray*, 30 Law J. Rep. (N.S.) Exch. 24; 6 Hurls. & N. 145.

In an action for contribution or for money paid upon a written contract, there being evidence of an authority to the plaintiff to enter into it on the part of the defendant, and of the work being done under it and the money paid, it is not necessary for the plaintiff to put in the contract, at all events if there is evidence of the defendant being informed of, and not objecting to the amount. And, *semble*, that even without such evidence of assent, it is not necessary to produce the agreement if there is no evidence that the amount was unreasonable. Ibid.

In a cause of possession brought by the owner of the greater part of a vessel, the master, owning the remaining part, is not entitled to retain possession of the vessel upon an offer of security to the amount of his co-owner's interest. *The Kent*, 1 Lush. Adm. Rep. 495.

If a person is by mistake registered as the owner of a ship which is proved to be the property of another, this Court will correct the error, and direct the person whose name is on the register to transfer the ship to the party declared entitled. *Holderness*

v. *Lamport*, 30 Law J. Rep. (N.S.) Chanc. 489; 29 Beav. 129.

The jurisdiction of this Court is not taken away by the Merchant Shipping Act, 17 & 18 Vict. c. 104, in cases not provided for by the statute. Ibid.

A liability for the supply of necessaries before transfer follows the ship into the hands of an innocent owner. It makes no difference that the transferee is a foreigner resident abroad and the purchaser a British resident. There may be a distinction between proceeding by the arrest of a ship and the express creation of a maritime lien. *The Ella A. Clarke, now The Golden Age*, 32 Law J. Rep. (N.S.) Prob. M. & A. 211.

A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other. *Priestley* v. *Fernie*, 34 Law J. Rep. (N.S.) Exch. 172; 3 Hurls. & C. 977.

The ground of forfeiture of the statutory exemption from unlimited liability is personal blame; the fault of one owner does not, therefore, involve in its consequences a forfeiture by his co-owners. The duty to register a transfer of ownership rests with the vendee; the bill of sale entirely divests the title of the vendor. Immediately on the execution of the bill of sale, the vendor becomes entitled to all the benefits of ownership, and he takes with them all the concurrent liabilities. *The Spirit of the Ocean*, 34 Law J. Rep. (N.S.) Prob. M. & A. 74.

### (E) CARGO.

By a charter-party the charterer agreed to load the ship with a full and complete cargo of sugar or other lawful produce, and to pay freight at certain rates for certain specified goods, including sugar and timber; "other goods, if any be shipped, to pay in proportion to the foregoing rates, except what may be shipped for broken stowage, which shall pay as customary." The charterer supplied the ship with as full a cargo of timber as she could carry, but leaving space for broken stowage to fill the interstices between the logs of timber:—Held, that he was bound to provide the ship with the broken stowage necessary to complete a full cargo. *Cole* v. *Meek*, 33 Law J. Rep. (N.S.) C.P. 183; 15 Com. B. Rep. N.S. 795.

### (F) MASTER.

The master of a vessel at the Mauritius, in April, entered into a charter-party under seal (therein describing himself as commander and owner,) with the Commissariat officer there, for the conveyance of troops to Gravesend, and paid certain moneys and incurred liabilities for fitting up the vessel for the purpose. In the following month, he entered into another charter-party, not under seal, at the Cape of Good Hope, for the conveyance of other troops, and thereupon paid further sums and incurred further liabilities to enable him to perform the contract. The owner became bankrupt, having previously mortgaged the vessel. Upon its arrival in the Thames the mortgagees seized it. The master filed a bill against the owner's assignees, praying a declaration that he was entitled to be repaid and indemnified out of the fund due from the Admiralty on account of the freight. The Commissioners of the Admiralty paid the amount into court:—Held, reversing the decision of the Lord Chancellor, and restoring that of *Vice Chancellor Wood*, that the master was entitled to be reimbursed out of the fund. *Bristow* v. *Whitmore* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 467; 9 H.L. Cas. 391.

A number of bags of grain, all bearing the same mark, but some weighing 12 stone and some 8 stone, were shipped on board indiscriminately, and the master signed two bills of lading, each for a portion of them, one of which, the plaintiff's, was for a certain number, at a certain total gross weight, which by computation would not exactly tally with a uniform weight either of 8 stone or of 12 stone, but nearly corresponding with the latter, the larger weight, and the master delivered the right number of bags, falling short of the gross total weight by several tons:—Held, per *Pollock, C.B.* and *Wilde, B.*, that the master was not responsible to the owner for the deficiency; and, per *Bramwell, B.* and *Channell, B.*, that he was responsible. *Bradley* v. *Dunipace*, 31 Law J. Rep. (N.S.) Exch. 210; 7 Hurls. & N. 200.

The 191st section of the Merchant Shipping Act, 1854, does not alter the relation of the master to the seamen, and he cannot compete with them to their detriment for a share in a fund. Neither can he compete with the bondholder for his wages against the ship's freight where he binds himself by the bond. Where, however, he has incurred no such personal obligation, he is not barred. *The Salacia*, 1242, 1286, 1261. *(Consolidated Actions)*, 32 Law J. Rep. (N.S.) Prob. M. & A. 41.

An attempt by the master of a ship to defraud constitutes a sufficient necessity for removal to induce the Court to act under section 240. of the Merchant Shipping Act, 1854. The power of the Court acting under section 240. is not limited to the class of cases enumerated in section 239. *The Royalist*, 32 Law J. Rep. (N.S.) Prob. M. & A. 105.

The words in the 10th section of the Admiralty Court Act, 1861, which give the master of a ship a right to sue for disbursements, do not extend to any liabilities of his for seamen's wages or necessaries supplied to the ship. Where, in an action against the ship, bail was given for the amount claimed, but the Court held that a great proportion of this claim was not recoverable, it ordered the bail to be reduced to an amount sufficient to cover the rest of the claim and costs. *The Chieftain*, 32 Law J. Rep. (N.S.) Prob. M. & A. 106.

The law will presume that the terms of a master's engagement for one voyage extend to a succeeding voyage performed without a new agreement, express or clearly implied. *The Gananoque*, 1 Lush. Adm. Rep. 448.

The defendant was sole owner of a ship which was equipped as a passenger ship, and chartered for Melbourne, Australia. The plaintiff, a master mariner, bought from him a small share of the ship, and, by a letter referring to the voyage then contemplated, became master, on the terms of receiving 15*l.* a month, and half cabin passage-money profits. The ship performed the voyage to Melbourne, carrying cargo only, and returned home. The defendant, being managing owner, anticipating her arrival, had chartered the ship to carry goods and emigrants to

New Zealand, the agreement being, that the charterers guaranteed the owners a lump sum; and if the freight and passage-money (calculated as provided in the charter) should exceed that sum, the surplus should be equally divided between the charterers and the owners; and further appointing (amongst other things) that the master should keep account of the issue of all stores provided by the charterers, and account for all surplus stores, less 10 per cent. This agreement was shewn by the defendant to the plaintiff, who expressed his general satisfaction. No communication passed between them as to the terms on which the plaintiff should serve on the new voyage, except that the plaintiff would receive a gratuity from the charterers. Under this agreement the ship, under the command of the plaintiff, took out to New Zealand a number of emigrants, including a number of cabin-passengers. The plaintiff also received his gratuity from the charterers:—Held, that the original agreement continued; and that, notwithstanding the altered circumstances, the master was entitled to a share of cabin passage-money profits. Ibid.

The master of a ship has no power, under his general authority, to draw bills of lading making the freight payable to other than his owner. *Reynolds* v. *Jex*, 34 Law J. Rep. (N.S.) Q.B. 251; 7 Best & S. 83.

A ship was chartered out and home at a lump sum, bills of lading to be signed by the shipowner or agent at any rate of freight without prejudice to the charter. At an outward port, the agents of the charterers advanced money to the master for the ship's use, on condition of the ship taking goods on the return voyage under bills of lading making the freight payable to them (the agents), or their assigns, at the port of delivery; goods were put on board, and bills of lading given accordingly by the master:—Held, that the master had no authority to make such bills of lading, and that the shipowner retained his lien on the goods for freight. Ibid.

Where a ship is by perils of the sea so much damaged as to be incapable of repair so as to prosecute the adventure, except at an expense exceeding her value, together with the freight when repaired, the master is justified in abandoning the voyage, and is not bound as agent of his owner to send the goods on in another bottom. *De Cuadra* v. *Swann*, 16 Com. B. Rep. N.S. 772.

## (G) PILOTAGE.

Where a master of a steam-vessel, trading between Hull and Rotterdam, passed an examination as to his qualification to pilot such vessel into and out of the port of Goole, and on the next day, he having sailed for Rotterdam, a certificate enabling him to pilot his vessel into and out of the said port was completed, sealed and dated, but remained in the office of the Commissioners, the Court held that such certificate had not been granted, and was not in his possession so as to exempt his ship from compulsory pilotage under the Merchant Shipping Act, 1854, s. 353. *The Killarney—Jewitt, Master*, 30 Law J. Rep. (N.S.) Prob. M. & A. 41.

*Semble*—That when the master or mate of a vessel is duly licensed under the 5th Part (Pilotage) of the Merchant Shipping Act, 1854, so as to render it unnecessary for him to take a pilot on board, the employment of such pilot does not bring his owners within the immunity of the 388th section. Ibid.

The exemptions from compulsory pilotage given by 6 Geo. 4. c. 125. s. 59, extended by Order in Council, the 18th of February, 1854, are continued by 17 & 18 Vict. c. 104. s. 353. A British ship, therefore, trading between Boulogne and the Baltic, whether carrying passengers or not, is not bound to employ a licensed pilot in the Thames. *The Earl of Auckland*, 30 Law J. Rep. (N.S.) Prob. M. & A. 121.

An Order in Council, which is based on an erroneous construction of a statute, cannot impose a new obligation, nor add a new exemption. Ibid.

A misdescription of the ownership of the vessel will invalidate a pilotage certificate granted under section 355. Ibid.

An Order in Council, made under the authority of section 332, can only extend, it cannot abridge an exemption. Ibid.

Where pilotage is not compulsory, a licensed pilot, if taken, is the servant of the owners; his presence does not, therefore, free them from liability. Ibid.

It is clearly within the scope of the British legisture to settle upon what terms a foreign ship shall enter a British port, even where the compliance with those terms attaches before the vessel enters British waters. The compulsion to employ a pilot is till the completion of the voyage, or so long as the pilot is bound to perform service. *The Annapolis—J. Pickett, Master*, and *The Johanna Stoll—P. H. Berg, Master*, 30 Law J. Rep. (N.S.) Prob. M. & A. 201.

Those sections of Part 5. of the Merchant Shipping Act, 1854, which do not expressly exclude foreign ships, must be taken to have a universal application; the exemption, therefore, from liability attaches equally to foreign as to British ships. Ibid.

Where, in a cause of collision, cross-actions were brought, and one vessel was found solely to blame, but her owners were freed from responsibility because the collision was caused by the act of a pilot who was employed compulsorily, in the action brought by the innocent vessel, the Court dismissed the plaintiffs without costs, but in the cross-action condemned the guilty vessel in costs. Ibid.

The fifth exemption from compulsory pilotage in the Merchant Shipping Act, 1854, applies to vessels confining their voyages within the limits of the port to which they belong. As, however, all the exemptions under the General Pilot Act were continued by the Merchant Shipping Act, the more extensive words used in the former act must be held to exempt from the necessity of taking a pilot any master of a ship so long as his vessel is within the limits of her port. In such case, therefore, if a collision occurs, the presence of a pilot gives no immunity to the owners. *The Stettin*, 31 Law J. Rep. (N.S.) Prob. M. & A. 208.

The 354th section of the Merchant Shipping Act, 1854, making pilotage compulsory upon certain vessels, is not to be restricted by the provision of the 353rd section, that all existing exemptions from compulsory pilotage should continue in force. An Irish trader (as described by 6 Geo. 4. c. 125. s. 59), therefore, carrying passengers, is compelled to employ a licensed pilot in the river Thames. *R.* v.

*Stanton* distinguished. *The Temora*, 1 Lush. Adm. Rep. 17.

The exemptions from compulsory pilotage given by 6 Geo. 4. c. 125. s. 59. (supplemented by the Order in Council, Feb. 18, 1854), are maintained by section 353. of the Merchant Shipping Act, 1854, and qualify sections 376, 379, of that act. *R.* v. *Stanton* (8 E. & B. 445) followed. The Order in Council, 16th July, 1857 (purporting to approve a by-law of the Trinity House), being based on a construction of the law held erroneous by the Court of Queen's Bench, imposes no new pilotage obligation, and adds no new exemption from compulsory pilotage. A British ship, coming from a port north of Boulogne, and carrying passengers, is not bound to employ a licensed pilot in the river Thames. Under the 332od section of the Merchant Shipping Act, 1854, a pilotage authority, with the consent of Her Majesty in Council, has no authority to create a new penal obligation to employ a licensed pilot, but only authority to create or extend an exemption from compulsory pilotage, on condition. Under section 355. the Board of Trade can issue certificates to masters or mates of ships described in section 354, and of such ships only. A pilotage certificate issued to a master under section 355, describing the ship as the property of a person, who was not the owner either at the time of the granting of the certificate, or at the time of a collision subsequently occurring, is invalid at the time of that collision. In the construction of statutes the Court of Admiralty is bound to follow the decisions of the Courts of Common Law. *The Earl of Auckland*, 1 Lush. Adm. Rep. 164.

In the 379th section of the Merchant Shipping Act, 1854, the description "ships trading to any place in Europe north of Boulogne," extends to vessels coming from a place north of Boulogne to the port of London. A vessel, not carrying passengers, on a voyage from Cronstadt to London, is exempted from compulsory pilotage in the river Thames. *The Wesley*, 1 Lush. Adm. Rep. 268.

The exemptions from compulsory pilotage, given by 6 Geo. 4. c. 125. s. 59. (supplemented by the Order in Council, Feb. 18, 1854), are maintained by the 353rd section of the Merchant Shipping Act, 1854, and qualify sections 376, 379, of that act. *R.* v. *Stanton* followed. *The Earl of Auckland* (P.C.), 1 Lush. Adm. Rep. 387.

A British ship coming from a port north of Boulogne, and carrying passengers, is not bound to employ a licensed pilot in the river Thames. Ibid.

The employment of a licensed Goole pilot is generally compulsory upon vessels inward bound to Goole, including vessels belonging to that port; not, however, by the Hull Pilot Act, 2 & 3 Will. 4. c. 105, but by the General Pilot Act, 6 Geo. 4. c. 125. ss. 58, 59, and the Merchant Shipping Act, 1854, s. 353. *Beilby* v. *Raper* (3 B. & Ad. 284) distinguished. *The Killarney*, 1 Lush. Adm. Rep. 427.

The 59th section of 6 Geo. 4. c. 125. allows the master of a ship to conduct his own vessel, "whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any act or acts of parliament or hy any charter or charters for the appointment of pilots" :—Held, that this exception, thus attached to this exemption from compulsory pilotage, applied to a Goole ship in Goole inward-bound to that place, by reason of 52 Geo. 3. c. 32. s. 21, by which provision was made for the appointment of pilots by the Hull Trinity House, for ships "*into* or out of any ports, harbours or places within the limits of their jurisdiction"; and consequently, that the exemption did not apply. Ibid.

*Quære*—If royal charters which provided for the appointment of pilots for vessels outward-bound only, would be sufficient to take such an inward-bound vessel out of the exemption. Ibid.

In a cause of collision it was proved that the collision was caused by the default of the pilot of the defendant's vessel, who was licensed by the Hull Trinity House; the defendant having pleaded that the employment of the pilot was compulsory, the point was argued on the Hull Pilot Act; the Court pronounced an opinion that the employment nf the pilot was not by that act compulsory, but allowed the defendant to give in evidence the royal charters to the Hull Trinity House and other public documents, and to have a further argument, upon terms of paying all further costs in any result. The Court refused an application on behalf of the Hull Trinity House to be heard by counsel. Ibid.

Where the words of the section of the act which applies to the renewal of pilotage licences are, "that the licence may be renewed on the 31st of January, or any subsequent day," such date is to be applied to the date at which the renewal shall take effect, and not to the date at which it must necessarily be made so as to cause a renewal for the year made at an earlier day to terminate at the next ensuing 31st. *The Beta* (P.C.), 34 Law J. Rep. (N.S.) Prob. M. & A. 76.

The power to license pilots granted to the Corporation of the Trinity House of Leith by their charter and statute 1 Geo. 4. c. xxxvii. s. 32. only extends to the navigating ships along the coast of Scotland, and does not empower the corporation to grant a licence to navigate a ship south of Orfordness to or from the Nore, for which a London Trinity House licence is necessary. *Hossack* v. *Gray*, 34 Law J. Rep. (N.S.) M.C. 209; 6 Best & S. 598.

A foreign-going vessel employed in taking a cargo from one coast port to another, from which last port she is to sail for the port abroad, is compellable to take a pilot as not being employed in the coasting trade within the meaning of the Merchant Shipping Act, 1854. *The Lloyds*, otherwise *The Sea Queen*, 32 Law J. Rep. (N.S.) Prob. M. & A. 197.

### (H) SHIPPING DOCUMENTS.

The defendants and the plaintiffs entered into a contract in London on the 25th of August, by which the plaintiffs "sold" to the defendants "a cargo of wheat (say from 1,800 to 2,200 quarters), at the price of 50*s.* per quarter, free on board at Taganrog and including freight and insurance to any safe port in the United Kingdom. The wheat was to be shipped between the 1st of October and the 15th of November, in a particular class of vessel. "Payment cash in London in exchange for shipping documents." The plaintiffs, having obtained in the market a cargo afloat answering the requirements of the contract, tendered to the defendants the shipping

documents and a provisional invoice, which, following the bill of lading, stated the cargo to be "1,850 quarters, at 50*s*., 4,626*l*.; less freight, at 10*s*. 9*d*. per quarter, 1,001*l*. 10*s*." The policy of insurance, tendered as one of the shipping documents, was on the cargo of 1,850 quarters, valued at 3,600*l*. The defendants refused the tender, and defended an action for the contract price of the wheat, on the ground that the policy tendered was one which they were not bound to accept, being of insufficient amount. A verdict having been taken for the plaintiffs, subject to the opinion of the Court on this point,—Held, that the policy was a proper shipping document within the meaning of the contract; inasmuch as under it the plaintiffs were not bound to ship the wheat themselves, but were only bound to provide a cargo in the market of a particular description, and that the policy contemplated as one of the "shipping documents" was therefore such a policy as would afford the original shipper reasonable protection against his own risk; consequently, the amount of freight shewn in the provisional invoice must be deducted, which left 24*l*. 10*s*. uncovered by the policy; and, with only that deficiency, there was evidence on which the jury might well have found that the policy afforded this reasonable protection. *Tanvaco* v. *Lucas*, 30 Law J. Rep. (N.S.) Q.B. 234; 1 Best & S. 185—affirmed in Ex. Ch. 31 Law J. Rep. (N.S.) Q.B. 296; 3 Best & S. 89.

### (I) LANDING OF GOODS.

By the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63. s. 67), a shipowner is empowered to land goods imported in his ship from foreign parts subject to the condition, that "if before the goods are landed the owner thereof has made entry for the landing and warehousing thereof at any particular wharf other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense":—Held, that the owner of the goods when he makes an offer to take delivery of them must be in a condition to receive the same if the offer be then accepted in order to entitle him to the benefit of such condition.—Held, further, that when such offer is made, the shipowner, if he then fails not only to make delivery of the goods, but also to give such owner of the goods information of the time at which they can be delivered, is bound to give the twenty-four hours' notice above specified before he lands the goods, although he was never asked to give such information. *Beresford* v. *Montgomerie*, 34 Law J. Rep. (N.S.) C.P. 41; 17 Com. B. Rep. N.S. 379.

### (K) PASSENGER.

The plaintiff took passage in the defendants' ship from New York to Galway, and on paying his fare received a ticket from the defendants' agents containing the following conditions: (1) "In case of the loss or detention of the ship during the voyage by any of the accidents of navigation, or by dangers of the sea, no liability of any kind is to attach to the proprietors." (2) "The ship will not be accountable for luggage, goods or other description of property, unless bills of lading have been signed therefor. Each first and second class adult passenger allowed to have 20 cubic feet of luggage free; but no merchandise, plate, jewelry, precious stones, specie or bullion will be carried as luggage." The plaintiff's luggage (whether or no it exceeded 20 cubic feet did not appear), consisting of several trunks, was received on board without any question being asked about it, the plaintiff neither declaring the contents of the trunks, nor taking a bill of lading for them, nor being required by any person to do so. The ship having been wrecked in the course of the voyage through the negligence of the captain, and the plaintiff's luggage lost, he sued the defendants for the value:—Held, that, the second condition not having been complied with by the plaintiff, the defendants were not liable. *Quære*—As to the effect of the first condition, in exempting the defendants from the consequences of the negligence of themselves or their servants. *Wilton* v. *the Royal Atlantic Navigation Co.*, 30 Law J. Rep. (N.S.) C.P. 369; 10 Com. B. Rep. N.S. 453.

### (L) REGISTRY.

If one who is sole owner and captain of a ship pledge the certificate of registry of the ship for good consideration, he may nevertheless re-demand the document for the purposes of navigation, and if it is not delivered to him on request, he may maintain an action against the pledgee; for the detention is made unlawful by section 50. of the Merchant Shipping Act, 1854. *Wiley* v. *Crawford* (Ex. Ch.), 30 Law J. Rep. (N.S.) Q.B. 319; 1 Best & S. 253, 265.

Funds lying in the registry of the Admiralty Court cannot be attached by process of foreign attachment out of the Court of the Lord Mayor of London. *The Albert Crosby*, 1 Lush. Adm. Rep. 101.

### (M) STOPPAGE IN TRANSITU.

The refusal by the master of a ship to deliver goods under a claim to stop *in transitu* is a breach of duty, which gives the Court of Admiralty jurisdiction under section 6. of the Merchant Shipping Act, 1854. *The Tigress*, 32 Law J. Rep. (N.S.) Prob. M. & A. 97.

By the right to stop *in transitu*, is intended not only a right to countermand the delivery to the vendee, but also to demand a re-delivery to the vendor. Ibid.

Though the indorsement of a bill of lading passes the property in the goods, yet the indorsement to the consignee of one bill of a triplicate set is not such a negotiation as to prevent the right of stoppage. Ibid.

If bills of lading are presented to the master by two different holders, and he delivers to one, no right of action against him accrues thereby to the disappointed holder, as it is not for the master to inquire who has the best right. Ibid.

### (N) BOTTOMRY.

There is no distinction in their right of precedence to a bottomry bond, between seamen's wages earned

antecedently and those earned subsequently to the execution of the bond. By the law maritime there is no necessity for a suggestion of a written contract under which a seaman is shipped. Questions of remedy, such as the precedence of liens, are governed by the *lex fori*. Where the result of the suit mainly affected the owners of the cargo bottomried, the Court allowed them to have a *persona standi* through the bondholder. *The Union—Degan, Master*, 30 Law J. Rep. (N.S.) Prob. M. & A. 17.

Every disbursement at a foreign port, necessary to enable a ship to prosecute her voyage, made in or about the ship herself or her crew, is a proper subject for bottomry. Charges upon the unloading of the outward cargo are such necessary disbursements. Such disbursements must be for charges for which the owner or master of the ship is liable; those for which the consignee of the cargo is liable are not the subject of bottomry. *The Edmond—Harvey, Master*, 30 Law J. Rep. (N.S.) Prob. M. & A. 128.

Where the Court orders the amount reported due upon a bond to be paid into the registry to abide the result of an objection to items, the party against whom the objection is made is entitled, if he succeeds, to interest upon the money paid in at the rate allotted by the Registrar up to the day of payment. Ibid.

To render valid a bottomry bond where communication is practicable between the port of distress and the owner, it is not sufficient that the owner should be made aware of the disaster which has happened to his ship; he should also be informed of the intention to hypothecate. *The Cargo ex the Olivier*, 31 Law J. Rep. (N.S.) Prob. M. & A. 137.

In considering an objection to a bottomry bond on ship and cargo, by owners of cargo, upon the ground that the master had not communicated with the owner of the cargo before giving the bonds, the Court will consider the probable effect of the delay arising from such communication, and not only whether it was possible, but also whether it was reasonable and practicable for the master or the lender of the money to have any such communication with the owner or consignee of the cargo before entering into the bond. Ibid.

If it is intended to rely upon such a ground to invalidate a bond, such objection ought to be specifically set forth in the pleading. Where money has been advanced upon bottomry of a British ship and her cargo, the owner of the cargo so hypothecated has his right of action for all costs, and charges against the owner of the ship. Ibid.

Where it appeared that at a foreign port, at which the master had taken in necessary supplies, the owner of the vessel had a recognized agent within the possible and probable knowledge of the person making the advance, the Court held, that the bottomry bond given for such advance was void. *The Faithful*, 31 Law J. Rep. (N.S.) Prob. M. & A. 81.

In all disputed cases of bottomry bonds the Court expects that, where it is practicable, the master will by his affidavit shew affirmatively the good faith of his own transaction and the circumstances relating to it. Ibid.

Where there is a creditor on two funds, and another creditor on one only of those funds, the assets will be equitably marshalled, if it can be done without violating a rule entitled to preferential observance. But cargo hypothecated cannot be resorted to for payment of any bottomry bond until ship and freight are exhausted. Where, therefore, there are two bottomry bonds, the first in date on ship and freight only, and the other or last bond on ship, freight and cargo, and ship and freight are insufficient to discharge both bonds, the last bond, which is entitled to priority, must be paid out of ship and freight. *The Prince Regent* followed; *dictum* in *The Trident* overruled. *The Priscilla*, 1 Lush. Adm. Rep. 1.

In a cause of bottomry *in pœnam*, the Court judging the premium to be excessive, will refer it to the Registrar and merchants to be reduced. *The Huntley*, 1 Lush. Adm. Rep. 24.

A right to general average contribution from a ship after adjustment made gives the owners of cargo no lien on the ship by the law maritime. A debt for general average contribution, arising in respect of an outward voyage, being a personal debt only, is not a sufficient foundation for a bottomry bond on the ship for the voyage homeward. *Quære*—If a lien upon the ship for general average contribution given by the law of the foreign port where the bond is given, could support such a bottomry bond. A bond, given at Buenos Ayres on ship and freight for the voyage to England to pay a general average contribution due upon adjustment from the ship to the outward cargo, pronounced against, but without costs. *The North Star*, 1 Lush. Adm. Rep. 45.

Where, on a claim for necessaries, the master, in contempt of the warrant, sailed out of the jurisdiction, the Court allowed a cause for necessaries to be set down and the plaintiff to file proofs; and upon such proof of the facts, condemned the ship in the claim and costs. *The Lady Blessington*, 34 Law J. Rep. (N.S.) Prob. M. & A. 73.

A master, on his own authority, can bottomry his vessel abroad for the homeward voyage only for necessary repairs and articles supplied to the ship: he cannot include in such a bond charges relating to the outward cargo, even though they constitute debts due from the owner of the ship, unless by the law of the port the ship can be arrested for them. The *Prince George*, *Osmanli*, considered. *The Edmond*, 1 Lush. Adm. Rep. 57.

*Semble*—The owner of the ship might bottomry his ship for such charges. Ibid.

An order by the owner of a ship to a house abroad to collect freight takes the freight out of the hands of the master. Ibid.

An assignment to a third party of freight, or a fixed sum out of freight, passes, as between part owners, only net freight, *Lindsay* v. *Gibbs*; but a mortgagee not in possession when the freight was received has no *locus standi* afterwards to insist on such a construction. Ibid.

Where, therefore, a person appointed by the owner of a ship to collect a freight abroad and remit a fixed sum to a third party, collects the gross freight and remits the sum named, which proves to be larger than the net freight, and then advances to the master, on a bottomry bond upon the ship and freight for the homeward voyage, money not only for necessary repairs but to pay the expenses relating to the outward cargo, as compensation to the consignees of cargo for short delivery, &c., the mortgagee of the

ship, not having been in possession when the bond was given, is not entitled to object to those expenses under the bond, on the plea that the master or the lender had in his hands a fund properly applicable for the payment of them. Ibid.

The master of a ship, before giving a bottomry bond on ship, freight and cargo, is bound, as against owners of cargo, to communicate both with the owners of ship and the shippers or consignees of cargo, where such communication is under all the circumstances reasonably practicable; but not otherwise. *The Bonaparte* considered. *The Olivier*, 1 Lush. Adm. Rep. 484.

A French ship, with a cargo from Hayti, consisting chiefly of mahogany, which was consigned to a single house in Liverpool, was obliged to put into the port of Horta, in the island of Fayal, for repairs. There was no dock there; but by discharging the cargo the ship could be repaired where she lay at anchor. There was no means of transhipping the cargo. The master wrote to the owners of the ship in France, but did not wait a reply; and he did not write to the consignee of cargo at Liverpool. He discharged the cargo and warehoused it; and obtained the repairs of the ship on bottomry of ship, and freight and cargo, by the sanction of the French consul; and eventually, after the lapse of several months, brought the ship and cargo to destination. By the ordinary means of communication between Fayal and France, a reply from France could not have been obtained in less than two months. The amount of the bond considerably exceeded the value of the ship and freight, which the shipowner abandoned to the bondholder:—Held, that in these circumstances, the master was not bound to have waited for a reply from the shipowner, nor to have communicated with either the shipper or consignee of cargo; and that the bond was valid against cargo. Ibid.

A defence that a bottomry bond is void, for want of communication with the shipowner or the consignee of cargo, must be specially pleaded. Ibid.

Where cargo is unshipped, stored, and transhipped at a foreign port, and a *respondentia* bund is given to defray the charges, the Court, though considering the custom of the port, will not allow as items in the bond any commissions beyond a reasonable amount, calculated upon a principle of *quantum meruit*. *The Glenmanna*, 1 Lush. Adm. Rep. 115.

Commissions charged at St. Thomas's of 2*l.* per cent. on the value of the cargo for storage, and of 2*l.* 10*s.* per cent. for landing and re-shipping, disallowed, and in lieu thereof reasonable sums allowed. Commission of 5*l.* per cent. on cash advances reduced to 2*l.* 10*s.* per cent., according to the practice observed in the registry. Commissions on freight in respect of the vessels chartered to tranship, disallowed. Advance of money to master for alleged services in taking care of the cargo and for personal expenses, not allowed as charges on cargo. Ibid.

In an appeal from a report of the Registrar the Court will not allow a party to set up a case which he did not endeavour to establish at the reference. Ibid.

"Necessaries," in 3 & 4 Vict. c. 65. s. 6, means articles immediately necessary for the ship, as contradistinguished from those merely necessary for the voyage. *The Comtesse de Frègeville*, 1 Lush. Adm. Rep. 329.

The statute does not apply to ordinary mercantile accounts between ship-owner and agent. Ibid.

In a cause of bottomry, where the bond is admitted to be valid, and referred to the Registrar and merchants to report the amount due, the plaintiff is usually entitled to the general costs of the reference, but will be condemned in costs clearly occasioned by improperly persisting in claims which cannot be sustained. *The Kepler*, 1 Lush. Adm. Rep. 201.

A firm in England, having accepted and paid a bill of exchange drawn on them by the master of a foreign ship abroad to procure necessaries, may sue the ship in the Admiralty Court, as for necessaries within the statute 3 & 4 Vict. c. 65. s. 6. *The Onni*, 1 Lush. Adm. Rep. 154.

An advance of money, to pay off a bottomry bond for which the ship is arrested, being made under a contract to pay off claims outstanding on the ship, and outfit her for a new voyage, in consideration of receiving brokerage and the prepaid freight for the new voyage, is not within the statute, and cannot be recovered in the Admiralty Court. Ibid.

By charter-party it was agreed between the plaintiff, owner of the ship *Sultan*, and the defendant, that the ship should proceed to a certain dock and there load in the customary manner a cargo of Marley Hill coke "to be loaded in regular turn." The Marley Hill Company kept a book in which they entered the ships to be loaded, and it was their practice to enter ships not only before they were ready to load, but before their arrival at the dock or even at the port, and if a ship was not ready to load when her turn came, the ship next in turn was loaded, and the other took its turn, when ready, before others which had been ready before it. On the 29th of November, the plaintiff's ship arrived at the dock, and on the 8th of December, his agent told the manager that he was ready to load, but several ships which had not arrived and were not ready until after the plaintiff's ship, were loaded before it, in consequence of the order in which they were entered in the book, and the loading of the plaintiff's ship did not commence until the 23rd of January. The Judge left it to the jury to say what was the meaning of "regular turn," and they found that the plaintiff's ship was loaded according to the practice of the Marley Hill Colliery, but that it was not an established or known custom, and that "regular turn" was the order of readiness, not the order of entry in the book:—Held, that the defendant was liable for demurrage. *Lawson* v. *Burness*, 1 Hurls. & C. 396.

A bottomry bond cannot affect a previous contract in a charter-party, so as to take precedence of money advances made subsequently to the bond under the authority of the charter-party. *The Salacia*, 1,307, 32 Law J. Rep. (N.S.) Prob. M. & A. 43.

Advance of money on freight can only be made in pursuance of a charter-party. Ibid.

A loan to the master of money constitutes a debt for which an action lies against the owner. Ibid.

Where goods of the charterers are sold to pay the ship's expenses, the charterers may recover from the owners of the ship. Ibid.

It is a general rule, though not a universal one, that a master before hypothecating cargo must, if

it be practicable, communicate with the owners, *The Hamburg*, 32 Law J. Rep. (N.S.) Prob. M. & A. 161.

A duty to tranship cargo in a foreign port can scarcely under any circumstances be thrown upon the master. Ibid.

In considering a bottomry bond given in a foreign port, the Court is governed by the general maritime law, not by the *lex loci contractus*. Ibid.

When the holder of a bottomry bond has obtained a decree for the sale of a ship, an adverse claimant must clearly satisfy the Court as to his own claim before he can dispute the validity of the bond. *The India*, 32 Law J. Rep. (N.S.) Prob. M. & A. 185.

No jurisdiction has been conferred upon the Court of Admiralty, by 3 & 4 Vict. c. 65. s. 6, to entertain a claim for necessaries supplied to a ship in a foreign port. Ibid.

The Admiralty Court Act, 1861, ss. 4, 5, applies only to British ships. A repayment of a debt due from the ship for the supply of necessaries does not place the person making such repayment in the position of a person supplying the necessaries, even though such repayment was required by the law of the country where the supply was made, and the ship could not leave the port until such repayment had been made. Ibid.

Where a question is raised as to the duty of the master in a port of distress to have transhipped the cargo, it must be considered that his first duty is to carry his cargo to its port of destination in the same bottom. *The Hamburg (Duranty* v. *Hart)* (P.C.), 33 Law J. Rep. (N.S.) Prob. M. & A. 116.

Where a master has a reasonable opportunity, according to the circumstances of the case, of communicating from the port of distress with the owners of the cargo and receiving directions from them, it is his first duty to endeavour to obtain such directions. Ibid.

The master only becomes agent for the owners of the cargo *ex necessitate rei*. Ibid.

If money is advanced upon consideration that a bottomry bond shall be given, the fact that such a bond is executed subsequently to such advance does not affect the validity of the bond, or place the advance upon the footing of personal credit. *The Laurel*, 33 Law J. Rep. (N.S.) Prob. M. & A. 17.

The existence of a local law of lien for advances may be pleaded, and become material as evidence that there was such an agreement at the time of the advance. Ibid.

The costs of an issue upon which he is unsuccessful, may be taxed against a party though successful in the suit. Ibid.

The power of the master of a ship to bind his owners personally is but a branch of the general law of agency; and where the master of a ship contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs; and the flag of the ship is notice to all the world that his implied authority is limited by the law of that flag. Where, therefore, the master of a French ship contracted in the West Indies to carry goods of an Englishman from thence to Liverpool, and on the voyage was obliged to put into a port of refuge, and there properly borrowed money on bottomry bonds for the use of the ship and crew, and the owner of the goods was obliged to pay money to the holder of the bonds in order to redeem his goods, it was held, —that the owner of the goods had no claim against the owners of the ship, if they chose to abandon the ship and freight: inasmuch as by the law of France it was lawful for them to free themselves from the acts and engagements of the master, in all that concerned the ship and voyage, by the abandonment of the ship and freight. *Lloyd* v. *Guibert*, 33 Law J. Rep. (N.S.) Q.B. 241.

### (O) LIEN AND MORTGAGE.

*Semble*—A mortgagee in possession of a ship is entitled to make use of her; and therefore, where, on obtaining an injunction to restrain the removal of a ship in the possession of a mortgagee, the plaintiff has entered into the usual undertaking as to damages, the Court, in dealing with such undertaking, will take into consideration the loss of profit occasioned by the injunction. *De Mattos* v. *Gibson*, 30 Law J. Rep. (N.S.) Chanc. 145.

But in such a case an actual loss of profit must be shewn by evidence that some particular voyage has been interfered with, the injury arising from the interference with the general user of the ship being too remote and speculative for the Court to deal with it. Ibid.

A mortgage of a ship must be accompanied with the formalities required by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and a Court of equity can therefore give no effect to an unregistered contract to assign a ship as a security for money due. *The Liverpool Borough Bank* v. *Turner*, 30 Law J. Rep. (N.S.) Chanc. 379.

Where the mortgagee of a steam-ship took possession of her and used her for the purposes of a speculation which resulted in a loss, and subsequently sold her disadvantageously, it was held, affirming the decision of one of the Vice Chancellors (*Turner, L.J.* to some extent dissenting), that the mortgagee must himself bear such loss, and be charged with the value of the vessel at the time he took possession of her. *Marriott* v. *the Anchor Reversionary Co.*, 30 Law J. Rep. (N.S.) Chanc. 571; 3 De Gex, F. & J. 177.

Under the 70th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), a mortgagor of a ship, remaining in possession, retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, provided his dealings do not materially impair the security of the mortgagee; and a mortgagee will be restrained, by injunction, from interfering with the due execution of such contracts. Therefore a mortgagor in possession of a ship having entered into a beneficial charter-party, the mortgagees were restrained at the suit of the charterer from dealing with the ship in derogation of the charter-party. *Collins* v. *Lamport*, 34 Law J. Rep. (N.S.) Chanc. 196.

A, the charterer of a vessel, shipped certain goods on board, under a bill of lading signed by the master, by which the goods were to be delivered to B or his assigns, he or they paying freight for the said goods as usual. B was A's agent, and at the time of shipment A was indebted to him for advances; and the bill of lading was handed to B, in order that he might apply the proceeds of such goods to the reduc-

tion of the debt; but B took the bill of lading with notice of the terms of the charter-party:—Held, that as B was the agent of the charterer, and had notice of the charter-party, he was not entitled to the goods without payment of the charter freight, which exceeded the amount of the bill of lading freight. *Kern* v. *Deslandes*, 30 Law J. Rep. (N.S.) C.P. 297; 10 Com. B. Rep. N.S. 205.

The plaintiffs, mortgagees of a ship, having permitted the mortgagor to remain in possession for upwards of four years, and during that time to use and navigate the ship for his own profit, the latter, without the knowledge of the plaintiffs, delivered her to the defendant, a shipwright, for the purpose of having reasonable and necessary repairs done to her, which the defendant did; the plaintiffs having demanded possession of the defendant, the latter refused to deliver her up until his bill for the repairs was paid:—Held, that the plaintiffs must be taken to have impliedly authorized the mortgagor to keep the vessel in an efficient state, and for that purpose to order necessary repairs to be done, upon the ordinary terms, one of which was, that the shipwright should have his lien upon the ship for the repairs. Held, also, that section 70. of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which enacts "that the mortgagor shall not be deemed to have ceased to be owner of the mortgaged ship, except in so far as may be necessary for making such ship available as a security for the mortgage debt," did not conflict with this view." *Williams* v. *Allsup*, 30 Law J. Rep. (N.S.) C.P. 353; 10 Com. B. Rep. N.S. 417.

S and F, owners of a ship, mortgaged her to the plaintiff, and also assigned to him all the freight to be earned by the ship. S and F retained possession of the ship, and sent her to Cuba, expecting to find there a return cargo; but none was ready. The captain of the vessel, therefore, determined to buy for his owners a return cargo for an English port, and he obtained a cargo of wood from T & Co., who supplied it to him, and took a bill of lading for the wood from the captain, who, by the bill of lading, bound himself "to deliver it in the like good order in the said port, or in such other my manitest may appoint, to order ——, who, on faithful delivery being shewn, shall pay me —— for freight and conveyance." A black line was drawn through the space in the bill of lading usually filled up with the amount of the freight. T & Co. sent to M & Co. of Havannah, the bill of lading, and the invoice of the goods, stating them to be "shipped by order of M & Co., of Havannah, and for account of risk of whom it may concern." M & Co. paid T & Co. for the goods, and drew bills for the price on an English merchant, who refused to accept them. The defendant thereupon accepted the bills for the honour of the drawer, and paid them when due. He also received the bills of lading indorsed in blank by T & Co. S & F became bankrupt. The plaintiff took possession of the ship on its arrival in England and claimed freight for the cargo. The defendant sold the cargo, and paid the freight, under protest, to the dock company, with whom the cargo had been deposited. On an interpleader issue whether the plaintiff was entitled to claim freight,—Held, that he was so entitled, as the goods remained the property of T & Co. under the bill of lading. *Gumm* v. *Tyrie* (Ex. Ch.) 34 Law J. Rep. (N.S.) Q.B. 124; 6 Best & S. 298—affirming the judgment below, 33 Law J. Rep. (N.S.) Q.B. 97.

The salvor who preserves the *res* has an indefeasible priority of lien. The master and seamen, next after the salvor, take precedence of the shipwright for wages earned before their ship comes into the shipwright's hands. If foreigners, they are also entitled, in addition to such wages, to a sufficient sum to take them back to their country. Next after the claims of the master and seamen comes that of the shipwright, taking precedence of claims for other necessaries supplied to the ship, in respect of which there is not any lien upon the ship at common law, but only a statutory remedy in default of payment. *The Gustaf*, 31 Law J. Rep. (N.S.) Prob. M. & A. 207.

The plaintiff's ship was chartered for a voyage from Glasgow to Porto Rico, and back to a port in the United Kingdom. By the charter-party freight for the voyage was to be at the rate of 4*l.* 10*s.* per ton upon the homeward cargo; and "for security and payment of all freight, dead freight, demurrage and other charges, the owner was to have an absolute lien and charge on the said cargo or goods laden on board; bills of lading to be signed by the master as presented to him, and at any rate of freight, without prejudice to charter-party." After the ship had arrived at Porto Rico, and part of the homeward cargo had been put on board by L & C, the charterers' agents there, for which the master had signed and given them a bill of lading at a freight of 40*s.* per ton, L & C received intelligence of the charterers having stopped payment, when they not only refused to put any further goods on board, but required the cargo which had been already shipped to be returned to them. The master having been told that by the Spanish law he could be compelled to discharge the cargo, made, under protest, a new contract with L & C, by which the ship was chartered to them on a voyage to a port in the United Kingdom, at the freight of 30*s.* per ton. Further goods were thereupon shipped by L & C; and the former bill of lading having been destroyed, a new bill of lading was signed by the master for the whole quantity on board, at the freight of 30*s.* per ton. L & C consigned the cargo to the defendants, as their agents, for sale, and the defendants for that purpose received and became the holders of the bill of lading. The plaintiff having refused to deliver the cargo to the defendants on payment of such bill of lading freight,—Held, that that part of the cargo which had been shipped before receipt of intelligence of the stoppage of the charterers, had been shipped under the terms of the charter-party, and that L & C had no right to require it to be unshipped, and the master had no power to vary the chartered freight as between the parties to the charter-party, and therefore the plaintiff had, as against the defendants, a lien on such part of the cargo for the freight at 4*l.* 10*s.* per ton. Held, also, that the rest of the goods were shipped under a new contract, which the master was authorized to make, under the circumstances, and that the plaintiffs therefore had no right of lien on these goods, except for freight at 30*s.* per ton. Held, further, that the expression "dead freight" in the charter-party did not apply to a claim of damages in respect of the charterers having failed to load a full cargo, and that it therefore gave the plaintiffs no right of

lien on the cargo for the difference between the rates of 4*l.* 10*s* and 30*s.* per ton. *Pearson* v. *Göschen*, 33 Law J. Rep. (N.S.) C.P. 265; 17 Com. B. Rep. N.S. 352.

The master of a ship in need of repairs gave a *respondentia* bond, but took no steps to forward the cargo. The English owner of the cargo chartered another vessel, and the master of this second vessel, having taken the cargo on board and knowing nothing of the bond, proceeded homewards. He was stranded on Scilly and the cargo taken out and stored, subject to the master's lien. The charterer sent down instructions to the master to proceed with the cargo to Hamburgh. Before he could do so the cargo was arrested in a suit by the bondholder. The master, having insured the ship and freight, obtained a settlement from the underwriters for the freight as upon a total loss:—Held, that the master, who alone by the Rules of the Court of Admiralty could appear in a suit of this nature, and the underwriters through him, had a lien upon the cargo for the freight, its non-arrival at its port of destination being caused by the owner and not being attributable to the master. *The Cargo ex the Galam* (P.C.), 33 Law J. Rep. (N.S.) Prob. M. & A. 97.

A claim for freight gives the master a possessory lien at common law. Ibid.

The master has at common law a possessory lien on the cargo, not only for freight due, but also for general average. This lien being lost with the possession, as to the general average the Court of Admiralty has no further jurisdiction to enforce a contribution. Ibid.

The lien for freight is regarded in the same light as salvage-service, and consequently, as between the master and a bondholder, takes precedence of an antecedent bond. Ibid.

The Court of Admiralty has not jurisdiction in claims for necessaries, except where it has been given expressly by statute. This has been given only where the owner is beyond the jurisdiction, either (under 3 & 4 Vict. c. 65. s. 6.) impliedly from the vessel being foreign owned, or (under 24 Vict. c. 10. s. 5.) expressly from the facts of the vessel being out of her own port, and the owner's domicil being out of England and Wales. The material-man has no maritime lien, his right to the *res* as a security only arises upon his instituting a suit: any security he may thus obtain is subject therefore to any then existing claims:—Held, therefore, that a registered mortgage takes precedence as an existing incumbrance over a claim for necessaries, though supplied previously to the register of the mortgage. *The Pacific*, 33 Law J. Rep. (N.S.) Prob. M. & A. 120.

Reasonable diligence in endeavouring to discover and arrest a ship is sufficient to prevent a claimant for damages from losing his lien upon the ship, even though she may have passed since the collision into the hands of an innocent holder. *The Europa*, 32 Law J. Rep. (N.S.) Prob. M. & A. 188.

The claim which a master has for his services and disbursements amounts to a maritime lien and is not impaired by the fact that the person supplying him had a fraudulent possession of the vessel upon which he was so employed. *The Edwin*, 33 Law J. Rep. (N.S.) Prob. M. & A. 197.

The master's lien for disbursements does not attach where there is merely a liability, as in the case of a bill of exchange drawn by him upon the owner and dishonoured. Ibid.

### (P) SALE AND TRANSFER.

The master of a British vessel in Australia drew a bill of exchange on C, the owner, for necessaries supplied to the vessel. The owner declined to accept the bill. The ship being afterwards at Havre, the holder of the bill indorsed it to T & Co., French subjects at Havre, who commenced a suit for the amount there against the master and against the ship, and obtained a condemnation on the master with a privilege on the ship, which was seized by the Court. No notice of this suit was given to C. To obtain an order for sale of the ship it was necessary for T & Co. to get the judgment of a superior Court, and to summon before the Court all those who appeared to be owners of the vessel. During the voyage C had mortgaged the ship to H, and this mortgage was transferred to the plaintiff. C, who had afterwards become bankrupt, and his assignee were then summoned to appear in the French court, but did not. No notice of the French proceedings was given to H or to the plaintiff. Judgment was given by the French Court by default, confirming the judgment below, and decreeing a sale of the ship. The plaintiff after that commenced a suit at Havre to replevy the ship, and judgment was given against him on the mistaken view of the law of England that it was impossible that, by that law, a transfer of the property in a ship could take place in the course of a voyage, to the prejudice of creditors, or without the transaction being indorsed on the certificate of registry or the ship's papers. This decision was affirmed on appeal, and the ship was sold to the defendant. The plaintiff brought trover for the ship:—Held, that he was not entitled to recover, as the proceedings in the French courts were proceedings *in rem*, and that the right of the property in the ship passed by the sale under the French decree. *Castrique* v. *Imrie* (Ex. Ch.), 30 Law J. Rep. (N.S.) C.P. 177; 8 Com. B. Rep. N.S. 405.

The plaintiff by a letter dated the 4th of June, 1858, addressed to one T C, agreed to take certain shares in a vessel called the *Conrad*, belonging to T C, on account of a debt due to him from T C, and also to take upon himself all liabilities after the vessel had discharged her cargo at S. The plaintiff, with several other creditors of T C, afterwards signed the following letter, dated the 14th of July, 1858, and addressed to T C: "Sir,—We, the undersigned, agree to purchase the ships in the annexed statement at the prices there put down, in the proportions set down opposite to our names, it being understood as part of this agreement that the debts owing by you to us annexed be taken to their full amount in payment or part payment of the said purchases." By the statement annexed to such letter the plaintiff was entered as a purchaser of the said shares of the *Conrad*. The plaintiff sold these shares to the defendant, who signed a memorandum, dated the 30th of September, 1858, and addressed to the plaintiff, in which he said, "I have this day bought from you sixteen sixty-fourth shares of the barque *Conrad*, 328, now registered in your name at the Custom-house, for the sum of 700*l.*, and all liabilities or profits on the said shares from the time of your purchase from T C for which you are liable as owner, in

any way, or entitled to if there be any profits or balance in your favour." At the time the defendant signed such memorandum he was aware of the letter of the 14th of July, but not of the letter of the 4th of June. T C did not execute a bill of sale of the shares to the plaintiff until the 14th of September, 1858. The plaintiff having paid certain expenses incurred on account of the *Conrad* after the ship had discharged her cargo at S, and before the said bill of sale had been executed to him, sued the defendant for the same upon the contract of the 30th of September, 1858:—Held, that the plaintiff could not recover such expenses, as the letter of the 14th of July was the only letter which could be connected with the contract, and there was therefore nothing to shew any liability of the plaintiff before he had become legal owner of the shares in the ship which the defendant had contracted to pay. *Chapman* v. *Callis*, 30 Law J. Rep. (N.S.) C.P. 241; 9 Com. B. Rep. N.S. 769.

*Quære*—Whether the contract of the 30th of September, 1858, was altogether void by reason of the Merchant Shipping Act, 17 & 18 Vict, c. 104. s. 55. Ibid.

Where an English-owned vessel came into collision in a foreign port, within telegraphic communication of England, at which port a British consul and agent of Lloyd's resided, and the master, believing the vessel would not again be fit for sea, sold her, against the advice of the agents of Lloyd's, and without first fully communicating with the owner and awaiting a reply from him, and it subsequently turned out that the vessel was but slightly injured, and was, at a small expense, fitted for sea, the Court set aside the sale, and held that the receipt of bills for the purchase-money by the owner, and letters written by him in ignorance of the circumstances under which the sale was made, did not amount to a ratification of the sale. *The Bonita—Cumming, Master*, 30 Law J. Rep. (N.S.) Prob. M. & A. 145.

Receipt of purchase-money by a vendor, an absent principal, acts only as a ratification of a sale when received by him with an intention to appropriate it to his own use, and with full knowledge of the facts of the case. In order to establish a legal sale by a master, it lies upon the purchaser to prove a necessity. In the case of an insured ship, it is the master's duty to consult, before selling, with the agent of Lloyd's, if there is one at the port of distress. Ibid.

When communication with the owner is practicable, it is the master's first duty to fully inform him before selling. Ibid.

To render valid the sale of a vessel by her master, the circumstances under which he sells, though of a like character, must be of a more pressing necessity than those which would justify him in hypothecating her. Ibid.

The law as to the effect of a transfer of a ship, which is in form absolute, but is in reality only intended as a security for an advance, is not altered by the 17 & 18 Vict. c. 104, and the provisions of section 66. of that act do not prevent the owner who has executed a bill of sale absolute in its terms from shewing, as before, that it was intended to operate as a security only. The 25 & 26 Vict. 63. s. 3. is a statutory declaration that this is the true interpretation of the act. *Ward* v. *Beck*, 32 Law J. Rep. (N.S.) C.P. 113 ; 13 Com. B. Rep. N.S 668.

The property in a ship passes, as between the vendor and his assignees and the vendee, by a bill of sale, although the transfer be not registered pursuant to the Merchant Shipping Act, 1854. *Stapleton* v. *Haymen*, 33 Law J. Rep. (N.S.) Exch. 170 ; 2 Hurls. & C. 918.

A vessel foreign-owned at the time when necessaries are supplied to her, cannot by a subsequent sale change her legal position so as to deprive the person supplying the necessaries of the remedies given by the 3 & 4 Vict. c. 65. s. 6. *The Princess Charlotte*, 33 Law J. Rep. (N.S.) Prob. M. & A. 188.

To constitute a valid sale at a port of distress there must be the consent of the master (except under most peculiar circumstances), an impossibility of repairs except at a ruinous cost, or an equally ruinous delay and an inexpediency arising from imminent risk of awaiting communication with the owners. *The Uniao Vencedora*, otherwise *The Gipsy*, 33 Law J. Rep. (N.S.) Prob. M. & A. 195.

## (Q) FREIGHT.

A charter-party stipulated that the ship should load a cargo of coal at Cardiff, and proceed to Pernambuco, and there load a cargo of sugar, and proceed home and deliver the same, on being paid freight at 60*s.* per ton for sugar in full for the round; "the freight to be paid in the following manner—150*l.* on signing bills of lading at Cardiff, less interest for three months and the costs of insurance, cash for disbursements abroad at the current rate of exchange free of interest and commission, and the remainder on the delivery of the cargo, less discount for two months on half freight. The ship to be addressed to the charterer's agent abroad, paying one commission only of 3*l.* per cent. on the amount of freight, either at port of loading or discharge, at merchant's option. The master to sign bills for each cargo, at any rate of freight that might be tendered, without prejudice to that charter-party. The owners to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of lading by captain's draft on charterers, at usance, which they agreed to accept and pay on consignee at loading port agreeing amount":—Held, that the freight was payable on delivery of the cargo, and that the agreeing the amount, or the tender of a bill, in accordance with the last stipulation, was not a condition precedent to the right of payment of the freight. *Santos* v. *Brice*, 30 Law J. Rep. (N.S.) Exch. 109; 6 Hurls. & N. 290.

To a declaration for freight, the defendant pleaded on equitable grounds that the freight was for goods shipped by him on board a vessel of which the plaintiffs were charterers, for and on account of E, the owner of the goods, whose agent he, the defendant, then was, and that he received from the master on behalf of the plaintiffs the bill of lading, of which the plaintiffs had notice; that he indorsed and delivered the said bill of lading to E, to whom the plaintiffs before the shipment of the said goods had advanced money on his (E's) undertaking that he, E, was about to ship goods in the said ship, and

would indorse to the plaintiffs a bill of lading for the said goods, whereon the freight should be made payable in this country, and that the freight should be paid by him, E, and the said bill be held by the plaintiffs as security for the said advance; that the shipment of the goods in the said bill mentioned was made in pursuance of the said undertaking, and that after the said shipment, and before the said freight became payable according to the terms of the said bill of lading, and after the indorsement thereof by him (the defendant) to E as aforesaid, E indorsed the said bill to the plaintiff in pursuance of the said undertaking, and as security for the said advance, and a still further advance then made by the plaintiffs on the same security; *by reason of which said indorsements the property in the said goods passed to and vested in the plaintiffs, who continued the owners of the said goods from thence until and at the time of the said freight becoming payable;* that the said bill was so signed and delivered to him (the defendant) after the passing of the 18 & 19 Vict. c. 111, 'An Act to amend the Law relating to Bills of Lading'; that the freight claimed is the freight mentioned in the said bill of lading, and accrued due by virtue of the said bill, and not otherwise. The plaintiffs replied, that the second advance in the plea mentioned was made upon the estimate between them and E, of the value of the goods as freight paid, and that the arrangement as to the shipment was made only between the defendant and the agents of the plaintiffs, who had only a general authority from them as to the agreeing about the shipment of goods for freight; and that the plaintiffs were not aware of the employment of the defendant by E as his agent in the said shipment before the receipt by them of the indorsed bill of lading:—Held, on demurrer, that the statute 18 & 19 Vict. c. 111. s. 1. did not apply, and that the defendant was liable for the freight. *Fox* v. *Nott*, 30 Law J. Rep. (N.S.) Exch. 259; 6 Hurls. & N. 630.

Where ship and cargo are totally lost in a collision, the measure of the loss of freight is the gross freight contracted for at the time of the accident, less the charges which would have been necessarily incurred in earning it, and which were saved to the owner by the accident. *The Canada*, 1 Lush. Adm. Rep. 586.

An indorsee of a bill of lading, who has indorsed the same over before the arrival of the vessel and delivery of the cargo, does not, under 18 & 19 Vict. c. 111. s. 1. (the Bills of Lading Act) remain liable for the freight. *Smurthwaite* v. *Wilkins*, 31 Law J. Rep. (N.S.) C.P. 214; 11 Com. B. Rep. N.S. 842.

On a guarantie that a certain vessel should sail with or before any vessel then in the berth, "under penalty of forfeiting one-half of the freight," another vessel having sailed first, it was held, that "one-half of the freight" could be recovered as liquidated damages; and also, that it was immaterial whether the money intended to be made payable was called by the parties "a penalty" or "liquidated damages." *Sparrow* v. *Paris*, 31 Law J. Rep. (N.S.) Exch. 137; 7 Hurls. & N. 594.

The plaintiff in his declaration alleged that in consideration that he, the plaintiff, would ship goods on board a certain vessel, the defendant guaranteed that the vessel should sail with, if not before, any other vessel then in the berth for the port of H, under penalty of forfeiting one-half the freight of the said goods, and averred that all that was necessary to entitle him to maintain the action had happened; that the vessel did not sail with or before any other vessel then in berth for the port of H, whereby he became entitled to half the freight, and was otherwise damnified by the delay of the defendant in forwarding the goods. The defendant paid 10*l.* into court, and the plaintiff claimed damages *ultra*:—Held, the whole freight being more than 20*l.*, that no evidence of any actual damage sustained by the plaintiff was necessary to entitle him to recover the half freight in this action; that the declaration was sufficient; that the sailing of the vessel with or before any other vessel then in the berth was the event intended to be secured, and that the plaintiff was entitled to recover the half freight as liquidated damages. Ibid.

A ship was chartered by the defendants for a voyage from Liverpool to the Havana, and loaded by them as a general ship, the freight being payable to the master. She went aground on the coast of Ireland. Subsequently she was got off with her cargo, both being damaged. S, one of the defendants, and who represented the freighters, visited the vessel, and was requested by the master "to act on behalf of the owners to the best of his judgment and ability." S caused the cargo to be taken out, and sent back to Liverpool in another ship, which he himself engaged for that purpose. The ship herself went to Dublin, and was there repaired. When the goods arrived at Liverpool they were inspected by various persons, and the result was, that the defendants, on account of their damaged condition, determined to sell them. Before the sale took place, however, the master claimed the entire freight on the goods to the port of destination, or that they should be detained to proceed in his vessel, when she was repaired. The defendants refused to accede to this, and proceeded to sell the goods. In an action by the master against the defendants for wrongfully preventing him from carrying the goods and earning freight, the jury found, in effect, that the course taken by the defendants was the reasonable one to take, having regard to the interests of all parties concerned:—Held, that on this finding the defendants were entitled to the verdict; that the authority to S to act for the owners as well as for the shippers gave him authority to sell the cargo, under the circumstances which the jury had found to exist; and that this authority, having been partially acted on and expenses incurred under it, could not be countermanded. *Blasco* v. *Fletcher*, 32 Law J. Rep. (N.S.) C.P. 284; 14 Com. B. Rep. N.S. 147.

S & F, who were owners of a ship, mortgaged her to the plaintiff as security for a sum of money lent to them, and they also assigned to him all the freight, &c. to be earned by the ship, and authorized him to recover all sums of money which were or might become due for freight and earnings of the said ship. In October, 1857, S & F arranged with I & Co. for a purchase of timber in Cuba to be supplied by T & Co., and to be sent home in the ship, and for which they gave a letter of credit on M & Co. of the Havanna, undertaking to accept their drafts for the cost of the cargo, upon presentation, against the shipping documents to be sent to I & Co. Owing to delays during the voyage out, the timber had been

disposed of before the ship reached her port in Cuba. The captain, however, purchased through T & Co. a cargo of wood on account of his owners, and on receiving it on board, he gave to T & Co. a bill of lading by which he bound himself "to deliver in the like good order in the said port, or in such other my manifest may appoint, to order —— who —— on faithful delivery thereof being shewn, shall pay me for freight and conveyance." The bill of lading contained no specified sums as freight, but opposite the descriptions of each of the different parts of the cargo was a blank space which had been filled up by a line. T & Co. sent to M & Co. an invoice of the goods shipped "by order of M & Co. of the Havanna and for account of risk of whom it may concern." M & Co. paid the amount of the invoices in their account current with T & Co., and drew on I & Co. for the amount, and sent the bill of lading to them. I & Co. refused to honour the bills, and in consequence M & Co. arranged with the defendant to accept and take them up for the honour of the drawer. He did so, receiving at the same time the bill of lading. S & F became bankrupt. S & F took possession of the ship and cargo when they arrived at Gravesend, and the cargo was afterwards claimed by the defendant as the holder of the bill of lading. The cargo was sold by the defendant; and upon an interpleader issue to try whether the plaintiff was entitled to recover freight, it was held, that he was so entitled, inasmuch as, under the circumstances, and supposing that there was no mortgage at all, S & F would have been entitled to freight. *Gumm* v. *Tyrie*, 33 Law J. Rep. (N.S.) Q.B. 97; 4 Best & S. 680—affirmed in Ex. Ch., 34 Law J. Rep. (N.S.) Q.B. 124.

*Quære*—Whether there would have been a claim for freight if the bill of lading had stated the cargo to be shipped on account of the owners, and it had turned out not to be their property. Ibid.

A consignee of goods, or an indorsee of a bill of lading, has no right to have the value of missing goods deducted from the freight payable in respect of the goods delivered. This being the general law, it cannot be altered by a universal practice of merchants, which is not confined to any particular place or trade, to have the value of such goods deducted from the freight. *Meyer* v. *Dresser*, 33 Law J. Rep. (N.S.) C.P. 289; 16 Com. B. Rep. N.S. 646.

The law of a foreign country, entitling the consignee to reduce the claim against him for freight by the value of goods put on board and lost, but which amounts to an allowance by way of set-off, and not to an extinguishment of the claim for freight, is matter of procedure only, and therefore does not apply to an action for freight brought in this country against the consignee. Ibid.

*Semble*, per *Erle*, *C.J.* and *Byles*, *J.*, that the 3rd section of the Bill of Lading Act (18 & 19 Vict. c. 111), by which a bill of lading in the hands of an indorsee for value is made conclusive evidence of the shipment of the goods therein mentioned, against the master signing the same, applies to a master and part-owner who has signed it, in an action for freight brought by him on behalf of himself and the other owners of the vessel. Ibid.

A charterer, whose cargo has been damaged by the fault of the master and crew, so as upon arrival at the port of discharge to be worth less than the freight, is not entitled to excuse himself from payment of freight by abandoning the cargo to the ship-owner. *Dakin* v. *Oxley*, 33 Law J. Rep. (N.S.) C.P. 115; 15 Com. B. Rep. N.S. 646.

A, of Alexandria, bought coals of B, of London, which were to be delivered at Alexandria, price to be paid on delivery of bill of lading, less balance of freight payable at Alexandria. B chartered C's ship to carry the coal, "coal to be delivered on freight being paid, . . . freight to be paid on unloading and right delivery of cargo, less advances, in cash, at current rate of exchange, . . . half the freight to be advanced at freighter's acceptance at three months on signing bills of lading; owner to insure amount and deposit with charterer the policy and to guarantee the same." The bill of lading was signed, B gave his acceptance for the half freight, the receipt of the half freight was indorsed on the bill of lading, and the bill of lading was indorsed in blank by B and given to A. The average length of the voysge was two months; before the ship arrived B became insolvent, and on arrival of the ship and before the acceptance was due, the master refused to deliver the cargo to A unless the whole of the freight was paid or payment guaranteed. A guarantie was given by D for A under protest, and the cargo was delivered; D then by A's direction refused to pay. An action was brought in the Consular Court against D, who then, by A's direction, paid under protest. A repaid D. C knew nothing of the arrangement between A and B:—Held, that A was entitled to recover the half freight from C. *Tamvaco* v. *Simpson*, 34 Law J. Rep. (N.S.) C.P. 168; 19 Com. B. Rep. N.S. 453—affirmed in Ex. Ch., 35 Law J. Rep. (N.S.) C.P. 196.

By a charter-party, made at Liverpool by the plaintiff, chartering his ship to the defendant for a voyage from Liverpool to Sydney, the defendant was to pay for the use of the vessel in respect of the voyage a lump sum in full, "on condition of her taking a cargo of not less than 1,000 tons of weight and measurement." The plaintiff placed the vessel at the disposal of the defendant, who loaded her with 525 tons weight goods and 330 tons measurement goods. The ship could not safely carry any more. There were left 150 tons vacant space. The ship sailed with this cargo. A cargo of 1,000 tons of weight and measurement is usually, and at Liverpool, loaded one-third weight goods and two-thirds measurement goods; but the ordinary cargo for the Sydney market reverses these proportions, being two-thirds weight and one-third measurement. The vessel was capable of carrying 1,000 tons of weight and measurement in the ordinary proportions of one-third weight and two-thirds measurement. In an action by the plaintiff for the freight, it was held that the defendant was liable; that the condition was not broken, since the charter-party meant that the ship was to be capable of taking an ordinary cargo of 1,000 tons weight and measurement at the port of loading, and not a Sydney cargo; and further, that even if the condition had meant a Sydney cargo, and had not been complied with, and was in terms a condition precedent to the right to the freight, still, as the defendant had received part of the consideration for the contract in having the ship placed at his disposal, and in having loaded her with his goods, with which she had sailed, he could no longer treat it as a condition precedent to defeat the claim to the freight wholly,

but must avail himself of the breach of the condition in reduction of the amount claimed. *Pust* v. *Dowie* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 127; 5 Best & S. 33—affirming the judgments below, 32 Law J. Rep. (N.S.) Q.B. 179; and 33 Law J. Rep. (N.S.) Q.B. 172; 5 Best & S. 20 and 33.

The master of a ship, who, having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owners' account, and being unable to procure remunerative freight, loads the ship with a cargo of his own:—Held, liable to account to the owners for all profits made by the sale of the cargo and not merely for a profit freight. *Shallcross* v. *Oldham*, 2 Jo. & H. 609.

### (R) DEMURRAGE.

The defendants having purchased a cargo of coals on board a ship in the Thames belonging to the plaintiff, signed and sent to a coal-meter a document called a turn-paper, which, after reciting that they had bought the cargo of coals, to be worked at the rate of 49 tons per working day, required him to work the same. The paper mentioned that the coals were to be unloaded at Dudman's Dock in the Thames. The plaintiff took his ship to the moorings off Dudman's Dock, but a delay of six days occurred before the vessel could begin to unload at the dock, owing to the turns of other vessels for unloading coming first:—Held, that if the turn-paper was evidence of any contract between the plaintiff and the defendant, it was evidence only of a contract to unload after the vessel had got into the dock at the place for unloading; consequently, that the plaintiff was not entitled to damages in the nature of demurrage for the six days' delay from the time the ship was off the dock ready to unload. *Shadforth* v. *Cory* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 379—affirming the judgment below, 32 Law J. Rep. (N.S.) Q.B. 78.

In an action for demurrage against the assignee of a bill of lading, where the vessel was detained at her port of discharge beyond the days for unloading allowed by the charter-party, the evidence was that the bill of lading made the goods deliverable to the assignee on his paying freight according to charter-party; and that in the margin of such bill of lading was the following: "There are eight working-days for unloading in London":—Held, that the defendant was not liable, as there was no intimation in the bill of lading that the person receiving the goods thereunder was to pay demurrage. *Chappel* v. *Comfort*, 31 Law J. Rep. (N.S.) C.P. 58; 10 Com. B. Rep. N.S. 802.

The plaintiff by charter-party engaged with the defendants to receive and load on board his ship a full and complete cargo of coals, about 110 tons, and to proceed to Dublin, &c., to allow 20 tons per working-day for discharging, or, if longer detained, to be paid 40*s.* per day demurrage. (The act of God, &c. during said voyage always excepted.) To be loaded *with usual despatch*. Penalty for non-performance of this agreement, estimated amount of freight. Defendants engaged to load the vessel on the above terms. Vessel to load in Nelson Dock. The Nelson Dock was on a canal by which coals were brought from the colliery in "flats" alongside the vessel to be loaded. In consequence of a sudden frost, the loading of the plaintiff's vessel with coals so brought was delayed for thirty-four days. It was proved that, if loaded with "usual despatch," it would have taken five and a half days, being at the rate of 20 tons a day. In an action for damages for the detention of the vessel, the learned Judge directed the jury that "usual despatch" meant "usual despatch of persons who have a cargo in readiness for the purpose of loading," and that the circumstance of the navigation of the canal having been stopped by the frost, and the defendants having been thereby prevented from completing the cargo at the rate of 20 tons a day, was no answer to the action;—Held, a right direction. *Kearon* v. *Pearson*, 31 Law J. Rep. (N.S.) Exch. 1; 7 Hurls. & N. 386.

By a charter-party made between the plaintiff and defendant it was agreed that the ship Bebec should take on board from the defendant a cargo of culm at Llannelly, and "proceed with all convenient speed to Mr. Coles's Wharf, Rochester, or so near thereto as she might safely get." The ship arrived at Rochester on the 24th of October, and was moored at a place called the Buoys, which was distant about 300 yards from Coles's Wharf. The master then gave the defendant's agent notice that the ship was ready to discharge the cargo; the defendant's agent ordered the master to proceed with the ship to Coles's Wharf. In consequence of the state of the tides and the want of water, the ship was then unable to get to Coles's Wharf, and the defendant's agent refused to send lighters to lighten the ship to enable her to do so. The ship did not reach Coles's Wharf until the 4th of November:—Held, in an action for demurrage, that the defendant was not bound to unload the ship until she reached Coles's Wharf, and that the lay days did not begin until the 4th of November. *Bastifell* v. *Lloyd*, 31 Law J. Rep. (N.S.) Exch. 413; 1 Hurls. & C. 388.

The true measure of the length of demurrage caused by a collision is the length of time which, by reason of the collision, the vessel has been thrown out of her usual employment. *The Black Prince*, 1 Lush. Adm. Rep. 568.

The plaintiff's vessel was one of a line of steamers belonging to different owners, which took turns for sailing at fixed intervals. In the ordinary course of business each vessel on returning home was a certain time idle in port. By reason of a collision with the defendant's vessel (for which the defendant had been found to blame) the plaintiff's vessel was obliged to undergo repairs, and lost her turn, which was taken by another steamer on the line. The plaintiff's vessel, as soon as repaired, took the next turn:—Held, that the measure of demurrage was not the length of time the plaintiff's vessel was undergoing repairs, nor the difference between the usual time of her being in port and the actual time she was in port, but the number of days she was detained beyond the date on which, but for the collision, she would have sailed in her regular turn. Ibid.

The costs of an appeal from a report of the Registrar follow the result, and do not depend upon the proportion of the plaintiff's original claim which is finally disallowed. Ibid.

### (S) WAGES.

Where a master has been guilty of no dereliction of duty in furnishing his accounts he is entitled to a claim for double pay for ten days where his wages

are withheld. *The Princess Helena—Connell, Master*, 30 Law J. Rep. (N.S.) Prob. M. & A. 137.

The protest by a foreign consul against the prosecution of a suit for wages against a ship of his country does not deprive the Court of its jurisdiction, but makes the exercise of that jurisdiction discretionary. *The Octavie*, 33 Law J. Rep. (N.S.) Prob. M. & A. 115.

Where the amount of wages due to a seaman under his contract was greatly lessened by a depreciation of the currency at the date of his claim, and it did not appear at what rate such wages were to be calculated, the Court construed the uncertain contract most strongly in favour of the seaman, and allowed him wages at the fullest rate. *The Nonpareil*, 33 Law J. Rep. (N.S.) Prob. M. & A. 201.

An apprentice is entitled to sue proceeds of the ship he has served in for wages due under a general apprenticeship to the owner, but not for the penalty contained in the indenture for breach of the agreement. A minor sues in the Admiralty Court by proxy. *The Albert Crosby*, 1 Lush. Adm. Rep. 44.

A master is entitled under sections 187, 191. of the Merchant Shipping Act, 1854, to double pay for the number of days (not exceeding ten), during which the payment of his wages is improperly withheld; but he is not so entitled, if he himself causes the delay, by improperly keeping back the accounts of the ship. *The Princess Helena*, 1 Lush. Adm. Rep. 190.

A master receiving, under an award, salvage money from the owners of property to which he, the ship and crew have rendered salvage services, is not bound to hand over to his owner the portion he *bona fide* conceives to be his own proper share, nor (*semble*) any part of the salvage money; the remedy of the owner is to apply to the Court, under section 498. of the Merchant Shipping Act, for a distribution of salvage. Ibid.

The owner of a ship refused to pay wages due to a master for a voyage, unless credited with certain salvage money received by the master under an award, and kept by him for his own share; the master refusing to account for a subsequent voyage, except on condition of a settlement for the former voyage without reference to the salvage money:—Held, that the payment of wages was improperly withheld, and that the master was entitled, under the statute, to ten days' double pay. Ibid.

*Semble*—Items not objected to on the reference to the Registrar cannot afterwards be objected to on an appeal from the Registrar's report. Ibid.

Upon a report made by the Registrar in a cause of master's wages, the Court will not determine the incidence of the costs of the reference by any fixed rule, but according to the circumstances of the case. *The William*, 1 Lush. Adm. Rep. 199.

The plaintiff suing for wages claimed 1,557*l.* 10s. 6*d.*, and refused a tender by the defendants of 150*l.*; the defendants thereupon set up a counter-claim of 1,571*l.* 13s. 6*d.*, and the accounts were referred to the Registrar and merchants, who found 413*l* 1s. 5*d.* due to the plaintiff:—Held, that the plaintiff must pay the costs of the reference. Ibid.

The Court of Admiralty has no jurisdiction over a contract for wages different from the ordinary mariner's contract. *The Harriet*, 1 Lush. Adm. Rep. 285.

The 189th section of the Merchant Shipping Act, 1854, bars a seaman from recovering wages less than 50*l.* in the Court of Admiralty, except in the contingencies therein specified. Ibid.

The plaintiff signed the ship's articles as mate at 5*l.* 10s. per month; he also verbally agreed with the owner to act as purser, and superintend the ship's accounts for 4*l.* 10s. per month additional; he served afterwards in both capacities, and finally claimed 63*l.*:—Held, that the parol agreement was, in the circumstances, a special agreement, which the Court could not enforce; and the claim, thus falling below 50*l.*, was dismissed altogether. Ibid.

The master of a foreign ship instituted a cause against the ship for his wages, and no notice of the institution of the cause was given by him to the consul of the foreign State. The owners appeared under protest; and the consul swearing an affidavit in the cause, protested as consul against the cause being allowed to proceed. Cause dismissed on the ground that the jurisdiction of the Court of Admiralty over causes of wages of foreign masters is discretionary only; that notice of the institution of any such cause ought to be given to the consul of the State to which the ship belongs; and that the protest of the consul was in the circumstances a bar to the cause proceeding. *The Herzogin Marie*, 1 Lush. Adm. Rep. 292.

In the Court of Admiralty, where money has been paid into court, the practice is not to pay it out to the third party entitled until the conclusion of the cause. Where therefore in a cause of foreign mariners' wages, money was paid into court before answer filed, in full satisfaction of the plaintiffs' demand, and the plaintiffs continued to claim a larger sum as due, motion to have the money paid out of court to the plaintiffs was refused. *The Annie Childs*, 1 Lush. Adm. Rep. 509.

The master of a ship does not forfeit his wages by occasional drunkenness; nor by mere errors of judgment in the performance of his duty. *The Atlantic*, 1 Lush. Adm. Rep. 566.

## (T) COLLISION AND DAMAGE.

The owners of a ship causing a collision, which resulted in the total loss of the other ship and the death of a passenger, satisfied out of court the claims of the relatives of the passenger who was killed, and filed their bill to limit their liability, in respect of the other damage, to the value of the ship and freight, under the 504th section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104. There being no claim in respect of loss of life or personal injury, it was held, that the proviso in that section, which fixes such value at not less than 15*l.* per registered ton, did not apply, and the owners were only liable for the value of the ship and freight. *Nixon* v. *Roberts*, 30 Law J. Rep. (N.S.) Chanc. 844; 1 Jo. & H. 739.

The owners of a ship causing a collision are liable to pay interest upon the sum payable as damages, although such damages may amount to the maximum sum limited by the Merchant Shipping Amendment Act, 1862, section 54. And if the ship injured is in ballast at the time of the accident, such interest will be calculated from the date of the collision. *Straker* v. *Hartland*, 34 Law J. Rep. (N.S.) Chanc. 122; 2 Hem. & M. 570.

The enactment of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63. s. 54), fixing the limit of liability of the owner of a ship "in respect of loss of life or personal injury caused by the improper navigation of his ship to persons carried in another ship," extends to the crew of such other ship as well as to other persons carried thereby, and such liability consequently is measured by and extends to the sum of 15*l.* per ton of the wrong-doing ship's tonnage. *Glaholm* v. *Barker*, 34 Law J. Rep. (N.S.) Chanc. 533; 34 Beav. 305—affirmed, on appeal, 35 Law J. Rep. (N.S.) Chanc. 259.

The owners of cargo on board a vessel proceeded against are liable only for the net freight, for which they would be liable to the shipowner. Costs of payment of freight into court by owners of cargo may be deducted from the amount paid. So also may expenses incurred by non-fulfilment and payments stipulated by charter-party to be paid to the owners of freight as commission. *The Leo*, 31 Law J. Rep. (N.S.) Prob. M. & A. 78.

In the Court of Admiralty, where there has been misconduct on the part of both vessels in a collision, the sum total of the joint damage is payable by the two in equal shares. There is an exception to this rule where a want of proper look-out on the part of one of the vessels occasioned the accident. *The Milan S.S.*, (942), 31 Law J. Rep. (N.S.) Prob. M. & A. 105.

Section 298. of the Merchant Shipping Act disentitles the owner of a ship guilty of a breach of the Admiralty regulations from recovering in the Court of Admiralty. Ibid.

Upon the question arising, whether the owners of cargo lost by the collision is *in eadem conditione* with the owner of the vessel as to the right to recover, the Court held, that though both ships are to blame, the owner of cargo not having any control over the blameworthy master and mariners of the vessel upon which his goods were carried, is not to be considered as having any share in the *delictum*, so as to be thereby disentitled to recover either under the old law of the Admiralty or under section 298. of the Merchant Shipping Act. He has a claim, therefore, upon the other vessel for the one-half of his loss. Ibid.

In considering what is a justifiable rate of speed reference must be had to the state of the atmosphere, to the locality, and the sea-room. Ibid.

Water running between two lands belonging to the same county, as in the case of the Solent, may still be considered as the high seas. Foreign vessels sailing therein are not, therefore, within the Merchant Shipping Act. *The Eclipse* and *The Saxonia* (*S.*) (P.C.), 31 Law J. Rep. (N.S.) Prob. M. & A. 201.

*Semble*—Nor are they necessarily so though within a tidal river. Ibid.

By all law and the rules of the sea, a vessel which has the wind free is to give way to a vessel which is close-hauled, and a vessel under steam is always to be considered as going free. Ibid.

Every vessel, whether close-hauled or at anchor, is bound by the general rules of the sea to shew a light. Ibid.

The Court has jurisdiction to entertain a suit brought against a steam-tug by the vessel in tow for damage done to such vessel by collision caused by the conduct of the tug. *The Night Watch*, 32 Law J. Rep. (N.S.) Prob. M. & A. 47.

Section 504. of the Merchant Shipping Act, which limits the liability of an owner to the value of ship and freight, does not apply in a case of collision on the high seas between a British and a foreign vessel where the foreigner is defendant and found to blame: so also where both vessels are foreign-owned. *The Wild Ranger* (1083), 32 Law J. Rep. (N.S.) Prob. M. & A. 49.

By the ancient law of the sea there is no limitation to the liability of a wrong-doer. Ibid.

The Court has not, in the absence of the authority of an act of parliament, any power to entertain a question of international reciprocity arising from identity of law. Ibid.

Where a collision occurred between two British vessels in Dutch waters, the Court held that it had jurisdiction. The question being novel, the Court gave no costs. *The Diana*, 32 Law J. Rep. (N.S.) Prob. M. & A. 57.

The words of 3 & 4 Vict. c. 65. s. 6, "claims in the nature of towage," do not include a claim for damage by a towed vessel against her tug for misconduct. The damage referred to by this section and by 24 Vict. c. 10. s. 7. is that which results from a collision. *The Robert Pow*, 32 Law J. Rep. (N.S.) Prob. M. & A. 164.

Held by the Court of Admiralty: In a cause of collision the Court will not require, before the owners of a vessel can claim a limitation of their liability to damage to the amount of ship and freight, that they should acknowledge that their vessel was to blame; and, upon appeal to the Privy Council: that the limitation of liability granted by the 54th section of the Merchant Shipping Act Amendment Act, 1862, applies to a case of collision between a British and a foreign vessel on the high seas. *The Amalia* (P.C.), 32 Law J. Rep. (N.S.) Prob. M. & A. 191.

The express use of the word "foreign" in the application at the head of the 57th and following sections, does not exclude foreign vessels from the operation of the previous sections. Ibid.

Where a sum is awarded as damages for collision the liability to have paid such sum dates from the time at which the loss is considered to have arisen, and the sum awarded bears interest from that date. This liability to interest is not affected by the Limitation Acts. *The Amalia*, 34 Law J. Rep. (N.S.) Prob. M. & A. 21.

When a cause has been referred to and heard by the Registrar and merchants, it is competent to the Judge of the Court, in considering the report thereon, in his discretion, to admit fresh evidence. *H.M.S. Flying Fish* (P.C.), 34 Law J. Rep. (N.S.) Prob. M. & A. 113.

In order to exonerate the party held to blame in a collision from a claim for subsequent damage, it is not necessary to shew that such subsequent damage arose from *gross* nautical ignorance, or *gross* negligence in the party injured; it is enough if it be shewn that there was a want of *ordinary* nautical skill and resolution; the question with regard to such subsequent damage being, by the act of which of the two parties was it really caused. Ibid.

In an action for a collision, the examination of the captain of the plaintiff's ship, taken by the receiver of wrecks under the Merchant Shipping

Act, 17 & 18 Vict. c. 104. s. 448, is not admissible for the defendant, under section 449, for the purpose of proving the fact that the damage to the plaintiff's ship from the collision was on her starboard bow; such fact being offered for the purpose of shewing that the plaintiff's ship was in fault,—the question which ship caused the damage to the other not being a matter which the receiver had power under section 448. to examine into. *Nothard* v. *Pepper*, 11 Com. B. Rep. N.S. 39.

In an action of collision, brought by the owner of a vessel and the crew for their private effects, admissions by the crew as to the circumstances of the collision cannot be pleaded. *The Foyle*, 1 Lush. Adm. Rep. 10.

A vessel proceeding in a cause of collision, and alleging herself to have been in stays at the time of the collision, and therefore helpless, is bound to prove in the first instance that such was the fact. The burden of proof then shifts, and the other side must shew that the collision was occasioned by the vessel proceeding being improperly put in stays, or was an inevitable accident. *The Sea Nymph*, 1 Lush. Adm. Rep. 23.

The pilot in charge of a ship is solely responsible for getting the ship under way in improper circumstances. The catching of the cable on the windlass in running out may be an inevitable accident. *The Peerless*, 1 Lush. Adm. Rep. 30.

A plaintiff may plead new matter in reply, if it is really matter of reply, and not properly a part of the case set up in his libel. A plaintiff, whose vessel has been run down at anchor, may charge negligence generally, and the burden of proof, the collision proved, is thrown upon the defendant to establish his defence. Where, therefore, the plaintiff's vessel was run down at anchor, and the plaintiff pleads that fact, charging negligence generally, and the answer pleads that the collision was not occasioned by negligence, but the violence of the tempest and sea, which prevented the anchors of the defendant's vessel from holding, the plaintiff may reply that the collision was occasioned by the default of the defendant's ground tackle. Where it is intended to charge non-observance of the 296th section of the Merchant Shipping Act, with respect to the rule of port helm, the act done or not done should be specifically pleaded to be in violation of the statute. *Quære*—Whether not porting in time, as distinguished from not porting at all, is a non-observance of the statute. *The Bothnia*, 1 Lush. Adm. Rep. 52.

In a cause of collision the plaintiff is only entitled to recover *secundum allegata et probata*. The case of the *North American* confirmed and extended. *The Ann*, 1 Lush. Adm. Rep. 55.

Where the plaintiff pleaded that the collision was wholly caused by the defendant's vessel starboarding, and the Court below dismissed the action upon the ground that the plaintiff's vessel was solely to blame, the Court of Appeal holding that the plaintiff was, on the true state of facts, entitled to recover, held nevertheless that he was barred from recovering, because the starboarding of the defendant's vessel was not proved, and therefore affirmed the judgment of the Court below, without costs. Ibid.

The cargo laden on board a vessel at the time of collision is in no case liable to be sued for the damage. Cargo arrested for freight will be released upon payment of the freight into court with an affidavit of value. The Admiralty Court has no power of levying execution upon a defendant's goods and chattels to satisfy a judgment. Where cargo is improperly detained under arrest, the owner is entitled to costs and damages. A cause of collision was entered against a foreign ship, freight and cargo. The for ship was arrested, and the cargo was arrested the freight. The ship was released upon an appearance and bail being given for the owners of the ship. The Court pronounced for the damage. An appearance was thereupon entered for the freight, and the freight paid into court, and the Surrogate was prayed to release the cargo. The value of ship and freight being insufficient to satisfy the damage, the plaintiff prayed the Surrogate not to release the cargo. The Surrogate referred the question to the Judge:—Held, that the cargo, even if the property of the owners of the ship, was not liable for the damage, and must be released with costs and damages for the improper detention of it. *The Victor*, 1 Lush. Adm. Rep. 72.

Collision between two foreign vessels A and B; total loss of A; B arrested in an action by the owner of A; cross-action by the owners of B, but no appearance. The Court refused to stay proceedings in the action against B until an appearance was given in the cross-action. Subsequently, an appearance being entered, but no bail given, and judgment in the original action pronouncing both vessels to blame, the Court refused to order any damages to be paid to the plaintiffs until decree given in the cross-action; but ordered the amount reported due by the Registrar to be paid into the registry. In the cross-action fresh evidence was admitted, and on the application of one party the whole of the evidence in the original action. The amount of damages being paid by order of the Court into the registry, the party finally adjudged to receive the same was not allowed interest from the date of such payment into court:—*Semble*, the Court on application would have ordered the money to have been invested. *The North American; The Tecla Carmen*, 1 Lush. Adm. Rep. 79.

Where the plaintiff charges two separate collisions, whereby his vessel, being at anchor, was driven on the rocks, and sustained great damage, and the first collision was such, that the plaintiff's vessel might, and probably would, have driven on the rocks if no second collision had happened, he will be entitled to recover, on proving the first collision only; as the rule that a plaintiff must recover *secundum allegata et probata* is thereby satisfied. The *North American* and *Ann* distinguished. *The Despatch*, 1 Lush. Adm. Rep. 98.

A vessel meeting another, within the meaning of the 296th section of the Merchant Shipping Act, 1854, is not, if close-hauled on the starboard tack, bound by the rule of that section to port her helm. *The Halcyon*, 1 Lush. Adm. Rep. 100.

The ordinary rule in causes of collision, that the plaintiff shall pay the costs of the reference to the Registrar and merchants, if their report disallows more than one-third of his claim, is not to be relaxed, even if the plaintiff fails in substantiating his entire claim upon a question of law only. *The Empress Eugénie*, 1 Lush. Adm. Rep. 138.

Where the ship of the plaintiff carrying cargo

was sunk in a collision, and afterwards raised and repaired, and the cost of repairs exceeded the original value of the ship, which might have been ascertained before the repairs were commenced,—Held, by the Registrar, that the plaintiff could not recover upon a principle of partial loss, but that the measure of damages was the value of the ship before the collision, with interest from the date when the cargo would in ordinary course have been delivered, together with the costs of raising, and the cost of placing the ship in dock for inspection,—less the value of the wreck as raised. Ibid.

Formal objections to jurisdiction not allowed to be taken after an absolute appearance given. *Quære*—Whether in suing a foreign ship, under section 527. of 17 & 18 Vict. c. 104, the arrest and action may be according to the ordinary process of the Court. *The Bilbao*, 1 Lush. Adm. Rep. 149.

Damage done by a foreign vessel to a barge in the river Thames; arrest according to ordinary process; absolute appearance and release of vessel thereon; petition filed. Plea, that the barge was not a sea-going vessel within the meaning of 3 & 4 Vict. c. 65. s. 6, and that the Court had no jurisdiction:—Held, that the Court had jurisdiction by section 527. of 17 & 18 Vict. c. 104, and that after absolute appearance, the defendants could not object that the arrest had not strictly followed the course prescribed in that section. Ibid.

Where the master and crew are bound by statute to obey the directions of a harbour master in going into dock, and a collision is occasioned by the ship being conducted according to the harbour master's directions, the ship is not liable in the Admiralty Court. Ibid.

A British ship in tow of a steam-tug meeting a foreign ship in the night-time is bound by British law. *The Cleadon*, 1 Lush. Adm. Rep. 158.

The vessel towed and the vessel towing are to be considered as one long steamer, for the conduct of which the vessel towed is responsible, and a vessel being so towed at night is bound to avoid other vessels. Ibid.

A foreign vessel, close-hauled on the starboard tack, approaching another vessel at night, is bound to keep her course, and will be held to blame for porting her helm, if porting was an injudicious manœuvre, and but for such manœuvre the collision would not have happened. Ibid.

In a cause for damage to goods,—Held, that the omission by the master of certain particulars in his protest is not a breach of duty or contract on the part of the shipowner or his servants so as to give the owner of the damaged goods a right of action, even if such omission had been made from improper motives. *The Santa Anna*, 32 Law J. Rep. (N.S.) Prob. M. & A. 198.

In a cause of collision the pleadings should be confined to the merits of the collision. Special damages, as reward paid to salvors for services rendered necessary by the commission, are not to be pleaded. *The George Arkle*, 1 Lush. Adm. Rep. 222.

In a contract of towage, each party contracts to use proper skill and diligence, and for damages solely occasioned by the negligent act of his servant is responsible to the other party. *Priestley* v. *Fowler* (3 Mee. & W. 5) distinguished. *The Julia*, 1 Lush. Adm. Rep. 224.

*Semble*—A steam-tug, under an engagement to tow a ship when required, is not, if the circumstances are perilous to her own safety, bound to take the ship in tow upon orders from the master; and the owner of the tug, so taking the ship in tow, cannot recover damages for a collision thereby occasioned. But if misconduct on the part of the ship, combined with the perilous circumstances, produces a collision, held, that the owner of the steam-tug is entitled to recover. Ibid.

The Court of Appeal will not reverse a judgment upon nautical questions determined by the Court of Admiralty, except on the most conclusive reasons. Ibid.

In a cause of collision, a defendant relying upon the statutory exemption given to the owner of the ship to blame, where the collision is "occasioned by the default of the pilot" employed by compulsion of law, is bound to prove his case in the strictest way. *The Schwalbe*, 1 Lush. Adm. Rep. 239.

The defendants' vessel was charged with improperly starboarding. The defendants denied the starboarding, and gave evidence that the helm was ported only, and by the order of the pilot; they also pleaded the statutory exemption. The Court found that the helm was improperly starboarded, and the collision thereby occasioned:—Held, that the defendants not having proved any order by the pilot to starboard had failed to establish their exemption under the statute. Ibid.

The plaintiff in a cause of collision is bound to plead facts from which the law will infer that the collision was occasioned by the default of the defendant, but not to plead the legal inference. The defendant is not bound to do more in plea than deny that the collision was occasioned by the default of his vessel or of his servants. The defendant, though pleading a particular fact as the cause of the collision, is not bound to prove it; and if he fails in so doing he is not thereby concluded; but the plaintiff must establish his case according to his pleading and evidence. The *North American* and the *Ann* distinguished. *The East Lothian*, 1 Lush. Adm. Rep. 241.

In a cause of collision, where the case is to be heard on *viva voce* evidence only, the preliminary acts are to be exchanged before the evidence is taken. The ship of the defendant is liable for the act of a contractor in sole charge of the ship. *The Ruby Queen*, 1 Lush. Adm. Rep. 266.

The yacht of the defendant was entrusted for reward to yachting agents for sale, and, by their servants, moored in the winter season without striking her top-gear, whereby, on a gale occurring, the yacht drifted and fouled another yacht:—Held, that the defendant's yacht was liable in a proceeding *in rem* in the Court of Admiralty. Ibid.

The statutory rule of port helm, given by the 296th section of the Merchant Shipping Act, 1854, applies only to a case when vessels meet in opposite directions end on, or nearly so, when the observance of the rule would make the vessels diverge, so as to pass port side to port side. *The Arthur Gordon* and *The Independence* (P.C.), 1 Lush. Adm. Rep. 270.

A steamer towing has not the same obligation to give way to sailing vessels as a steamer not towing. Ibid.

A vessel close-hauled on the port-tack, in the open

sea, and in daytime, and a steamer towing a large ship, were standing so as to cross each other's bows, the steamer being on the lee-beam of the sailing-vessel:—Held, that the sailing-vessel was to blame for holding her reach, and that the steamer was likewise to blame for taking no measure in time to avoid collision. Ibid.

The master of a vessel agreed with a tug for towage from Sea Reach in the Thames to a London wharf, and agreed to pay 6*l.* and give an order upon the owner of the wharf for the amount usually allowed by him (under the name of towage) as a premium to vessels of the kind coming to his wharf. The service was performed by the tug, and the master paid the 6*l.*, but refused to give the order on the owner of the wharf. The amount actually paid by the owner of the wharf according to his practice was proved; and it was also proved that if an order, signed by the master of the vessel towed, was presented by the master of the tug, the money would be (as a matter of practice) paid to him:—Held, that the master of the vessel had no authority to agree to transfer to the master of the tug an uncertain sum payable to the owners of the vessel; and that the Court had no authority to enforce such a contract or give damages for the breach of it. *The Martha*, 1 Lush. Adm. Rep. 314.

A British vessel losing her Admiralty lights by tempestuous weather is bound to obtain new lights on the first opportunity. *The Aurora; The Robert Ingham*, 1 Lush. Adm. Rep. 327.

A and B British vessels: A alleged in petition that the collision was *solely* occasioned by vessel B not exhibiting the regulation lights; the Court found that the collision was partly so occasioned, and partly by vessel A not keeping a due look-out; and that the rule of port helm imposed by 17 & 18 Vict. c. 104. s. 296. did not apply. The cross-action being determined at the same time,—Held, that B was barred by 17 & 18 Vict. c. 104. s. 298. from recovering anything, but that A was entitled to recover half damages by the maritime rule. Ibid.

A vessel driven from her anchors by a gale of wind, and setting sail to get out to sea, is, even if wholly unmanageable, "under way," within the meaning of the Admiralty Regulation (1858), and is bound to exhibit coloured lights. Omission, under such circumstances, to exhibit the coloured lights, is negligence, notwithstanding the ship is in great difficulty and danger, and the ship is liable for any collision occasioned thereby. *The George Arkle* (P.C.), 1 Lush. Adm. Rep. 382.

A fishing vessel is not bound to carry coloured lights. A fishing vessel is bound to shew a light in reasonable time to an approaching vessel; but this obligation is not statutory, but an obligation of maritime law. *The Olivia*, 1 Lush. Adm. Rep. 497.

The Admiralty Regulations, dated 1st May, 1852, are wholly revoked by the Regulations dated 24th February, 1858; and the Regulation dated the 26th October, 1858, exempts fishing vessels from the obligation to carry the coloured lights prescribed by the Regulations of February, 1858. Ibid.

By the 295th section of the Merchant Shipping Act, 1854, it was provided, that "the Admiralty might make" certain regulations, such regulations to be published in the *London Gazette*, and production of the *Gazette* to be "sufficient evidence of the due making and purport thereof": and by the 2nd section, "the Admiralty" was defined to mean "the Lord High Admiral, or the Commissioners for executing his office":—Held, that a notice published in the *Gazette*, purporting to be given by the Lords Commissioners of the Admiralty, but signed only "by command of their Lordships, W. G. Romaine," was, by production of the *Gazette*, proved to be duly made by the Admiralty. Ibid.

By the 7th section of the Admiralty Court Act, 1861, the High Court of Admiralty has jurisdiction over a cause instituted for a collision occurring between foreign vessels in foreign waters. *The Courier*, 1 Lush. Adm. Rep. 541.

The Court of Admiralty has original jurisdiction over torts committed on the high seas, and therefore over a collision on the high seas where the vessel doing the damage was a keel, or vessel without masts, usually propelled by a pole. *The Sarah*, 1 Lush. Adm. Rep. 549.

Where in a cause of collision, after petition and answer filed, the crew of the plaintiff's ship are upon application examined immediately in open court, the Court will order the preliminary acts to be exchanged. *The Two Friends*, 1 Lush. Adm. Rep. 552.

### (U) SALVAGE.

In exercising the jurisdiction given by the Merchant Shipping Act, 1854, to apportion salvage, the Court will only be bound by clear proof of an equitable agreement, or of an equitable and sufficient tender. An agreement between salvors and persons of contrary interest held void. The Court regards the claims of the owners of the salving vessel more liberally since the introduction of steam-power. *The Enchantress—Farr, Master*, 30 Law J. Rep. (N.S.) Prob. M. & A. 15.

The Court of Admiralty has no original jurisdiction to award compensation to be given by the owners of a foreign vessel, for services rendered in the saving of life only on the high seas, nor has any such jurisdiction been given by statute. The fact that the vessel has been brought into an English port by other salvors, does not confer on the life-salvors a right to proceed *in rem*. *The Johannes*, 30 Law J. Rep. (N.S.) Prob. M. & A. 91.

Where a vessel was picked up with four to five feet water in the hold, her compasses and the seamen's clothes having been taken off, the Court pronounced against her as a derelict, though it did not appear that her crew had left her *sine spe recuperandi*. *The Gertrude*, 30 Law J. Rep. (N.S.) Prob. M. & A. 130.

To oust the Court of its municipal jurisdiction, it lies upon the defendant to prove that the vessel was at a distance from shore to which the powers of the Court do not extend. Ibid.

The claim of an owner to a share in the salvage-reward, beyond compensation for damage incurred by his vessel, is of a feeble character; and he has no claim to the custody of such money. *The Princess Helena*, 30 Law J. Rep. (N.S.) Prob. M. & A. 137.

Where an owner thinks that a proper share of the salvage reward has not been paid to him, his proper course is to bring the share so paid to him into court, to pray for a monition to the master to do the same, and to apply for an order of distribution. Ibid.

On appeal from a report of the Registrar and merchants, no objection can be made before the Court to an item which was not questioned before them. Ibid.

Where passengers remained on board a vessel that had received injury, but was in no immediate danger, and assisted at pumping her until her arrival in port, the Court held that this was not such service as to entitle them to salvage reward. *The Vrede—Ter Bruggen, Master*, 30 Law J. Rep. (N.S.) Prob. M. & A. 209.

Where there is a common danger it is incumbent on all to assist. To entitle passengers to reward for civil salvage, there must be a voluntary remaining on board, accompanied with extraordinary exertions on behalf of the ship. Ibid.

Salvage service may be performed by the seamen of the ship salved, when an abandonment of her has put an end to their original contract. Ibid.

Circumstances may change a stipulated towage into a salvage service, the right to salvage superseding the towage contract. Such salvage can never be claimed when the danger of the vessel salved is attributable in any way to the default of the tug. *The Storm King and the United Kingdom* v. *the Minnehaha* (P.C.), 30 Law J. Rep. (N.S.) Prob. M. & A. 211.

Where a derelict was found at sea by salvors, who were incapable of performing the attempted service, but remained by the wreck until a second set of salvors came up, who dispossessed these first and brought it into port, the Court allotted to the first set a sufficient sum to cover the expenses to which they had been put. *The Magdalen (a derelict)*, 31 Law J. Rep. (N.S.) Prob. M. & A. 22.

Where the wreck had been greatly damaged by the erroneous conduct of the salvors in their treatment of it, the Court awarded them a smaller sum, deducting from the reward which it would have otherwise held that they had earned, a certain amount, as compensation for the additional damage thus done to the property, and the Court proportioned the amount that it deducted to the want of skill shewn. Ibid.

In a salvage suit, the right to begin does not shift with the burden of proof, but is, almost universally, with the claimant. Ibid.

There can be no claim to salvage where the efforts to salve have not been attended by success. *The Edward Hawkins*, 31 Law J. Rep. (N.S.) Prob. M. & A. 46.

A seaman's share of salvage cannot be recovered by action from the owner or captain of his vessel, although the salvage claimed shall have been paid by the owners of the vessel saved to the owner of the salvor. *Atkinson* v. *Woodall*, 31 Law J. Rep. (N.S.) M.C. 174; 1 Hurls. & C. 170.

All questions relating to salvage, both as regards the amount due in respect of services rendered and the apportionment of such amount among the different classes of salvors, are within the jurisdiction of the Court of Admiralty, subject to the provisions of the Merchant Shipping Act, 1854. Ibid.

Where the sum claimed as salvage is under 200*l.*, and any dispute arises thereon, such dispute must be referred to two Justices of the Peace, as provided by sections 460–3. of that statute. Ibid.

An offer to pay a sum less than the sum claimed, if not accepted, is no evidence against a defendant in an action for the larger sum, on a count for money had and received to the plaintiff's use, or on an account stated. Ibid.

If there be no salvage, there can be no reward; but if a salvage is finally effected, those who meritoriously contributed to that result, although the part they took, standing by itself, would not in fact have produced it, are entitled to share in the reward. *The Atlas* (P.C.), 31 Law J. Rep. (N.S.) Prob. M. & A. 210.

No misconduct short of that which is wilful and may be considered criminal will work a forfeiture of salvage reward. Ibid.

Such misconduct must be proved, as any other criminal charge, beyond reasonable doubt. Unskilfulness on the part of the salvor must be atoned for by a diminished amount of salvage reward. Ibid.

*Quære*—As to the liability of salvors for the misconduct of an agent whom they are compelled to employ. Ibid.

In estimating salvage service, the Court will be guided above all by the consideration of whether there was danger to human life. *The Thomas Fielden*, 32 Law J. Rep. (N.S.) Prob. M. & A. 61.

The words "sum in dispute" in the Merchant Shipping Act, 1854, section 464, refer to the sum originally claimed, and not to the sum awarded and appealed against. *The Andrew Wilson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 104.

Where an arrest was made without notice of claim and for a sum disproportionate to the value of the vessel and the services rendered, the Court awarded damages. *The Eléonore*, 33 Law J. Rep. (N.S.) Prob. M. & A. 19.

Where the Court has no jurisdiction the defendant is not prejudiced in his claim for damages by having appeared absolutely. Ibid.

A reference to the Registrar will not be ordered when the Court can itself satisfactorily dispose of the question. Ibid.

Though the Court of Admiralty has no jurisdiction in salvage suits where the value of the property salved is under 1,000*l.*, it has the power to condemn in costs and damages in cases of a wrongful arrest. *The Kate*, 33 Law J. Rep. (N.S.) Prob. M. & A. 122.

The Court will not decree damages, unless there has been *crassa negligentia* in arresting. Ibid.

The not obtaining before arrest a valuation from the Receiver of Wrecks of the property salved, held not to amount to *crassa negligentia* where the value nearly approached 1,000*l.* Ibid.

Where no special risk has been incurred by the salvors, salvage reward is allotted upon a calculation of a fair remuneration for time and trouble to the owners of the salving vessel and to each hand engaged. *The Otto Hermann; The Albert; The Ella Constance*, 33 Law J. Rep. (N.S.) Prob. M. & A. 189.

Where there is danger to the salvors, the risk of life receives the greatest remuneration. A lower scale of remuneration is given where the case of the vessel salved is not one of present danger, but a case of urgency. The lowest where, a vessel being disabled from proceeding, as in the case of a steam-vessel in want of fuel, there is a possible contingency of serious consequences. In all cases the value of the vessel salving is regarded, and to whatever

remuneration is given must be added a sum to meet any damage she sustains. Ibid.

When a damaged vessel hoists a signal the presumption is that it is a signal of distress. The capability of steamers to perform services with greater rapidity and certainty entitles them, as salvors, to a higher scale of reward. Ibid.

By the salvage clauses of the Merchant Shipping Act, 1854, life became a subject-matter for salvage, to be rewarded in the same manner, and from the same sources, as other salvage services before the statute. The words "persons belonging to the ship" apply to passengers as well as crew. *The Fusilier*, 34 Law J. Rep. (N.S.) Prob. M. & A. 25.

The remuneration of service in life-salvage does not rest upon a consideration of any direct benefit conferred upon those upon whom there falls the liability to pay, but rather upon the interest which the community have in encouraging the efforts of salvors; and upon this ground the owners of cargo on board a salved vessel are liable to a share of the payment of life-salvage for the rescue of those on board. Ibid.

If in an action for salvage services rendered in the United Kingdom a tender under 200*l.*, "with such costs (if any) as may be due by law" for the services rendered, is accepted, the Court will not certify for costs under the 460th section of the Merchant Shipping Act, except for special cause shewn. *The John*, 1 Lush. Adm. Rep. 11.

Removal of the ship salved from Yarmouth to London without *mala fides*, will not, if the salvors had opportunity at Yarmouth to have the dispute determined by the local Justices, suffice to induce the Court to certify. Ibid.

The Court will not entertain an appeal from the salvage award of Justices upon the mere question of amount, unless plainly exorbitant. *The Cuba*, 1 Lush. Adm. Rep. 14.

Where the salvors' vessel is injured or lost whilst engaged in the salvage service, the presumption is that the injury or loss was caused by the necessities of the service, and the burden of proof is on the defendants alleging that the loss was caused by the default of the salvors. *The Thomas Blyth*, 1 Lush. Adm. Rep. 16.

Amount and distribution of salvage. *The Saint Nicholas*, 1 Lush. Adm. Rep. 29.

Where a ship is in distress and accepts the services of strange hands, the services are in the nature of salvage, although the work done may be of no great difficulty or importance. *The Bomarsund*, 1 Lush. Adm. Rep. 77.

Salvors having brought a vessel in distress to a situation of safety from ordinary peril but not to anchor, and having given up the charge to a licensed pilot, are not prejudiced as to their claim by injury subsequently happening to the ship from the negligence of such pilot. Ibid.

A liberal reward is to be given for the saving of human life, consideration being had to the degree of peril to which the salvors and the persons saved are exposed. *The Eastern Monarch*, 1 Lush. Adm. Rep. 81.

Where in a cause of salvage an offer out of Court has been made by the defendants, and rejected by the salvors, and the salvors subsequently accept a smaller sum tendered by act of Court, the salvors are entitled to their costs up to the date of the formal tender, unless the offer out of court was made in gold or bank notes. *Quære*—Whether an express offer to pay costs due by law is necessary to a complete tender either in or out of court. *The Sovereign*, 1 Lush. Adm. Rep. 85.

Salvors, induced by an ambiguous signal to put off from the shore to the assistance of a ship, are not entitled to salvage reward, if the actual condition of the ship shews that the signal was for a pilot only. Action in such case dismissed, but without costs. *The Little Joe*, 1 Lush. Adm. Rep. 88.

*Semble*—Mere giving of information concerning the locality, even if needed, is no salvage service. Ibid.

Where the master of a vessel refuses to go on shore, and refer to the local Justices the amount of salvage due for services rendered in the United Kingdom, and removes the vessel from the local jurisdiction, and an action is thereon brought in the Court of Admiralty, the Court, awarding only 50*l.*, will certify for the salvors' costs under section 460. of the Merchant Shipping Act, 1854. *The Alpha*, 1 Lush. Adm. Rep. 89.

Efforts to give assistance under an engagement to a ship in distress will, although the ship receives no benefit from them, be rewarded as being in the nature of salvage services, if the ship is otherwise saved. *The Undaunted*, 1 Lush. Adm. Rep. 90.

A ship parted from both anchors at the North Foreland, and thereupon engaged a steamer to go on shore, and bring off an anchor and chain. The steamer went to Ramsgate, and, as the best method of executing the service, got the anchor and chain on board two luggers; and the three vessels were engaged for three days looking for the ship in distress. The steamer at length fell in with the ship, but no longer in a condition of imminent distress, and then towed her to Gravesend. The luggers did not arrive with the anchor and chain until the ship had arrived at Gravesend, when the master of the ship refused to accept them:—Held, that the original order to the steamer included a direction to take all necessary measures to carry out the order, and that the steamer and the luggers were entitled to salvage remuneration for the whole of their efforts. Ibid.

Salvors are entitled to salvage upon a value calculated at the place where their services terminated. The value of freight salved is to be reckoned *pro rata itineris peracti*, and the other equities of the case. A ship bound from Honduras to England was disabled on the voyage, and towed into Bermuda, where expenses nearly equal to the whole freight were incurred to refit; the voyage home was afterwards completed and the cargo delivered. The Court allowed salvage upon one-half of the total gross freight. *The Norma*, 1 Lush. Adm. Rep. 124.

Towage of a ship near the land in unsettled weather, if her ground tackle is disabled, is in the nature of salvage. *The Albion*, 1 Lush. Adm. Rep. 282.

A steam-tug was engaged to tow a ship from the North Foreland to Gravesend, and towed her to the Prince's Channel, where both vessels anchored to stop tide. In the night a gale of wind arose, and blew the ship to sea, with loss of anchors and damage to hawsepipes, bowplanking and windlass. The tug

was forced to run to Ramsgate, and the next day, the weather having moderated, put to sea, and after considerable search discovered the ship, which had received an anchor and chain by a lugger from the shore. The ship was then towed by the steam-tug, another tug assisting, to the port of London:—Held, that the services of both tugs were in the nature of salvage, and that the first tug was entitled to salvage remuneration for her labour and loss of employment whilst seeking the ship. Ibid.

If, in the performance of a contract to tow, an unforeseen and extraordinary peril arise to the vessel towed, the steam-tug is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance, and thereupon becomes entitled to salvage reward. *The Saratoga*, 1 Lush. Adm. Rep. 318.

A steam-tug under contract to tow into dock was lashed alongside a vessel; in rounding to enter the dock basin the tide forced the vessel and the steam-tug close to the landing-stage, the steam-tug next to the stage: the pilot of the vessel hailed the tug to hold on and go ahead, which the tug did, but was forced against the stage and injured:—Held, that the steam-tug was bound to endeavour to save the vessel from the impending peril, especially upon the order of the pilot, and so doing was entitled to salvage reward, including re-payment of all damages and losses thereby incurred. Ibid.

Where a part-owner of the salvage vessel has an interest in the vessel salved, his co-owners and the master and crew of the salving vessel may sue for salvage; the sum to which they are entitled being computed by deducting, from the value of the entire service, the share which would have been due to such part-owner, if he could have joined as plaintiff. *The Caroline*, 1 Lush. Adm. Rep. 334.

A contract to tow is not a warranty to tow to destination, but an engagement to use best endeavours and competent skill for that purpose, with a vessel properly equipped. If performance of the stipulated service is rendered impossible by a *vis major*, the obligation is terminated. If unforeseen danger unavoidable by the steam-tug supervenes to the ship in tow, as by breaking of the hawser, the steam-tug is bound to complete the service, if still possible; and the steam-tug, if thereby incurring risk and performing duties not within the scope of the original engagement, is entitled to salvage reward. The conversion of towage into salvage depends on the circumstances of each case. *The Minnehaha* (P.C.), 1 Lush. Adm. Rep. 335.

A tug under contract to tow, by misconduct or negligence, or want of reasonable equipments, occasioning or materially contributing to occasion danger to the ship in tow, is not entitled to salvage reward for rescuing the ship from such danger. A steam-tug engaged in towing or performing salvage services is generally bound to follow the directions of the pilot in charge of the ship. Under a simple traverse of salvage services, wilful misconduct of salvors cannot, but negligence may, be proved. The Privy Council awarding a sum less than 200*l.* for salvage services within the United Kingdom, will give costs, if the case was a fit one to be tried in a superior Court. Ibid.

A steamer engaged to tow is bound, notwithstanding a merely temporary accident interrupting the service and endangering the vessel towed, to complete the stipulated service with all reasonable skill and promptitude, and for so doing the steamer, if incurring no risk, is not entitled to salvage reward. Express demand or express acceptance of salvage services actually performed is not necessary to entitle to salvage reward; but for services rendered without demand or acceptance, and indirectly only, no salvage is due. *The Annapolis; The Golden Light; The H. M. Hayes* (P.C.), 1 Lush. Adm. Rep. 355.

A steamer was engaged to tow a vessel A; in performance of the service, whilst in the river Mersey, A came in collision with another vessel, and the steamer for her own safety was obliged to let go A; A drifted with the tide upon a vessel B, and A and B then drove together; the steamer then came up and towed A to safety, and then returned and towed B (at her request), B being then in collision with a vessel C:—Held, that the steamer was not entitled to salvage from A, because of the contract to tow, nor from C, because the services were rendered too indirectly, but was entitled to salvage of 100*l.* from B, which vessel was also required to pay costs, the case being fit to be tried in a superior Court. Ibid.

*Quære*—If the steamer had been guilty of negligence in fulfilling her contract to tow A, and thereby had occasioned the danger to B and C, from which the steamer subsequently relieved them, could the owners of B and C take advantage of the breach of contract to which they were strangers, to repel the steamer's claim for salvage? Ibid.

After release of salved property by the receiver of wreck upon security to his satisfaction, salvors have no right to detain the property, or to arrest it by warrant of the Admiralty Court: release, in such case, granted, with costs, against the salvors. *The Lady Katherine Barham*, 1 Lush. Adm. Rep. 404.

On the wreck of a ship the seamen are bound by their contract to do their utmost to save ship and cargo; but the seamen's contract of service may be terminated either by final abandonment of the ship or by discharge given by the master. An abandonment of a ship, which is relied upon as operating a dissolution of the seamen's contract, must be clearly proved. *The Warrior*, 1 Lush. Adm. Rep. 476.

If, upon a ship being wrecked, the master, improperly disregarding the interests of the owners of ship and cargo, discharges the seamen, the discharge is nevertheless valid, unless the seamen are proved to have fraudulently accepted their discharge; and subsequent services rendered by them to ship and cargo are salvage services. Ibid.

A ship by accident in calm weather went on a rocky beach in the Canary Islands, beat heavily, and in half an hour filled with water: the master and crew immediately quitted the ship and went on shore. The next day the master discharged all the officers and crew; but it was not proved that they were guilty of fraud in accepting their discharge. On the same day some of the crew, at the suggestion of the mate, returned to the ship, and, working for several days, succeeded in saving part of the ship's stores and a considerable amount of cargo: the ship then broke up:—Held, that there was no abandonment terminating the seamen's contract, but that the contract was terminated by the discharge given by the master; and that, for their subsequent services, the seamen were entitled to salvage reward. Ibid.

A vessel lying in a dock, and in danger of catching fire from the surrounding warehouses which were in flames, was towed thence by a steamer to a place of safety. The Court held, that salvage was payable; and distributed the salvage money between the owners and crew. *The Tees; The Pentucket,* 1 Lush. Adm. Rep. 505.

A ship was being towed by a steam-tug to be docked at high water, when, to make sure of docking that tide, another tug was engaged for the sum of 5*l.* to assist in towing her to the pier head. After the second tug made fast, the ship grounded, but was towed off by the tugs in a few minutes, and was then docked. In a claim for salvage brought on behalf of the second tug, the Court held, that the ship was not in immediate danger, and that the tug had not "incurred any risk or performed any duty which was not within the scope of her original engagement," and accordingly pronounced against the claim with costs. The *Minnehaha* applied. *The Lady Egidia,* 1 Lush. Adm. Rep. 513.

A steam-ship, employed under an agreement to tow to a specified place another vessel which was partially disabled, towed for eleven hours, and was then obliged by a gale of wind to quit the vessel in a position of imminent peril. The vessel was subsequently saved by her own resources, and it was not proved that the towing had contributed to her safety: —Held, that no salvage was earned. *The Edward Hawkins* (P.C.), 1 Lush. Adm. Rep. 515.

Advice may, in certain circumstances, constitute a salvage service. *The Eliza,* 1 Lush. Adm. Rep. 536.

A vessel ran on shore by mistaking her course, and being in danger, hoisted a signal of distress. A pilot's cutter came up, and hailed the vessel to adopt certain measures. The vessel acted accordingly and came off the shore:—Held, that the service so rendered by the cutter was in the nature of salvage. Ibid.

Salvage in the case of a mail steamer losing her screw, and being towed to her destination by another steamer carrying cargo. *The Ellora,* 1 Lush. Adm. Rep. 550.

A Portuguese vessel came on shore at Dungeness. The master, not being able to speak English, accepted the services of the district agent of the Portuguese Vice-Consul, who entered into an agreement for the assistance of a steam-tug, for the sum of 600*l.*, on the condition that 50*l.* should be returned. The steamer got the vessel off, and brought her into a place of safety. On the ship being sued in the Admiralty Court, the owners disputed the agreement, and tendered 250*l.* The Court set aside the agreement as corrupt, and pronounced for the tender. *The Crus. V.,* 1 Lush. Adm. Rep. 583.

### (W) MEASUREMENT OF TONNAGE.

With reference to regulating the mode of ascertaining the register tonnage of steam-ships, the 23rd section of the Merchant Shipping Act (17 & 18 Vict. c. 104.) provides, that in every ship propelled by steam-power an allowance shall be made for the space occupied by the propelling power, and that the amount so allowed shall be deducted from the gross tonnage of the ship; and in directing how such deduction shall be estimated, the section makes a distinction between ships propelled by paddle-wheels and those propelled by screws, and provides that where the tonnage of the space occupied by the boilers and machinery is above a certain per-centage, and there is no agreement between the Commissioners of Customs and the owners, the deduction shall consist of the actual space so occupied, with the addition, in case of paddle-wheels, of one-half, and in case of screws, of three-fourths of the tonnage of such space, and the measurement and use of such space shall be governed by the rules which are afterwards set out in that section. The 29th section empowers the Commissioners, with the sanction of the Board of Trade, to make such modifications and alterations in the tonnage rules as may become necessary, "in order to the more accurate and uniform application thereof, and the effectual carrying out of the principles of admeasurement therein adopted":—Held, that this last section did not authorize the making of rules which, abolishing the distinction between paddle-wheels and screws, in estimating the deduction to be made for space occupied by boilers and machinery, substituted one uniform allowance for all classes of steam-vessels, together with a new mode of ascertaining by admeasurement such allowance. *City of Dublin Steam-packet Co.* v. *Thompson,* 34 Law J. Rep. (N.S.) C.P. 316; 19 Com. B. Rep. N.S. 553.

### (X) ADMIRALTY COURT.

[See STATUTE; *The Ironsides.*]

#### (*a*) *Jurisdiction.*

The Court of Admiralty, although influenced by equitable considerations, is not a Court of equity so as to allow matters foreign to the issue to be introduced in order that complete justice may be done between the parties: it follows rather, in its pleadings and practice, the Courts of common law. *The Don Francisco,* —— *Master,* 31 Law J. Rep. (N.S.) Prob. M. & A. 14.

To give the Court of Admiralty jurisdiction it is not necessary that the cause of action should arise on the high seas. It attaches to every ship, whether within the body of a county or not. *The Malvina,* 31 Law J. Rep. (N.S.) Prob. M. & A. 113.

The breach of duty or contract, which gives the Court of Admiralty jurisdiction, under the Admiralty Court Act, 1861, section 6, must be in respect of goods absolutely to be delivered in England or Wales. *The Kasan,* 32 Law J. Rep. (N.S.) Prob. M. & A. 97.

The limitation of the jurisdiction of the Court of Admiralty, by section 460. of the Merchant Shipping Act, 1854, and section 49. of the Amendment Act, 1862, to cases where the claim is over 200*l.* and the value of the *res* is over 1,000*l.*, refers as to the sum claimed to the claim made antecedently to any proceedings. *The William and John,* 32 Law J. Rep. (N.S.) Prob. M. & A. 102.

An agreement between the parties to go to the superior Court can only be considered by the Court of Admiralty in giving costs in cases where the original claim was adequate to the jurisdiction, but the sum awarded by the Court below 200*l.* Ibid.

A right of action is given to a consignee by section 6. of the Admiralty Court Act, 1861, in all cases in which there is a non-delivery of goods, subject only to the condition of the arrival of the vessel upon which the goods were to be shipped within an

English port. *The Danzig*, 32 Law J. Rep. (N.S.) Prob. M. & A. 164.

The appellants, salvors, having sent in a formal demand in writing for 40*l.*, afterwards, before the Justices, claimed "a sum not exceeding 200*l.*" The Justices found that no salvage was due, and from that decision the salvors appealed:—Held, that the "sum in dispute" was the sum formally demanded, and that as that was under 50*l.* an appeal did not lie. *The Mary Anne*, 34 Law J. Rep. (N.S.) Prob. M. & A. 73.

The High Court of Admiralty of England has concurrent jurisdiction with Vice-Admiralty Courts abroad. The Admiralty Court does not require the same strict proof of colonial (and *semble* of foreign) law as a Court of common law. An Indian act is sufficiently proved by a clerk of the India House producing a copy of the act officially forwarded by the Indian Government to the India House. An order of the Lieutenant-Governor of Bengal held under the circumstances not proved. Proof under the circumstances held sufficient to shew a person to have been a duly licensed pilot of the Port of Calcutta. *The Peerless*, 1 Lush. Adm. Rep. 30.

Substantive objections to the jurisdiction entertained after absolute appearance. The Court will not exercise jurisdiction over a foreign river, if the parties are foreigners, and the subject-matter of the action is of doubtful cognizance by the Court. The Court has jurisdiction over causes of collision, but not over damage generally. *The Ida*, 1 Lush. Adm. Rep. 6.

*Quære*—Whether in an action brought in the Admiralty Court here by a foreign plaintiff against a foreign defendant, in respect of a matter occurring in foreign waters, the defendant is liable for the wilful act of his servant. Ibid.

The master of a Danish schooner lying alongside the quay at the port of Ibraila in the Danube, got on board an English barque lying outside him, and with a view to get the schooner out, wilfully cut the barque adrift from her moorings, whereby she swung to the stream, and capsized a barge which contained part of her cargo belonging to Turkish owners:—Held, that the Turkish owners of the cargo destroyed could not sue the Danish schooner in the Court of Admiralty. Ibid.

### (*b*) *Prize Causes.*

Where a delay of six years had taken place in proceeding against one of Her Majesty's vessels for an illegal detention, the Court refused to entertain an application for a monition, no sufficient reason being given for the delay. It is no excuse that the plaintiff had, through ignorance of the law, made application elsewhere. In the absence of any express statute, the Court of Admiralty will entertain prize causes under its original commission. *The Katherina*, 30 Law J. Rep. (N.S.) Prob. M. & A. 21.

### (*c*) *Priority of Claims.*

Where there are several claims on a ship, and the proceeds are insufficient to pay all, a wages claim is preferred to a bottomry bond previously pronounced for, the bond having been given before the wages were earned. A claim by a person having paid wages to the ship's crew at the request of the master on account of the ship, is in the nature of a wages claim, and entitled to the same priority. A bottomry bond is preferred to a claim of necessaries previously pronounced for, the necessaries having been supplied before the bond. Where one only of several plaintiffs in different causes of necessaries has obtained a decree of the Court, he is entitled to be paid in priority; the others, being *in pari conditione*, share rateably. Costs to be paid with the principal sums in each action. *The William F. Safford*, 1 Lush. Adm. Rep. 69.

### (*d*) *Bail.*

A managing owner of a vessel has power to bind his co-owner, as his agent, to release the vessel from an arrest in the Admiralty Court in a suit for collision, by procuring bail for damages and costs in such suit. Where, therefore, such managing owner has obtained the release of the vessel by procuring such bail, and the suit in the Admiralty Court has terminated against the vessel, the bail is entitled to recover from the other owner the amount which such bail has had to pay under the bail-bond. *Barker* v. *Highley*, 32 Law J. Rep. (N.S.) C.P. 270; 15 Com. B. Rep. N.S. 27.

Where a release had been set aside, in consequence of insufficiency of the bail, and a second warrant granted and arrest made, upon which, though fresh bail had been given, the vessel was still detained under a caveat; it appearing, upon an inquiry before the Registrar, that the second sureties were good and sufficient, the Court released the vessel, with costs and damages against the detainers from the day following the notice of the second bail. *The Corner*, 33 Law J. Rep. (N.S.) Prob. M. & A. 16.

A bail-bond to lead the *supersedeas* of an arrest, signed before a commissioner by the sureties simply, without the addition of their descriptions and addresses, is good. *The Tamarac*, 1 Lush. Adm. Rep. 28.

### (*e*) *Practice, Pleading, and Evidence.*

Where in the pleadings, in the Admiralty Court, an answer does not deny the truth of a preceding allegation, but draws a conclusion from it, it must be taken to admit the truth of the allegation. *The Peerless* v. *the Jason* (P.C.), 30 Law J. Rep. (N.S.) Prob. M. & A. 89.

Where there is no proof that the pilotage was compulsory, no exemption can be claimed by the owners, on the ground of the vessel having been in charge of a pilot. Ibid.

The statutes 24 Hen. 8. c. 12. and 25 Hen. 8. c. 19. do not extend to any causes in which an appeal did not at that time lie to the Pope. The limitation of time to appeal in Admiralty cases does not rest upon legislative enactment. *Lord Stowell's* opinion to the contrary, in *The Sally*, controverted. *The Florence Nightingale* (P.C.), 32 Law J. Rep. (N.S.) Prob. M. & A. 1.

The principle which governs the Court of Admiralty as to pleadings is that they should be such as to indicate, if laid before an examiner, every fact of the case which he ought to elicit. *The Claus Thomesen*, 32 Law J. Rep. (N.S.) Prob. M. & A. 106.

The Court of Admiralty, regarding lighthouse journals as official books kept under competent authority, will admit their contents in evidence upon

their mere production. *The Maria Das Dorias*, 32 Law J. Rep. (N.S.) Prob. M. & A. 163.

In a cause of damage, where the evidence is taken before an examiner, the old rule applies, that if it is intended to rely upon a defence of *inevitable accident*, such defence must be in terms distinctly raised on the pleading. *The E. Z.*, 33 Law J. Rep. (N.S.) Prob. M. & A. 200.

Where several actions are brought against a ship in respect of one collision by different plaintiffs, and several bail bonds given and the actions are consolidated by order of the Court, and the damage pronounced for in the usual course, the Court has the power to open the order of consolidation and disever the actions, but will not do so unless due cause be shewn. But if the cause is remitted from the Court of Appeal, with injunction "to proceed according to the tenor of former acts had and done," the Court has no authority to relax an order made previously to the appeal. *The William Hutt*, 1 Lush. Adm. Rep. 25.

There is no appeal from an interlocutory order, which is a mere grievance; but the cause being appealed on the merits, the party may bring the grievance to the notice of the superior Court; failing to do so, the party is held to adopt the interlocutory order; and upon the cause being remitted, is estopped from moving the Court to rescind such order. Ibid.

An appeal from the High Court of Admiralty asserted after ten, but before fifteen days from the sentence, held to be in time according to the practice in force. *The Ulster* (P.C.), 1 Lush. Adm. Rep. 424.

An offer by a defendant out of court to pay the plaintiff a specific sum and costs, made after judgment pronouncing the defendant liable in general damages, does not prevent his right of appeal. Ibid.

### (*f*) *Costs, and Security for Costs.*

Where the amount due to a master of a vessel for wages, &c. was referred to the Registrar and merchants, and reported by them as less than a third of the amount claimed, the Court refused to mulct the plaintiff in the costs of both parties in the reference, but ordered each to pay his own costs therein. *The Lemuella—Nattrass, Master*, 30 Law J. Rep. (N.S.) Prob. M. & A. 1.

Where in a cause of salvage the defendants had tendered 40*l.*, with costs, but the plaintiffs would not accept such tender, and the Court awarded 60*l.* additional, but did not certify,—Held, that the Court had no power to enforce the payment of costs. *The Comte Nesselrood*, 31 Law J. Rep. (N.S.) Prob. M. & A. 77.

Where in a suit against the owners of a foreign vessel for damage done in collision, the owners had filed a petition for a limitation of their liability to the value of their vessel, the Court, following a precedent in Chancery, ordered them to give security for costs. *The Wild Ranger*, 31 Law J. Rep. (N.S.) Prob. M. & A. 206.

Upon disallowance by the Registrar of a fee to counsel for advising as to the admissibility of a plea, the Court reviewed the Registrar's taxation, and directed the allowance of the fee and the costs attendant thereon. *The Rouen*, 31 Law J. Rep. (N.S.) Prob. M. & A. 132.

Where in a cause of damage in which the vessel of the defendants had been arrested, it appeared upon affidavits that the plaintiffs were mistaken as to the identity of the vessel proceeded against, and the defendants offered to disclose the real wrongdoer, the Court refused to accede to an application to extend the security to be given by the plaintiffs to meet the costs if unsuccessful so as to cover the damages caused by the wrongful arrest. *Semble*—Cases may arise in which the security would be extended. "*The Peri D. H.* 131," 32 Law J. Rep. (N.S.) Prob. M. & A. 46.

Previously to statute 18 & 19 Vict. c. 90. the Court had no power to condemn the Crown in costs. Under that statute, the Crown is only liable in suits to which the Attorney General or the Lord Advocate are parties: not so, therefore, where the suit is by the Queen in her office of Admiralty. *The Leda*, 32 Law J. Rep. (N.S.) Prob. M. & A. 58.

Immunity of a co-plaintiff from costs does not create a like immunity for the remaining co-plaintiffs. In the Admiralty Court each co-plaintiff is severally liable for the whole of the costs. Ibid.

The provisions of the 34th section of the Admiralty Court Act, 1861, relating to the giving of security in certain cases to answer a cross-cause, &c., apply to the case where the plaintiff suing *in rem* is a British subject, resident in the jurisdiction. The section regulates procedure from the date of the act coming into operation, and may be applied to cases then pending. *The Cameo*, 1 Lush. Adm. Rep. 408.

The master of a foreign ship, suing for his wages, must give security for costs. *Franz et Elise*, 1 Lush. Adm. Rep. 377.

## (Y) CONSULAR COURT.

Though as between Christian States a treaty is the ordinary, as it is always the best, proof of the consent and acquiescence of parties, it does not exclude other proof; and such may be found, especially as between a Christian and an Oriental State, in an active assent or a silent acquiescence with full knowledge. *The Laconia* (P.C.), 33 Law J. Rep. (N.S.) Prob. M. & A. 11.

When a State allows another sovereign to exercise a jurisdiction within its territory, the decree of a Court so created is binding upon a suitor submitting himself to such jurisdiction with the consent of his sovereign, whether he be the subject of the sovereign exercising the jurisdiction or of another power. Ibid.

Upon a question of what in a particular case is the proper mode of proceeding in such court, regard must be had to its usage and its manner of treating cognate causes. Ibid.

Where an Admiralty jurisdiction is conferred, it is accompanied by the rule of the Admiralty Court to divide the total damages equally between the parties, where both are held to blame. Ibid.

## (Z) LOCAL MARINE BOARD.

A local marine board, appointed under the Merchant Shipping Act, 1854, to inquire into a charge of alleged misconduct against the master or mate of a vessel, has a discretionary power as to granting summonses for witnesses for the defence. *R. v. Collingridge*, 34 Law J. Rep. (N.S.) Q.B. 9.

It is a proper course for such Court before granting

the summonses, to inquire who the witnesses are, and what they are expected to prove; and to refuse the summons in respect of any witness who can only speak to matters clearly irrelevant. Ibid.

The witnesses summoned for the defence are witnesses of the Court, and their expense is borne not by the defendant but by the public. Ibid.

## SIMONY.

A contract by the owner of the advowson of a rectory, such owner not being the incumbent of the rectory, for the sale of the advowson, with a stipulation for the payment by him to the purchaser of interest on the purchase-money until a vacancy, is not simoniacal, and the specific performance of such a contract was accordingly decreed. *Sweet* v. *Meredith*, 31 Law J. Rep. (N.S.) Chanc. 817; 3 Giff. 610.

## SLANDER.

(A) Defamatory Words.
(B) Privileged Communications.
(C) Special Damage.

### (A) Defamatory Words.

To say of a master mariner in command of a vessel, that during his stay at a port he was frequently drunk, and in that state had to be carried to his boat to reach his vessel, is actionable without special damage. *Irwin* v. *Brandwood*, 33 Law J. Rep. (N.S.) Exch. 257; 2 Hurls & C. 960.

### (B) Privileged Communications.

In an action of slander, laying special damage, it was proved that the plaintiff, a trustee of a charity, asked C (by whom he was employed as bailiff) to obtain signatures to a protest against his being turned out of the trusteeship. C asked the defendant for his signature, which the defendant refused; and on being pressed to give his reasons, said that he would not keep a big rogue like the plaintiff in the trust; and he explained the reasons for his opinion, which were that the plaintiff had left the parish under discreditable circumstances and without settling with his creditors, including the defendant. He also added, that he was surprised that C kept such a man on with his son. The whole of what was said about the plaintiff's character was said with reference to the discussion whether it was proper that he should be continued as a trustee of the charity. In consequence of what the defendant said, C dismissed the plaintiff from his employment. The jury found that the defendant had not acted with malice:—Held, that, assuming the words were *bona fide* spoken with reference to the propriety of taking steps to retain the plaintiff in the trusteeship, as they were pertinent to the question whether he was fit to be trusted or not, they were to be regarded as a privileged communication, and therefore that the defendant was entitled to have the verdict entered for him. *Cowles* v. *Potts*, 34 Law J. Rep. (N.S.) Q.B. 247.

A, suspecting B of stealing meat from his shop, accused her of having done so (no one being by at the time). B thereupon obtained a summons from a police magistrate. A meeting a third person, who was in his shop at the time the supposed larceny was committed, told him that proceedings had been taken against him, and said to him, "You were in the shop; did not you see her take it?"—Held, a privileged communication. A having accused B of stealing meat, a friend of the latter, to whom she had mentioned the fact, called at A's shop, and asked him if he had accused her. He answered, "Yes; and I believe it to be true":—Held, *not* a privileged communication. *Force* v. *Warren*, 15 Com. B. Rep. N.S. 806.

In an action of slander in giving a character of a servant, although the occasion *prima facie* justifies the communication of matter which would otherwise be actionable, yet if, at the close of the plaintiff's case, there is any evidence which would warrant the jury in inferring actual or express malice, the Judge cannot withdraw the case from them. Thus, where the defendant, in answer to an inquiry as to her character, charged the plaintiff with acts of dishonesty, having previously told her, if she would acknowledge having committed them, he would give her a character,—Held, that it was properly left to a jury to say whether the defendant *bona fide* believed the charge to be true, or was influenced by sinister or corrupt motives. 60*l.* damages in an action of slander, where it was proved that, in consequence of the speaking of the words, the plaintiff lost an employment worth 50*l.* a year, besides board, &c.:—Held, not excessive. *Jackson* v. *Hopperton*, 16 Com. B. Rep. N.S. 829.

### (C) Special Damage.

*Quære*—Whether a wife can maintain an action against a third person for words occasioning to her the loss of the *consortium* of her husband. *Lynch* v. *Knight*, 9 H.L. Cas. 577.

Per *Lord Campbell*: She can. Ibid.

If she can, the words must be such that from them the loss of the *consortium* follows as a natural and reasonable consequence. Where therefore a wife (her husband being joined for conformity as a plaintiff) brought an action to recover damages from A for slander uttered by him to her husband, imputing to her that she had been almost seduced by B before her marriage, and that her husband ought not to let B visit at his house, and the ground of special damage alleged was, that in consequence of the slander, the husband forced her to leave his house and return to her father, whereby she lost the *consortium* of her husband,—Held, that the cause of complaint thus set forth would not sustain the action, for that the alleged ground of special damage did not shew (in the conduct of the husband) a natural and reasonable consequence of the slander. *Allsop* v. *Allsop* (5 Hurls. & N. 534) confirmed. Ibid.

Per *Lord Campbell*, though a case is of first impression, if it shows a concurrence of loss and damage arising from the act complained of, the action will be maintainable. Ibid.

The loss by the wife of her maintenance by the husband, occasioned by slander uttered by a third person, may be made the subject of a claim for damages, but such loss cannot be presumed to have so arisen: it must be distinctly averred. *Vicars* v. *Wilcocks* (8 East, 1) observed upon. Ibid.

In such a case, though the act of the husband in sending away his wife was wrongful, because the slander was false, the fact that it was false, cannot be taken advantage of by the slanderer as an objection to the husband appearing on the record as a plaintiff. Ibid.

The special damage necessary to support an action for defamation, when the words spoken are not actionable in themselves, must be the loss of some material temporal advantage. *Roberts* v. *Roberts*, 33 Law J. Rep. (N.S.) Q.B. 249; 5 Best & S. 384.

Where words were spoken imputing unchastity to a woman, and by reason thereof she was excluded from a private society and congregation of a sect of Protestant Dissenters, of which she had been a member, and was prevented from obtaining a certificate without which she could not become a member of any other society of the same nature,—Held, that such a result was not such special damage as would render the words actionable. Ibid.

In an action for slander by husband and wife against husband and wife, the words declared upon, imputing adultery to the female plaintiff, having been addressed to her by the female defendant, in the presence of other persons, but in the absence of the other plaintiff, and repeated without the authority of the female defendant by the female plaintiff to her husband, who in consequence of such words so repeated, refused to continue to cohabit with her,—the loss by the female plaintiff of the *consortium* of her husband was alleged as special damage:—Held, on the authority of *Ward* v. *Weeks*, that the defendants were not liable for the unauthorized repetition by the female plaintiff to her husband. *Parkins* v. *Scott*, 31 Law J. Rep. (N.S.) Exch. 331; 1 Hurls. & C. 153.

*Quære*—Whether the loss of *consortium* is a ground of special damage. Ibid.

*Quære*—Whether the words were such as to justify the husband in depriving his wife of her *consortium*. Ibid.

*Semble*—That there was no duty or obligation on the wife to repeat the words to her husband. Ibid.

## SLAVE TRADE.

The governor of a colony is the person to whom the general management of that colony is entrusted, and therefore is the person entitled to the bounties which are payable in respect of a seizure of slaves, even though he is absent from the colony at the time when the seizure is made. *In the matter of the Bounties payable in respect of the seizure of certain Slaves at Sierra Leone*, 32 Law J. Rep. (N.S.) Prob. M. & A. 189.

## SOVEREIGN POWER.

The sovereign power of every State has the right of issuing notes for payment of money as part of the circulating medium therein. *The Emperor of Austria* v. *Day*, 30 Law J. Rep. (N.S.) Chanc. 690; 3 De Gex, F. & J. 217; 2 Giff. 628.

## SPECIFIC PERFORMANCE.

(A) When enforced.
(B) When refused.
(C) Damages.
(D) Practice in Suits for.

### (A) When enforced.

The defendant entered into a contract to purchase leaseholds, after his solicitor had perused the leases. He intended to apply the property to a purpose which it turned out was prohibited by the lease:—Held, that whether the vendor knew the purchaser's intention or not, the purchaser was bound specifically to perform his contract. *Morley* v. *Clavering*, 29 Beav. 84.

On a decree for specific performance of a contract to purchase a lease, the assignment was ordered to be antedated, so as to bear date on the day on which the contract ought to have been performed. Ibid.

A solicitor contracted, in his own name, to purchase a freehold; he resisted the performance of the contract, on the ground that he had acted as the mere agent of a client, and that, it being a case of hardship, damages at law would be an adequate remedy to the vendor:—Held, that he was bound to perform the contract. *Saxon* v. *Blake*, 29 Beav. 438.

The tenant for life of a real estate, the trustees of which were empowered to sell it at his request and by his direction, entered into a contract to sell it. The estate was subject, with others, to a charge for younger children. The tenant for life died without issue, and the fee of the estate passed under his will:—Held, that the purchaser on waiving the objection as to the charge, was entitled to a specific performance against the representatives of the vendor, but that he was not entitled either to an indemnity against the charge or to compensation. *Bainbridge* v. *Kinnaird*, 32 Beav. 346.

Notice by a railway company to take land under their compulsory powers, and the subsequent fixing of the purchase and compensation money by arbitration, together constitute a contract for sale and purchase, which the Court will enforce at the instance of the vendor. *Mason* v. *the Stokes Bay Pier and Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 110.

A contract was entered into, dated the 26th of May, 1862, by which M agreed to buy of W a parcel of land for 2,000*l.*, to be paid on the 1st of July, on a good title being shewn and on a proper conveyance by all necessary parties being executed. The abstract was to be delivered within ten days, and the objections of the purchaser and requisitions on the title were to be made within twenty-one days from that time, "and in this respect time was to be considered as of the essence of the contract." It was then provided that M should within eighteen months from the execution of the conveyance build a house fit for habitation on the land. The purchase was not completed on the day fixed by the contract. Delays arose in answering the requisitions on the title. During the continuance of these delays M the purchaser gave notice to the vendor W that if the requisitions were not complied with within one month from the date of the notice he should consider the

contract at an end. The requisitions were not complied with within the month, and subsequently M refused to complete, and commenced an action for breach of the contract against W, who thereupon filed a bill for specific performance:—Held, (affirming a decision of the Master of the Rolls) that the time fixed for completion was not of the essence of the contract; and it appearing that the vendor had not been guilty of unreasonable delay, and that the time fixed for completion was too short having regard to the nature of the objections to the title, and that the objections had ultimately been removed, specific performance was decreed. *Wells* v. *Maxwell*, 33 Law J. Rep. (N.S.) Chanc. 44; 32 Beav. 408.

An agreement for a lease of certain premises containing a stipulation that the lessees should execute certain building works, and that the lessor should advance 1,000*l.* on mortgage to a limited company, was executed by the directors and secretary of the company as lessees. The 1,000*l.* was advanced, and the lessor (the plaintiff) had in correspondence treated the company as liable to perform the stipulations of the agreement, and evidence was given that the directors and secretary were trustees of the agreement for the benefit of the company:—Held, nevertheless, that the directors and secretary, who signed the agreement, were personally liable, and decree made for specific performance of the agreement to take a lease, but specific performance of the building stipulations refused, and an inquiry as to damages granted in respect thereof. *Kay* v. *Johnson*, 2 Hem. & M. 118.

A contract for sale of a patent specifically enforced at the suit of the vendor, although all he required was the payment of the purchase-money. *Cogent* v. *Gibson*, 33 Beav. 557.

The defendant contracted to grant the plaintiffs an under-lease of property held by him under the C company, and he covenanted that if the C company refused to grant a licence for that purpose, he would pay the plaintiffs 1,000*l.* by way of liquidated damages:—Held, that the defendant could not escape a specific performance by refusing to apply for a licence, and by paying to the plaintiffs the 1,000*l.* *Long* v. *Bowring*, 33 Beav. 585.

The defendant agreed to grant the plaintiff a lease of a public-house, and to make and form therein a spirit vault, and put in plate-glass windows, and do everything therewith necessary at his own expense, and paint the outside of all the wood-work, and put the slates, chimney-pots and roofing in thorough repair. A decree directing specific performance of the agreement to grant the lease, and directing an inquiry as to the damages for the non-performance of the agreement with respect to the vault, windows, painting and repairs, was affirmed on appeal. *Middleton* v. *Greenwood*, 2 De Gex, J. & S. 142.

Possession and expenditure on the faith of a parol agreement to grant a lease of a farm, held sufficient to entitle the tenant to a lease, although the agreement was denied by the defendant. *Farrall* v. *Davenport*, 3 Giff. 363.

A tenant having entered into possession of a farm, and expended moneys under an agreement that the landlord would grant a lease for twenty-one years, and make such improvements and repairs as he and the landlord should jointly agree,—Held, on demurrer, that the stipulation as to repairs was not of the essence of the agreement, and that the impossibility of the strict performance of that stipulation in consequence of the death of the landlord was no sufficient reason for allowing a demurrer to a bill for specific performance, where the plaintiff had so long a possession, and had expended money on the faith of the agreement. *Norris* v. *Jackson*, 3 Giff. 396.

Where the defendant agreed to grant to the plaintiff the right to use certain roads and ways (delineated on the plan), in and through his estate, the Court restrained the defendant from continuing a wall at the extremity of his estate, which obstructed the plaintiff from passing through the roads into the land of other landowners. *Phillips* v. *Treeby*, 3 Giff. 632.

Where a lessor agreed to let a house, and to put it in decorative repair, but refused to fulfil his contract, the Court, at the instance of the lessee, decreed specific performance of the agreement, with an inquiry whether the agreement as to decorative repair had been performed, and if not, decreed that the defendant should compensate the plaintiff in damages. *Samuda* v. *Lawford*, 4 Giff. 42.

The doctrine and practice of the Court with reference to directing execution of a covenant by way of specific performance with a view to giving to the covenantee a remedy at law, considered. *Onions* v. *Cohen*, 34 Law J. Rep. (N.S.) Chanc. 338; 2 Hem. & M. 354.

By articles of agreement C agreed to lease by indenture certain premises to O for seven years; O to covenant to pay the rent and keep in repair; C to covenant that O, his executors and administrators, should peaceably enjoy the premises for the term. There were under the premises mines to which C had no title. O expended money upon the premises, and apprehending injury by subsidence in consequence of the mines underneath being worked, he filed a bill seeking specific performance of the agreement, or in the alternative that the agreement might be cancelled without prejudice to any action at law:—Held, that O was entitled to a decree for the specific performance of the agreement, and that C must enter into an absolute covenant for quiet enjoyment during the term. Ibid.

An award made under a submission to arbitration which has been made a rule of Court can be set aside only by the particular Court of which the submission is made a rule; but after the time for questioning the award in the particular court has expired, proceedings may be founded thereon in any other court. *Blackett* v. *Bates*, 34 Law J. Rep. (N.S.) Chanc. 515; 2 Hem. & M. 610.

Consequently a Court of equity has jurisdiction to enforce in a suit specific performance of an award which can no longer be set aside summarily, notwithstanding the submission to arbitration has been made a rule of a Court of common law. Ibid.

A submission to arbitration between A and B was made a rule of the Court of Exchequer. An award was subsequently made by which both A and B were directed to execute a lease, in a prescribed form, within twenty-one days after delivery of the award. B tendered a lease to A, who, intending to dispute the validity of the award, refused to execute it, and the twenty-one days expired before A could take proceedings to set aside the award. A afterwards obtained from the Court of Exchequer a rule to set aside the award, which, however, was ultimately dis-

charged by the Court. Subsequently B refused to execute the lease, but availed himself of other provisions of the award. On a bill for specific performance being filed by A against B,—Held, that the Court of Chancery had concurrent jurisdiction to enforce performance of the award; and that, under the circumstances, A's right to a decree for specific performance was not taken away by his refusal to execute the lease within the time prescribed. Ibid.

If an agreement is capable of being carried out as a whole, the Court will decree specific performance, although there may be collateral subordinate provisions which would not be enforced independently. Ibid.

This case has been overruled, see 35 Law J. Rep. (N.S.) Chanc. 324.

A verbal promise, prior to marriage, by an intended husband to an intended wife to leave all her property (personalty) to her by his will, upon condition of her foregoing a settlement of it, which she did, enforced at her instance against his estate, the husband having, after his marriage, made a will in accordance with his promise, but subsequently revoked it by another will by which he gave less benefits to his widow. *Caton* v. *Caton*, 34 Law J. Rep. (N.S.) Chanc. 564.

A, prior to his marriage with B, who was entitled to personalty of the value of about 14,000*l*., drew up in his own handwriting a memorandum by way of instruction to a solicitor for the preparation of a settlement. In that memorandum it was stated that all the property of B was "to go to the uses of her will," but that the annual income of it was to be received and taken by A for his life, with the exception of 80*l*. per annum to be paid to B as pin-money. A settlement was prepared in accordance with the memorandum, but A induced B to forego any settlement, promising verbally that he would by his will leave her the whole of her property present and future. The marriage was solemnized; and immediately afterwards A, in the vestry of the church where the ceremony took place, executed a will, whereby he gave to B the whole of her fortune. A afterwards died, and upon his death it was found that he had subsequently made another will, by which he did not give to B all her property at his death, but left her much less benefits than those which he had promised to leave to her. Upon a bill by B against the executors of A, praying that it might be declared that she was absolutely entitled to the property of which she was possessed at the time of her marriage,—Held, that by virtue of the contract entered into by A upon his marriage with B, she, upon his death, became absolutely entitled to all the property of which she was possessed at the time of her marriage with A, and to all such as accrued to her, or to A in her right, during their coverture, and that A's real and personal estate was liable to make good to her such portion of her property as might have been converted by A during the coverture. Ibid.

This case has been reversed on appeal, 35 Law J. Rep. (N.S.) Chanc. 292.

Upon a treaty for a lease of a house, the lessor sent to the lessee a letter specifying the terms on which he would let it. The lessee immediately took possession, but he signed no contract. The lessor having instituted a suit for specific performance, the lessee insisted that, in addition to the terms contained in the letter, the lessor had verbally promised to put the house into thorough repair: this the lessor denied. The Court doubted whether the specific performance could be enforced, and gave the defendant the option, either of a decree for specific performance on the terms of the letter, or a decree to deliver up possession and to pay an occupation rent. But if he refused to exercise the option, the Court directed a decree on the latter branch of the alternative. *Chappell* v. *Gregory*, 34 Beav. 250.

In the absence of any agreement on the subject, a person who agrees to take a house, must take it as it stands, and cannot call on the lessor to put it in a condition which makes it fit for his living in. Ibid.

### (B) WHEN REFUSED.

Auctioneers advanced a sum of money to J S, who agreed to put a miscellaneous collection of property in their hands for sale, from the proceeds of which they were to retain the money advanced; a part only of the property was delivered and sold, but it realized less than the sum advanced; J S refused to part with the remainder of his collection; and upon a demurrer to a bill filed for a specific performance of the agreement,—Held, that the Court would not compel the performance of the contract for an agency; that J S, if he satisfied the claims of his agents, was at liberty to countermand the sale of his property; that the advance of the money to J S was not made on the security of the property mentioned in the contract, and that the claims of the agents must be determined in a court of law; and the demurrer was allowed. *Chinnock* v. *Sainsbury*, 30 Law J. Rep. (N.S.) Chanc. 409.

Held, also, that under the 21 & 22 Vict. c. 27, damages independent of relief in this Court could not be given. Ibid.

If particulars inaccurately describe premises to be sold by auction, the Court will refuse to direct a specific performance of the contract, though the error might have been ascertained upon a minute inspection of the particulars and conditions of sale. *Swaisland* v. *Dearsley*, 30 Law J. Rep. (N.S.) Chanc. 652; 29 Beav. 430.

S agreed to take of M the lease of a public-house upon condition that a retail licence should be obtained for him by M. On application being made by S to the magistrates a licence was granted in the ordinary form, but with an oral undertaking that the applicant would not sell spirits by retail to be consumed on the premises. On a bill filed by M to enforce the specific performance,—Held (affirming a decision of the Master of the Rolls), that the bill must be dismissed. A "retail licence" must be construed to mean the ordinary retail licence without any qualification. *Modlen* v. *Snowball*, 31 Law J. Rep. (N.S.) Chanc. 44.

J H and S R sold by auction, in 1855, an estate, representing it in the particulars of sale as an estate in fee simple in possession; and in one of the conditions of sale it was stated that the purchaser would be "let into receipt of the rents and profits." E J became the purchaser, and signed an agreement to purchase for 1,500*l*. On a claim filed by J H and S R a decree was made, in 1858, at the Rolls, for the specific performance of the agreement, subject to a reference to chambers to inquire whether the

plaintiffs had a good title, and when a good title was first shewn. Upon the working out the reference, it appeared that certain tenements, forming an inconsiderable portion of the property, were subject to certain leases for lives. The chief clerk certified that there was a good title as to all other parts of the property; but as to the part subject to the leases for lives, there was no title shewn, though that as to such part the defendant was aware at the time of the sale that it was subject to the leases, and had not made any objection till after the claim was filed. In March, 1861, the Master of the Rolls signified his approval of the certificate. The chief clerk by another certificate, dated in the same month, found that, with the above exception, a good title was first shewn in July, 1859. The defendant, in April, 1861, moved to vary the first certificate by stating that a good title could not be made, and by omitting the finding that the defendant was aware of the leases. The Master of the Rolls refused to make any order; and on the hearing, upon further consideration, he decreed specific performance against the defendant with costs. The defendant appealed. The Lords Justices discharged both orders, as they considered that the evidence did not shew that the defendant was aware of the existence of the leases or that he had waived the objection, wherefore specific performance could not be decreed without compensation. The defendant electing to take with compensation, the Lords Justices, at the request of both parties, settled the amount of compensation. *Hughes* v. *Jones*, 31 Law J. Rep. (N.S.) Chanc. 83; 3 De Gex, F. & J. 307.

If an assurance society takes an extra premium upon an increased risk, and promises to reduce it upon being satisfied that the risk has ceased, such promise is not an agreement which a Court of equity can carry into effect. *Manby* v. *the Gresham Life Assur. Society*, 31 Law J. Rep. (N.S.) Chanc. 94; 29 Beav. 439.

Where, therefore, the directors of a society, upon re-examination of a life assured, and upon medical evidence subsequently sent to them, "considered the risk existing," and declined to reduce an extra premium,—Held, that they were sole judges of the fact; that the Court could not interfere with their discretion; and a demurrer to a bill for a specific performance of the promise was allowed. Ibid.

Whether the Court will decree specific performance of an agreement to take shares in a company, which were allotted on application—*quære*. *The Oriental Inland Steam Co. (Lim.)* v. *Briggs*, 31 Law J. Rep. (N.S.) Chanc. 241; 2 Jo. & H. 625.

A shareholder in a public company applied to the directors for an allotment of new shares, which they were authorized to issue, and signed an undertaking to accept the same or any less number that might be allotted to him, to pay the calls thereon when due, and to sign the articles of association when required. The shares applied for were duly allotted; and in the notification of allotment he was informed that the articles of association must be signed by him, and in default thereof the shares and deposit would be forfeited to the company. The articles of association contained no clause authorizing the forfeiture of the shares for such a cause. The allottee having refused to sign the articles of association, or to pay the calls which were from time to time made upon the shares, the company filed a bill for specific performance of the undertaking contained in his application for the shares:—Held, by the Lord Chancellor, on appeal from *Wood, V.C.*, that the contract had been varied by the notification of allotment, and that the bill could not be sustained. Ibid.

The company having delayed filing their bill for two years after the allottee's refusal to sign the articles,—Held, by the Lord Chancellor, overruling the decision of *Wood, V.C.*, that such delay was not in itself fatal to the plaintiffs' case. Ibid.

A tenant under an agreement to take a lease of a house is not bound to accept it if the house, upon a competent survey, is found defective, and finished in such a manner that it is likely to subject the tenant, under the covenant to repair, to an unusually large annual outlay to maintain it. *Tildesley* v. *Clarkson*, 31 Law J. Rep. (N.S.) Chanc. 362; 30 Beav. 419.

An agreement to join a firm as partner, or otherwise to lend the firm 5,000*l.* for two years on the acceptances of the firm, is not a contract which this Court can specifically perform. *Sichel* v. *Mosenthal*, 31 Law J. Rep. (N.S.) Chanc. 386; 30 Beav. 371.

The plaintiff, by letter, offered to work the ironstone lying under the lands of the defendant at P, and to pay a fixed rent and a royalty. The land-steward, by letter, accepted the offer, and agreed to grant a lease for twenty-one years, if, after a year's trial, it was asked for. The plaintiff applied for the lease, but he refused to give any security that the undertaking would be carried out and the covenants in the lease observed, or to join any responsible person with him in the undertaking. The land-steward, accordingly, declined to proceed with the lease, or to assign the area over which the ironstone was to be worked. Upon a bill for the specific performance of the agreement,—Held, that the agreement was indefinite, that the land-steward in the absence of assurance that the undertaking would be carried out and the covenants in the lease observed, was not bound to assign the area for the mineral workings; and the bill was dismissed, but, under the circumstances, without costs. *Lancaster* v. *De Trafford*, 31 Law J. Rep. (N.S.) Chanc. 554.

Held, also, that the plaintiff, having stipulated for a trial year without rent, with liberty to abandon the working, was not entitled under the 21 & 22 Vict. c. 27. to damages for his outlay. Ibid.

A bill was filed for the purpose of enforcing the specific performance of an agreement between the plaintiff and the defendant, whereby the defendant agreed to grant to the plaintiff a lease of a wharf and premises for twenty-one years, and the plaintiff agreed to employ the defendant as manager at the wharf at a salary and commission, the agreement providing that the employment should be co-extensive with the tenancy. One of the Vice Chancellors decreed specific performance of the contract, on the ground that it might be divided and made a decree for granting the lease. On appeal, the Lords Justices considered that the contract must be considered as one entire contract, and that it did not come within the equitable jurisdiction of the Court as applied to specific performance, and held, that when the Court cannot do complete justice between parties it will not interfere partially, and therefore their Lordships

dismissed the bill. *Ogden* v. *Fossick*, 32 Law J. Rep. (N.S.) Chanc. 73.

The cases in which the Court of Chancery has decreed specific performance of part only of an agreement, are cases in which the part enforced was considered as independent of that part which could not be enforced. Ibid.

The owner of an estate, consisting of freeholds, leaseholds for years and leaseholds for lives, agreed to demise the same in consideration of receiving a year's rent in advance. He signed notices requesting the tenants to attorn to the lessee; but he did not, in the first instance, clearly understand the boundaries, limits and rental of the several estates. The agreement was subsequently added to by a further agreement and by verbal communications, and a sum for the year's rent was paid in advance. These arrangements still left the subject and the terms and conditions indefinite, and difficulties arose in carrying the agreement into effect. Upon a bill by the lessee for specific performance,—Held, by the Master of the Rolls, that there had been no part performance which had reference to the agreement alleged; that it was too vague and uncertain to be enforced; and that the bill must be dismissed; but, under the circumstances, without costs. *Price* v. *Salusbury*, 32 Law J. Rep. (N.S.) Chanc. 441; 32 Beav. 446.

An appeal to the Lords Justices was dismissed, *dissentiente Turner, L.J.; Knight Bruce, L.J.* being of opinion that the defendant was not sufficiently advised respecting the terms of the agreement to justify a decree for specific performance against him. Ibid.

If a bill is filed to enforce a parol agreement, on the ground of part performance, there must be no uncertainty; the terms of the agreement must be plainly and distinctly shewn, and it must also be shewn that the part performance referred to them—per Master of the Rolls. Ibid.

Where there has been part performance of a written agreement as varied by parol, and the non-performance of the agreement as so varied would, in the eye of the Court, amount to a fraud, evidence must be received to shew what the agreement as varied really was; and the authorities establish that in cases of agreements part performed, parol evidence is admissible to add to or alter a written agreement, and that a specific performance of the agreement as varied may well be founded on such evidence—per *Turner, L.J.* Ibid.

G H B, an engineer, received a written authority from the directors of the B, U and T Railway Company on their behalf to enter into a contract for the construction, by P & B (railway contractors), of their line of railway for 215,000*l.*, 63,000*l.* to be paid in debentures and the balance in shares of the company. G H B negotiated the contract with P & B, and on behalf of the B, U and T Railway Company signed an agreement. In the mean time the directors of the B, U and T Company, having arranged for the sale of their undertaking to the L, B and S C Railway Company, repudiated the authority given to G H B. On a bill, filed by the contractors, praying specific performance, and that the B, U and T Company might be restrained by injunction from dealing with the debentures and parting with their shares,—Held, that as the Court could not compel P & B to carry out their part of the agreement, it would not interfere to prevent the B, U and T Company from parting with their shares. *Peto* v. *the Brighton, Uckfield and Tunbridge Wells Rail. Co.*, 32 Law J. Rep. (N.S.) Chanc. 677; 1 Hem. & H. 468.

R devised real estate to trustees, one of whom was an infant, upon trust for sale as they should think expedient. The trustees sold to K, who, upon disputes arising, filed a bill for specific performance:—Held, that the contract could not be enforced. *King* v. *Bellord*, 32 Law J. Rep. (N.S.) Chanc. 646; 1 Hem. & M. 343.

A testator gave real and personal estate to trustees upon trust for sale, and declared that no sale should be made without consent in writing of his sons and daughters. The proceeds of sale were to be held in certain shares upon trust for the sons and daughters and their issue, with ulterior trusts:—Held, by the Master of the Rolls, that a contract entered into by the trustees after the decease of one of the daughters, could not be specifically enforced, and that for want of her consent the trustees, notwithstanding the concurrence of the person absolutely entitled to her share of the proceeds, could not make a title: and, on appeal, the Lords Justices affirmed that decision, considering that the title was open to too serious a doubt to be forced upon a purchaser. *Sykes* v. *Sheard*, 33 Law J. Rep. (N.S.) Chanc. 181; 2 De Gex, J. & S. 6; 33 Beav. 114.

A purchaser of leasehold premises will not be compelled to complete his contract if the title to the reversion expectant on the lease is admittedly the subject of contest, so that there is a strong probability of his being involved in litigation in consequence of disputed claims to the ground-rents. *Pegler* v. *White*, 33 Law J. Rep. (N.S.) Chanc. 569; 33 Beav. 403.

Every contract for the sale of shares in a joint-stock company, the directors of which have the right of approving or rejecting a proposed transferee, must be regarded as conditional on their approval being given, and in default of that approval, the contract must be treated as rescinded. *Bermingham* v. *Sheridan*, 33 Law J. Rep. (N.S.) Chanc. 571; 33 Beav. 660.

A shareholder agreed to sell shares in a company by the deed of settlement of which the right of transfer was subject to the approval of the board of directors; the purchaser paid the money, but, before any transfer of the shares was made, the Court ordered the company to be wound up. Subsequently the vendor and purchaser executed a deed transferring the shares to the purchaser. The official liquidator, acting on behalf of the directors, declined to approve of the purchase or recognize the transfer; the vendor was put on the list of contributories, and a call was made; and the purchaser brought an action to recover the purchase-money. Upon a bill by the vendor, against the purchaser, to compel specific performance,—Held, that the Court could not interfere with the discretion of the official liquidator; and that as the company did not choose to accept the purchaser as a shareholder, specific performance of the contract could not be decreed. Ibid.

A mortgagee of leaseholds, whose mortgage contained no leasing power, agreed to grant a lease of the mortgaged premises. The intended lessee was aware that the intended lessor was only a mortgagee,

and, though the agreement contained no stipulation to that effect, both parties understood that the concurrence of the mortgagor was to be obtained. The mortgagor, subsequently, refused to concur. Upon a bill by the intended lessee against the mortgagee, —Held, that he was not entitled to a specific performance of the agreement, though he offered to take the lease without the concurrence of the mortgagor; also, that the case was not one in which the Court would give damages; but the bill was dismissed without costs. *Franklinski* v. *Ball*, 34 Law J. Rep. (N.S.) Chanc. 153; 33 Beav. 560.

*Quære*—Whether the Court would have enforced specific performance even if there had been no understanding as to the concurrence of the mortgagor. Ibid.

An agreement to let certain land upon building leases contained a proviso that the lessee should have the option of purchasing any of the plots of ground, if he should give three months' notice to the lessor of his intention, and should at the expiration of such notice pay to him the sum of 210*l.* in respect of each plot mentioned in such notice; and no objection was to be taken to the title. The lessee gave the notice to purchase under the terms of the proviso, but failed to pay the purchase-money at or before the expiration of the notice:—Held, upon bill for specific performance, that time was of the essence of the contract, and that the money not having been paid within the stipulated time, the bill must be dismissed. *Lord Ranelagh* v. *Melton*, 34 Law J. Rep. (N.S.) Chanc. 227; 2 Dr. & S. 278.

The circumstance that an agreement of which specific performance is sought in equity contains stipulations on the part of the plaintiff which could not themselves be specifically enforced, affords no valid objection to making a decree in favour of the plaintiff if the intention of the parties was, that the performance of those stipulations should be secured by covenant only. *Wilson* v. *the West Hartlepool Harbour and Rail. Co.*, 34 Law J. Rep. (N.S.) Chanc. 241; 2 De Gex, J. & S. 475.

A, an officer of a company, but whether the general or only the traffic manager was disputed, proposed, by a letter referring to a prior agreement which was not produced, terms for the sale by the company of some of its land to the plaintiff, one of the terms being that the plaintiff should use the defendants' railway "whenever reasonably practicable, and for the longest distance it is reasonably capable of use." The plaintiff accepted the terms unconditionally, and thereupon took possession of the land; and, as might be inferred from the facts, with the connivance, if not with the co-operation, of the directors, put it to various uses. On the subsequent repudiation of the contract by the company, after the death of A, on the ground that no valid contract was ever made by the company, a decree was made by the Master of the Rolls for specific performance of the contract made by A with the plaintiff; and, on appeal, this decree was affirmed (*dissentiente Knight Bruce, L.J.*, on the ground that the provisions respecting the use by the plaintiff of the defendants' railway could not be specifically enforced by the Court, and that it was not the intention that these provisions should be satisfied by the execution of an instrument giving a claim to damages only). Ibid.

In enforcing contracts of which there has been a part performance, Courts of equity proceed upon the ground that it is a fraud in such cases to set up the absence of a binding agreement, and the equity arising from part performance operates against a company, in like manner as against an individual. Ibid.

A purchaser being let into possession is sufficient to take a contract out of the Statute of Frauds whether the vendor or purchaser is seeking specific performance. Ibid.

O contracted to sell to H an estate of which he believed himself to be absolutely seised in fee simple. H upon examining the title contended that O was bound, under the trusts of a will, to re-invest the purchase-money in land, and required O to give him an assurance that he would make such re-investment. O having refused to give such assurance, H filed a bill for specific performance of the contract. O by his answer stated that he would not have sold unless upon the footing of his being able to deal with the purchase-money as he might think fit:—Held, that assuming H to be right in his contention as to re-investment, O had entered into the contract under a mistake, and could not be compelled to perform it. *Hood* v. *Oglander*, 34 Law J. Rep. (N.S.) Chanc. 528; 34 Beav. 513.

Held, also, that as the question, though one of title, affected the validity of the contract, it must be decided at the hearing of the cause. Ibid.

A agreed to sell to B an estate, which was supposed by both parties, and was stated in the agreement to contain 21,750 acres, but in fact contained 11,814 acres:—Held, that B was not entitled to a specific performance of the agreement with compensation. *The Earl of Durham* v. *Sir F. Legard*, 34 Law J. Rep. (N.S.) Chanc. 589.

The doctrine of part performance of a parol agreement is not to be extended by the Court, and it is inapplicable to a case where a trustee has a power to lease, at the request in writing of a married woman, which has not been made. *Phillips* v. *Edwards*, 33 Beav. 440.

Land was vested in a trustee for the separate use of Mrs. E, a married woman, and the deed gave the trustee a power to lease, at the request in writing of Mrs. E. The trustee and Mrs. E agreed, by parol, to let the property to the plaintiff, and a lease was prepared, approved of and executed by the trustee and Mrs. E, but before their solicitor had parted with it, and before the plaintiff had executed it, Mrs. E recalled her assent to it. She had made no request to the trustee in writing:—Held, that there was no contract binding on Mrs. E, and no part performance, and that the plaintiff could not enforce the agreement. Ibid.

The plaintiff purchased a small freehold property by auction. The Court refused specific performance, on the ground of a mistake and misunderstanding between the vendor and the auctioneer as to the reserved price. *Day* v. *Wells*, 30 Beav. 220.

A agreed with the plaintiff to grant a lease of certain premises, and to execute such repairs that they should jointly agree upon to the intent that the premises should be fit for the use and occupation of the plaintiff and his family, upon the performance of which stipulation the plaintiff agreed to accept a lease. The plaintiff entered, and after several years A died without any joint agreement having been

come to as to the repairs and having shortly before his death sold the premises subject to the agreement. On demurrer to a bill against the purchaser and A's executors for specific performance and damages:—Held, that the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), did not apply, and demurrer allowed both for want of equity and for multifariousness. *Norris* v. *Jackson*, 1 Jo. & H. 319.

Bill for specific performance of an agreement to take a lease of a limestone quarry. In the course of the treaty the plaintiff had represented that the limestone was of a certain quality, the fact being that a quarry in the immediate neighbourhood had been worked and the stone ascertained not to be of the specific quality. The result of this trial was not known to either party, but might have been ascertained on inquiry, and it further appeared that the plaintiff had no knowledge of the quality of the limestone. The defendant afterwards, and before signing the agreement, made a cursory inspection of the old quarry, and satisfied himself that the stone was limestone, but ascertained nothing as to its quality:—Held, that the misrepresentation was a bar to a decree for specific performance, and the bill was dismissed without costs. *Higgins* v. *Samels*, 2 Jo. & H. 460.

Specific performance of a parol agreement for a lease by tenant for life with power of leasing not decreed on the ground of expenditure, if prejudicial to remaindermen. *Trotman* v. *Flesher*; *Flesher* v. *Trotman*, 3 Giff. 1.

Whenever the principal portion of an agreement is incapable of specific enforcement by the Court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause therein contained, which is merely incidental to the general relief sought, although such clause might have been enforced had it stood alone or had the agreement been in other respects still subsisting and undisputed. *Brett* v. *the East India and London Shipping Co.*, 2 Hem. & M. 404.

A delay from May to December in filing a bill for specific performance,—Held, not sufficient to deprive a vendor of his right to have the contract enforced, *Colby* v. *Gadsden*, 34 Beav. 416.

A purchaser was let into the receipt of the rents before completion and without payment of his purchase-money. Great delay having occurred and no payment having been made to the vendor, he gave notice to the tenants and prevented any further receipt of the rents by the purchaser:—Held, that this did not deprive the vendor of his right to have the contract specifically performed, *Knatchbull* v. *Gruebar* (3 Mer. 124) distinguished. Ibid.

### (C) DAMAGES.

A mortgagor agreed to grant a lease of a shop; the lessee entered into possession and commenced alterations; the mortgagees refused to confirm the lease or to allow him to proceed with the alterations. Upon a bill against the lessor for specific performance,—Held, under the circumstances, as damages had clearly been sustained, that the Court would make an order to assess them, though the 21 & 22 Vict. c. 27, never intended in simple cases to transfer the jurisdiction from a Court of law to a Court of equity. *Howe* v. *Hunt*, 32 Law J. Rep. (N.S.) Chanc. 36; 31 Beav. 420.

Relief in equity is not incident to damages. Ibid.

A decree had been made in a suit by purchaser against vendor for the specific performance of an agreement for the sale of freeholds. The bill asked also for damages in consequence of the delay in the completion of the contract. No special damage, such as deterioration in the value of the property, was shewn:—Held, that an inquiry as to damages occasioned by delay in completion ought not to be directed, *Chinnock* v. *the Marchioness of Ely*, 34 Law J. Rep. (N.S.) Chanc. 399.

A agreed to grant a lease to B, who was to enter at once and expend money on improvements with a proviso that if A failed within three months to grant a valid lease he would repay to B the amount of his outlay, and from and after such failure B should be at liberty to quit, and the agreement should cease, except as to B's right to repayment. A being unable to grant a lease for want of title,—Held, that B had a lien on A's interest on the premises for his outlay and costs of suits and decree accordingly. *Middleton* v. *Magnay*, 2 Hem. & M. 233.

### (D) PRACTICE IN SUITS FOR.

After a decree for specific performance and execution of the conveyance, the purchaser neglected to pay the purchase-money. The Court, on the application of the vendor, fixed a day and place for that purpose. *Morley* v. *Clavering*, 30 Beav. 108.

Where by reason of one of several vendors becoming of unsound mind before the purchase-money is paid, a suit for specific performance becomes necessary, no costs of the suit will be given on either side. *Cresswell* v. *Haines*, 31 Law J. Rep. (N.S.) Chanc. 237.

The plaintiff and the defendant entered into an agreement, that when a certain house belonging to the plaintiff should be completed and finished fit for habitation, the plaintiff would grant to the defendant a lease of such house for twenty-one years. The defendant took possession before the house was completed, and occupied it for a year; but refused to pay rent or execute the lease. The plaintiff filed a bill for specific performance, and moved that the defendant might be ordered to pay the year's rent into court. Motion refused, with costs. *Faulkner* v. *Llewellin*, 31 Law J. Rep. (N.S.) Chanc. 549.

Decree for specific performance, with direction to settle conveyance "by all necessary parties" in case the parties should differ. *Nash* v. *Browne*, 32 Law J. Rep. (N.S.) Chanc. 148.

There is no general rule of practice to the effect that the Court will not, in a suit for specific performance by a vendor, restrain an action by a purchaser to recover the deposit. *Kell* v. *Nokes*, 32 Law J, Rep. (N.S.) Chanc. 785.

The purchaser of certain property by private contract having paid his deposit, considered the title defective, and brought an action for the recovery of such deposit. The vendor then filed a bill, and moved for an injunction to restrain such action:—Held, that a Court of equity is the proper tribunal to try a question of title, and that on bringing the deposit into court, the injunction must be granted. Ibid.

In a suit by a vendor against a purchaser for specific performance the Court will not, upon an interlocutory application, direct an inquiry as to title,

and when it was first shewn, unless the other grounds of defence are manifestly frivolous. And, *semble*, in no case would such an inquiry be directed at the instance of a defendant purchaser. *Reed* v. *the Don Pedro North del Rey Gold Mining Co. (Lim.)*, 32 Law J. Rep. (N.S.) Chanc. 773.

G B contracted to sell real estate, and died before completion of the purchase intestate as to real estate, leaving an infant heir. On a bill for specific performance of the contract being filed by G B's executrix against the purchaser and infant heir,—Held, that the heir was entitled to his costs as between solicitor and client out of the purchase-money. *Barker* v. *Venables*, 34 Law J. Rep. (N.S.) Chanc. 420.

Where a bill is filed by a purchaser for specific performance with the object of clearing the title, if the point raised is in favour of the defendant's contention that the title is good, the plaintiff must pay the costs. *Hood* v. *Oglander*, 34 Law J. Rep. (N.S.) Chanc. 528.

In a suit by a vendor for specific performance against a railway company, the defendants by their answer having admitted the contract, their acceptance of the plaintiff's title, and that they had taken possession, the Court, on an interlocutory motion, ordered them to pay the purchase-money into court. *Chapple* v. *the London, Chatham and Dover Rail. Co.*, 34 Law J. Rep. (N.S.) Chanc. 597.

In a suit by a purchaser for specific performance, an injunction to restrain the vendor from selling the property was dissolved, it not being clear that the plaintiff would be able to establish his right to specific performance, and it appearing that the granting the injunction would in case of the plaintiff's failing, be ultimately more injurious to the defendants than the refusal of it would be to the plaintiff in the event of his success. *Hadley* v. *the London Bank of Scotland (Lim.)*, 3 De Gex, J. & S. 63.

A decree of specific performance was made against the purchaser. Not having paid the purchase-money, he was ordered on motion to pay it within a limited time, and in default that the contract should be rescinded and all proceedings stayed. He was also ordered to pay the costs of the motion. *Simpson* v. *Terry*, 34 Beav. 423.

The plaintiff agreed to purchase an estate which, on the written contract, was by mistake stated to contain 21,750 acres:—Held, that the purchaser was not entitled to specific performance with a proportionate abatement for the deficiency of acreage, but that he could only enforce the contract on payment of the full price or rescind the contract. *The Earl of Durham* v. *Legard*, 34 Beav. 611.

## STAMP.

[Certain duties of Excise and stamps granted and imposed on licences to deal in spirits, hawkers and pedlars' licences, house-agents' licences, foreign bills of exchange, and leases of furnished houses for less than a year, by 24 & 25 Vict. c. 21.—The laws relating to the Inland Revenue amended by 24 & 25 Vict. c. 91.—The law of the stamp duties on probates, administrations, inventories, legacies, and successions, amended by 24 & 25 Vict. c. 92.—Certain stamp duties granted, and the laws relating to the Inland Revenue, amended by 27 & 28 Vict. c. 56.—The act 27 Vict. c. 18, as to the stamp duties on certain powers of attorney, amended by 27 & 28 Vict. c. 90.—The laws relating to the Inland Revenue amended, and certain new scales of stamp duties fixed, by 28 & 29 Vict. c. 96.]

(A) Agreement.
(B) Conveyance.
(C) Settlement.
(D) Notarial Instrument.
(E) Copy of Lost Instrument.
(F) Ad Valorem Duty.

### (A) Agreement.

The following document was held to be admissible in evidence, without either a promissory note or an agreement stamp:—"I, J D, have this day borrowed of J C 300*l.* at 4*l.* per hundred, payable yearly." It is not competent to the Judge at *Nisi Prius*, under the 21st s. of the Common Law Procedure Act, 1854, to reserve a question as to the admissibility of a document on a stamp objection, unless he decides against its admissibility. *Cory* v. *Davis*, 14 Com. Rep. N.S. 370.

### (B) Conveyance.

The consideration for the transfer of the whole undertaking of one railway company to another consisted of the purchasing company taking on themselves the liabilities of the vendors, and creating and allotting to the shareholders of the selling company preference stock of the purchasing company equal in amount to the capital of the other, which was to be extinguished:—Held, that this preference stock was to be stock within the meaning of the schedule, and therefore liable to pay duty on its market value. *The Furness Rail. Co.* v. *the Commissioners of Inland Revenue*, 33 Law J. Rep. (N.S.) Exch. 173.

Under the powers of an act of parliament, a railway company sold and transferred their railway and works to another railway company, and, in consideration thereof, the latter agreed to create and deliver to the shareholders of the former company preferential shares of the nominal amount of 298,000*l.*, bearing 6*l.* per cent. interest, and to take upon themselves a debenture debt of 98,687*l.*, and simple contract debts of that company to the amount of 40,032*l.*:—Held, first, that the preferential shares were "stock" within the meaning of the 13 & 14 Vict. c. 97, Schedule, tit. 'Conveyance'; secondly, that the liability to pay the debenture and simple contract debts was part of "the consideration money" within that act. *The Ulverstone and Lancaster Rail. Co.* v. *the Commissioners of Inland Revenue*, 3 Hurls. & C. 855.

### (C) Settlement.

The 13 & 14 Vict. c. 97, in the Schedule, tit. 'Settlement,' enacts that any deed or instrument, whereby any *definite and certain* principal sum or sums of money, or any definite and certain share or shares in any of the Government stocks or funds, or in the stock or funds of the Bank of England, the East India Company, or any other company, shall be settled or agreed to be settled upon any person, shall be liable to an *ad valorem* duty:—Held, that foreign stock and bonds, and India stock (though created

since the passing of the act) are "definite and certain" sums of money within the meaning of the act. *Alsager* v. *the Commissioners of Inland Revenue*, 33 Law J. Rep. (N.S.) Exch. 161; 2 Hurls. & C. 969.

(D) NOTARIAL INSTRUMENT.

A notarial instrument in the form of Schedule H. given by section 12. of the statute 21 & 22 Vict. c. 76. is correctly stamped with a one-shilling stamp. *The Trustees of the late Lord Eglinton* v. *the Commissioners of Inland Revenue*, 34 Law J. Rep. (N.S.) Exch. 225; 3 Hurls. & C. 871.

(E) COPY OF LOST INSTRUMENT.

Whether the practice of the Court of allowing a copy of a lost instrument to be stamped, in order that it may be given in evidence, is altered since the 13 & 14 Vict. c. 97. s. 12.—*quære*. *May* v. *May*, 33 Beav. 81.

(F) AD VALOREM DUTY.

A contingent debt is included in the words "mortgage, &c. or other debt," in the 10th section of the 16 & 17 Vict. c. 59; and therefore a conveyance of a reversionary interest, subject to the payment of a sum of money by the purchaser to a third party, within three months after the death of N, *provided N should die without issue male*, is chargeable with *ad valorem* duty on that sum;—the object of the act being that upon every purchase *ad valorem* duty should be paid on the entire consideration, which (either directly or indirectly) represents the value of the free and unencumbered corpus of the subject-matter of sale. *Mortimore* v. *the Commissioners of Inland Revenue*, 33 Law J. Rep. (N.S.) Exch. 262; 2 Hurls. & C. 838.

## STATUTE.

[Certain enactments which have been consolidated in several acts of the present session relating to indictable offences and other matters repealed by 24 & 25 Vict. c. 95.—Divers acts and parts of acts which have ceased to be in force repealed by 24 & 25 Vict. c. 101.—Various expiring acts continued by 26 & 27 Vict. c. 95.]

(A) CONSTRUCTION OF.
(B) INCORPORATION OF GENERAL ACTS.
(C) NEW RIGHTS UNDER.
(D) RETROSPECTIVE OPERATION.
(E) REPEAL BY IMPLICATION.

(A) CONSTRUCTION OF.

A local act of parliament is not, in the absence of any indication of intention on the part of the legislature, repealed or superseded by a public general act subsequently passed. *Fitzgerald* v. *Champneys*, 30 Law J. Rep. (N.S.) Chanc. 777; 2 Jo. & H. 31.

An act of parliament is not to be construed retrospectively by inference, but only by express enactment. *Evans* v. *Williams*, 34 Law J. Rep. (N.S.) Chanc. 661; 2 Dr. & S. 324.

Under an act of 1845, the dividends on the shares in a water company were limited to 10*l.* per cent., after payment of which and providing for a contingent fund, the Court of Quarter Sessions had power to reduce the water-rates. By a second act in 1854, the capital was extended and a variation made in the shares and rate of interest:—Held, on the construction of the second act, that shareholders under the first act were not deprived of their right to payment, out of any surplus, of their arrears of dividends existing at the passing of the second act. *Coates* v. *the Nottingham Waterworks Co.*, 30 Beav. 86.

By the Great Yarmouth Haven Improvement Act, 5 & 6 Will. 4. c. xlix. s. 76, any person who shall place &c., on any space of ground immediately adjoining to the said haven, and within the space of 10 feet from high-water mark any goods, materials, or articles whatsoever so as to obstruct the free and commodious passage through and over the same, shall forfeit &c. The appellant placed three boats on the space of ground immediately adjoining the haven and within the space of 10 feet from high-water mark, so as to obstruct the free and commodious passage through and over the same. There was no public right of passage over the space of ground, and it was occupied by the appellant:—Held, by *Cockburn, C.J.*, *Crompton, J.*, and *Blackburn, J.*, that the appellant could not be convicted, as the provision could only apply to cases where a public right of passage existed. Held, by *Wightman, J.*, that by the express terms of the act, and the apparent intention, the provision extended to such a case, and that the appellant was liable to be convicted under the above section. *Harrod* v. *Worship*, 30 Law J. Rep. (N.S.) M.C. 165; 1 Best & S. 381.

By a private Estate Act of 1720 (6 Geo. 1. c. xxix.) a family settlement of certain lands was confirmed, with a restriction on alienation; and a power to grant leases "at the usual and accustomed rents, boons and services," was conferred on each tenant in tail when in possession under the limitations of such settlement. By s. 1. of an act of 1803 (43 Geo. 3. c. xl.) a portion of these lands was vested in trustees for sale, "freed, released and discharged, and absolutely acquitted, exempted and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations and agreements, in and by," *inter alia*, the said Estate Act of 1720 created and declared, except only such leases as had been heretofore made in pursuance of the powers contained in the said settlement and act, and the trustees were to re-invest the proceeds of the sale in the purchase of other lands to be settled to the same uses and subject to the same powers as the lands so sold. The 7th section of the act of 1803 enacted, that until sale the said lands should be held and enjoyed, and the rents, issues and profits thereof should be received by such person as would have been entitled thereto in case such act had not been made:—Held, that the power of leasing given by the Estate Act of 1720 was destroyed as to the lands vested in the trustees for sale by the act of 1803, with the exception only of the leases which had been then made; and that therefore a lease made in 1838, in conformity with such power, was void as against the heir, notwithstanding s. 7. of the act of 1803, and the fact that the

lands had never been sold. *The Earl of Shrewsbury* v. *Keightley*, 34 Law J. Rep. (N.S.) C.P. 322; 19 Com. B. Rep. N.S. 606.

By a private act of parliament certain lands were, in 1720, settled on those who should be Earls of Shrewsbury. In 1803 a portion of these estates, by another act, was vested in trustees for sale, freed from the uses, &c., of the prior act, with a provision that till sale they should be held for the benefit of those who but for the act would be entitled. In 1843, by a third act, which provided for the sale of another portion of the above estates, it was also provided that those to whom the estates limited by the first act were successively limited when by virtue of the limitations they came into possession or were en titled to the profits of the lands which should for the time being stand limited and settled to such of the uses of the said first act as should then be subsisting or capable of effect, might lease them in a particular way:—Held, on the construction of the acts, that this power of leasing extended to lands vested in trustees under the second act and still unsold. *The Earl of Shrewsbury* v. *Beazley*, 34 Law J. Rep. (N.S.) C.P. 328; 19 Com. B. Rep. N.S. 651.

Steam-vessels plying between the River Itchen, at Southampton, and the Isle of Wight, are bound, under the Southampton Pier Act, 1 & 2 Will. 4. c. 1. s. 56, to call at the Royal Pier at Southampton when requested by five passengers to do so. *Farrand* v. *Cooper*, 12 Com. B. Rep. N.S. 283.

The Southampton Dock Company are empowered by their act (6 Will. 4. c. xxix. s. 149.) to charge for the landing of goods in their docks the several sums mentioned in the schedule thereto annexed, and for articles not therein particularized, such sums as shall be equal to the sums affixed on goods, &c., "of a similar nature, package, value and quality" in the schedule. All the charges mentioned in the schedule were of small fixed sums, none being *ad valorem*, except the charge for sculptured marble:—Held, that the company were not entitled to make an *ad valorem* charge for the landing of goods not enumerated, or at all approaching in "nature, value and quality" to those enumerated in the schedule. *The Southampton Dock Co.* v. *Hill*, 14 Com. B. Rep. N.S. 243.

By a local act, 1 Geo. 4. c. liii, a toll or tax of ¼*d.* per chaldron is imposed upon the owners or lessees of "any collieries or coal-mines *near* the river Tyne" for every chaldron of coals sold or delivered by them to be exported from or out of the said river, and which shall be so exported; such toll "to be collected or received at the offices or places respectively where the contracts for the sale or delivery of such coals are usually made," in aid of the Tyne Keelmen's Charitable Fund created by 28 Geo. 3. c. lix. Since the formation of railways and docks the services of the keelmen in the shipment of coals on the Tyne have become unnecessary, the coals being brought down to the wharfs or quays by railway, and shipped direct:—Held, that coals shipped on the Tyne from collieries "near" to the river were still liable to the payment; and that a colliery situate ten miles from the Tyne is "near the said river Tyne" within the meaning of the act. Held also, that coals brought for shipment to the Tyne, by a public railway, from collieries which before the formation of the railway had always shipped their coals on the river Wear, to which they had been conveyed by private tramways from the collieries, were equally liable to the keelmen's dues. *The Tyne Keelmen* v. *Davison*, 16 Com. B. Rep. N.S. 612.

### (B) INCORPORATION OF GENERAL ACTS.

The 1st section of the Cleveland Junction Railway Act (8 & 9 Vict. c. clv.), which enacts that "so much of the Railways Clauses Consolidation Act, 1845, as relates to the mode of crossing roads and construction of bridges, shall respectively, except so far as the same may be by this act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated and form part of this act," incorporates not only all the provisions of the general act which regulate the crossing of turnpike-roads by the railway and the construction of railway bridges, together with the 65th section, which imposes penalties for suffering the roads and approaches to the bridges to be out of repair, but also the 145th and subsequent sections which relate to the mode of enforcing such penalties. *The Bristol and Exeter Rail. Co.* v. *Tucker*, 13 Com. B. Rep. N.S. 207.

### (C) NEW RIGHTS UNDER.

Where a new right has been created by act of parliament, the proper mode of enforcing it is by mandamus at common law. *Simpson* v. *the Scottish, &c. Insur. Co.*, 32 Law J. Rep. (N.S.) Chanc. 329; 1 Hem. & M. 618.

### (D) RETROSPECTIVE OPERATION.

The exception to the general rule, that a statute is not to have a retrospective operation, especially so as to affect a vested right, must depend upon the words of the statute, or the special nature of each case. *The Ironsides*, 31 Law J. Rep. (N.S.) Prob. M. & A. 129; 1 Lush. Adm. Rep. 458.

S. 6. of the Admiralty Court Act, 1861, gives the Court jurisdiction only where the breach of contract complained of has been committed by the ship which actually brings the goods into a port in England and Wales. Where, therefore, a part of goods shipped on board vessel A was lost, and the remainder was transhipped and brought into an English port on board vessel B, the Court held that no jurisdiction was given to it to arrest B, to satisfy the owner of the goods lost. Ibid.

### (E) REPEAL BY IMPLICATION.

The plaintiffs, by s. 24. of their private act passed in 1851, were precluded from charging more than 4*s.* for every 1,000 cubic feet of common gas supplied by them of a certain quality. By the Metropolis Gas Act, 1860, the City Gas Companies were bound to supply a better and more expensive common gas. Power was given to them to enter into any contracts, subject to the provisions of the general act. All existing contracts were to terminate at a particular day; and thereafter the provisions of the general act in all particulars were to apply to the companies. No company was to charge more than 5*s.* 6*d.* per 1,000 cubic feet of common gas:—Held, that the provisions of the general act were so inconsistent with those of the private act as to price, that s. 24. of the private act was repealed; and that

the plaintiffs were entitled to charge 4*s*. 6*d*. per 1,000 feet for common gas. *The Great Central Gas Consumers' Co.* v. *Clarke* (Ex. Ch.), 32 Law J. Rep. (N.S.) C.P. 41; 13 Com. B. Rep. N.S. 838.

Though a statute does not lose its force by non-user alone, and the presumption is against a repeal of it by implication, a subsequent statute, though not expressly referring to it, will be taken to have repealed it, when its continuance would be inconsistent with the state of things introduced by the later statute. *The India* (No. 2), 33 Law J. Rep. (N.S.) Prob. M. & A. 193.

## STOCK.

*Unclaimed.*

Where stock, standing in the sole name of a person who died in 1843, had been transferred to the Commissioners for the Reduction of the National Debt, —Held, that one of the next-of-kin, who took out administration in 1860, was not entitled to an order for re-transfer, without an inquiry who were the persons interested. *In re Molony*, 1 Jo. & H. 249.

## STOPPAGE IN TRANSITU.

[See SHIP AND SHIPPING.]

Stoppage *in transitu* is an ordinary legal right, as to which this Court, unless by reason of some unusual circumstances, will not interfere. *Straker* v. *Ewing*, 34 Beav. 147.

## SUNDAY TRADING.

A farmer is not within 29 Car. 2. c. 7. s. 1, which enacts, "that no tradesman, artificer, workman, labourer, or other person whatsoever shall exercise any worldly labour or business of his ordinary calling upon the Lord's Day." *R.* v. *Silvester*, 33 Law J. Rep. (N.S.) M.C. 79; *R.* v. *Cleworth*, 4 Best & S. 927.

*Semble*—That the term "labourer" in this section extends to an agricultural labourer. *Concessum*—That whether haymaking is a work of necessity is a question of fact on which the finding of the Justices before whom a party is convicted under this section must be taken as conclusive. *R.* v. *Cleworth*, 4 Best & S. 927.

## TELEGRAPH.

[The exercise of powers for the construction and maintenance of telegraphs regulated by 26 & 27 Vict. c. 112.]

## TENANT FOR LIFE.

Right of a tenant for life to enjoy a residue in specie was inferred from a direction to get in and convert the same into money and divide after his death. *Rowe* v. *Rowe*, 29 Beav. 276.

A testator gave his real and personal estate to trustees, to permit his wife to receive "the income arising from one-third" for her life, with remainder to his children. And, to facilitate the ultimate devise, he authorized them to convert his personal estate into money, and to sell his real estate. And he authorized his trustees to permit any part of his personal estate to remain in the state of investment in which it might be at his death, and to invest his residuary personal estate in the public funds, &c., and from time to time to alter and vary the securities: —Held, that the widow was not entitled to enjoy leaseholds and perishable property in specie. *In re Llewellyn's Trust*, 29 Beav. 171.

Where a part of the testator's assets was so situated, that it could not be realized immediately without loss to the estate, and was producing 5*l*. per cent., the tenant for life was held entitled in the meanwhile to 4*l*. per cent. on the value. Ibid.

Where there is a trust to raise fines for the renewal of settled leasehold estates out of the rents or by a mortgage thereof, the fines must be borne by the successive tenants for life of such estates in proportion to their actual enjoyment. *Ainslie* v. *Harcourt*, 30 Law J. Rep. (N.S.) Chanc. 686.

A trust by sale or mortgage of other estates to raise fines for the renewal of the lease of a particular estate imposes on the successive tenants for life the duty of keeping down the interest on the mortgages. Ibid.

If a tenant for life pays more than he ought towards the fines, &c. for renewing the leases of the settled estates, his executors and trustees cannot, nearly twenty years after his decease, claim an account with a view to the repayment of the excess beyond what he ought to have paid. Ibid.

If a trustee misapplies rents which ought to have been applied in payment of fines for the renewal of a lease, the loss will fall on the tenant for life, and not upon the trust estate generally. *Solley* v. *Wood*, 30 Law J. Rep. (N.S.) Chanc. 813; 29 Beav. 482.

A tenant for life may ask for inquiry respecting the outlay of money expended by him in the completion of a mansion commenced by a testatrix, and also in payments made by him in respect of mines, to prevent their being forfeited, though the mines themselves had been unproductive. *Dent* v. *Dent*, 31 Law J. Rep. (N.S.) Chanc. 436; 30 Beav. 363.

But a tenant for life is not entitled to any inquiry in respect of money expended by him in building a conservatory and vinery or other superfluous additions to the mansion, or in the erection of furnaces, &c. to copper works, or for rebuilding dilapidated farm-houses, or for the substitution of new cottages for old dilapidated farm-buildings, or for draining the estates, even though some of the improvements had been contemplated by the testatrix. Ibid.

A leasehold for three lives was settled in the usual way, but there was no trust to renew. After two of the lives had dropped, the trustees renewed the lease by adding two new lives, and the tenant for life voluntarily advanced a portion of the fine:—Held, that he was not entitled to repayment out of the other trust funds until the extent of his enjoyment could be ascertained. But the tenant for life having died in the life of the remaining *cestui qui vie*,—Held, that his estate was then entitled to be repaid out of the trust funds. *Harris* v. *Harris* (No. 3.), 32 Beav. 333.

A pond which supplied a stream by which a flour-mill was worked was purchased by the Ordnance,

under the Defence Act, 1842. The water being diverted, the tenant for life of the mill claimed compensation, and before an award was made he erected a steam-engine and suitable buildings for the mill, expending thereon 1,300*l.* Compensation, amounting to 920*l.*, being awarded to him, the Court permitted this sum to be paid to the tenant for life in respect of the permanent alterations he had thus made. *In re the Duke of Wellington's Settled Estates Act*, 30 Law J. Rep. (N.S.) Chanc. 187; 3 De Gex, F. & J. 13.

A railway company took certain leaseholds which stood limited to A for life, with remainder to B for life, with remainder to C absolutely. The Court held, that the purchase-money must be divided according to the number of years unexpired of the lease; attributing to the tenant for life in possession so many years as he lived, and the residue to those in remainder. *In re Money's Trust*, 31 Law J. Rep. (N.S.) Chanc. 496; 2 Dr. & S. 94.

The tenant for life of an estate under settlement agreed in consideration of 3,000*l.* to withdraw his opposition to a bill promoted in parliament by a railway company for the construction of a line of railway through the estate. The bill passed, and the 3,000*l.* was paid, but the act was allowed to expire. Subsequently the company obtained another act for construction of a similar line, and took part of the settled estate:—Held, upon bill filed by the remainderman, that the 3,000*l.* must be treated as having been received for the benefit of the tenant for life and those entitled to the estate in remainder. *Pole* v. *De la Pole*, 34 Law J. Rep. (N.S.) Chanc. 586; 2 Dr. & S. 420.

A mortgagee of the tenant for life of equity of redemption filed his bill against the mortgagees of the fee and remaindermen, for redemption or foreclosure. The tenant for life having died between the setting down of the case and the hearing, the bill was dismissed with costs. *Riley* v. *Croydon*, 2 Dr. & S. 293.

As between tenant for life and remainderman, the interest on the testator's debts must be borne by the income, as from the day of his death. *Barnes* v. *Bond*, 32 Beav. 653.

The rights and interests of tenants for life and remaindermen, in reference to timber felled and minerals won by a tenant for life impeachable for waste, discussed and considered. *Bagot* v. *Bagot; Legge* v. *Legge*, 33 Law J. Rep. (N.S.) Chanc. 116; 32 Beav. 509.

*Semble*—That the tenant for life may work abandoned mines where the previous working has been stopped merely from inability to carry it on at a profit. *Secus*, if stopped with a view to the permanent advantage of the estate. Ibid.

*Semble*—That the tenant for life may cut oak coppice in due course for his own benefit, when the custom of a country so permits, and may also take the profits which arise from the periodical thinnings of woods. Ibid.

*Semble*—That the proceeds of timber and minerals, properly cut and won having regard to the benefit of an estate, by a tenant for life impeachable of waste, will, by the rules of the Court of equity, be invested and dealt with as part of the corpus of the estate, the tenant for life, though impeachable of waste, receiving the income. Ibid.

*Semble*—That the proceeds of timber and minerals improperly cut and won at a time when there is no person *in esse* unimpeachable for waste, must be similarly dealt with, except that the tenant for life, so improperly acting, cannot receive the income. Ibid.

*Semble*—That the proceeds of timber and minerals improperly cut and won by a tenant for life impeachable of waste, at the time when there is in existence a remainderman entitled indefeasibly to the first estate unimpeachable of waste, belong absolutely to such remainderman. Ibid.

*Semble*—That, notwithstanding the popular notion to the contrary, the proceeds of windfalls of timber must be invested and dealt with as part of the corpus of the settled estate. Ibid.

A testator died possessed of shares in a foreign adventure; subsequently dividends were declared upon profits made previously to his death:—Held, that they were income, and belonged to the tenants for life of the shares under his will. *Bates* v. *Mackinley*, 31 Law J. Rep. (N.S.) Chanc. 389; 31 Beav. 280.

A testator was one of a body of shareholders who, on the formation of a company, stipulated for a bonus for their exclusive benefit; they afterwards, in the lifetime of the testator, relinquished it for a fixed payment per share:—Held, that payments made to the executors in pursuance of the arrangement which was completed after the death of the testator, formed a part of the capital of the testator's estate. Ibid.

If shares in a foreign adventure are bequeathed to trustees, with power to continue the investment, the Court, unless asked to change the investment, will make no order as to the continuance of the shares as an investment. Ibid.

Tame deer in a park are personal property, and the Court will not interfere to restrain waste in not keeping up the herd. *Ford* v. *Tynte*, 31 Law J. Rep. (N.S.) Chanc. 177.

A tenant for life impeachable for waste is entitled only to the windfalls of such trees as he had a right to cut. He is also entitled to the thinnings of plantations if properly made, and he is entitled to the crops of all coppices cut in due rotation. *Bateman* v. *Hotchkin*, 32 Law J. Rep. (N.S.) Chanc. 6; 31 Beav. 486.

What a prudent owner would do in the proper course of management is no measure of what a tenant for life without impeachment of waste may do as to cutting timber planted or left standing for ornament. Form on inquiry as to cutting ornamental timber. *Ford* v. *Tynte*, 2 De Gex, J. & S. 127.

The solicitor to the tenants for life, with power of leasing settled real estate, who had obtained from his clients a parol agreement for a lease, on faith of which he expended large sums,—Held, not entitled to a lease. *Trotman* v. *Flesher; Flesher* v. *Trotman*, 3 Giff. 1.

Shares being settled on A for life and then over:—Held, that a dividend declared before A's death, but not payable till afterwards, belonged to A's estate. *Wright* v. *Tuckett*, 1 Jo. & H. 266.

For a long series of years the manager of a public company had fraudulently retained large sums of money, whereby the dividends declared, from time to time, were much less than they otherwise would have been. After his death, a consider-

able sum was recovered by the company from his estate, in respect of his defalcations, and thereupon the company declared a large bonus:—Held, as between the tenant for life and remainderman of some shares, that the bonus belonged solely to the person entitled to the shares at the time it was declared. *Edmondson* v. *Crosthwaite*, 34 Beav. 30.

In 1832, a testator bequeathed ten Carron shares to his widow for life, with remainder over. She died in 1847, and in 1854 the executor sold the shares for 10,000*l.* to the manager. After this, large sums were recovered from the estate of a former manager, and thereout, in 1858, a bonus of 470*l.* per share was declared, whereupon the executor insisted upon setting aside the sale, and obtained an additional 8,000*l.* by way of compromise. A bill by the executor of the widow, claiming to be entitled to participate in the 8,000*l.* was dismissed with costs, the Court holding, first, that the widow's interests (if any) were not comprised in the compromise, and, secondly, that the whole bonus belonged to the persons entitled to the shares at the time it was declared, Ibid.

An insurance company by their deed of settlement were directed to create a reserve fund, and pay no dividend till a specified amount was realized. This provision was departed from with the consent of the majority of the shareholders, and a bonus was distributed every three years. The company then amalgamated with another, and it was agreed that 50*l.* per share should be paid upon all shares, and also a proportionate part of the surplus assets. The plaintiff, who was tenant for life of ten shares in the company, claimed the share of surplus assets which had been paid over to her trustee as part of her annual income:—Held, that these surplus assets, which must be considered as the reserve fund, were capital, and not income. *Nicholson* v. *Nicholson*, 30 Law J. Rep. (N.S.) Chanc. 617.

An equitable tenant for life, unimpeachable of waste, was entitled to estates, subject to a trust for payment by the trustees out of the rents and profits, but not by sale or mortgage of such estates, of certain mortgages on the estates. The timber had been cut on the estates by the direction of the Court:—Held, that the term "rent and profits" meant *annual* rents and profits, and that the tenant for life in possession, though not in possession of the rents and profits of the estate, was entitled to all other rights incident to his estate, and therefore that he was entitled to the proceeds of the timber which had been cut. *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & S. 75.

A testator leaving large property, real and personal, gave, by his will, elaborate directions as to realization, and gave to his executors and trustees 400*l.* a year each for five years after his decease, which he called "annuities or allowances," a sufficient sum to be set apart for that purpose. He then directed a general conversion of all his personalty not specifically given, and invested in government funds or upon mortgage, to be divided into thirteen parts, which parts he gave to persons therein named for life, with remainder to their children. And the testator gave power to his trustees to retain any part of his property in the same form as at his decease, and directed the income of the part retained to be applied in the same manner as the income of the proceeds of sale:—Held, that the gifts to the executors were to be regarded as annuities payable out of income: Also that the tenants for life were entitled to the actual income accruing due during the first year after the testator's decease on property remaining unconverted. *Scholefield* v. *Redfern*, 32 Law J. Rep. (N.S.) Chanc. 627; 2 Dr. & S. 173.

Where stocks are sold between dividend days, the Court will not apportion the proceeds of sale, so as to give a tenant for life the value of the current dividend in the sale moneys. And the rule is the same though the subject-mater sold may consist of debentures or securities carrying interest *de die in diem*. Ibid.

*Semble*—The practice of the Court in declining to recognize the equity to an apportionment is governed by considerations of convenience and saving of expense. Ibid.

## TENANT IN TAIL.

The produce of an entailed property was settled on the parents, and afterwards on the children. It turned out that, as to part of the fund, the entail had not been barred:—Held, that the heir in tail (a son of the marriage) having excepted benefits under the settlement, was bound to give effect to it as to the part not disentailed. *Mosley* v. *Ward*, 29 Beav. 407.

## TENANTS IN COMMON.

The Court refused, on the application of one of several equitable tenants in common, to appoint a receiver over the whole estate, against an equitable tenant in common in possession, there being no exclusion, but limited the appointment of receiver to the share of the plaintiff only. *Sandford* v. *Ballard*, 30 Beav. 109.

Where persons were tenants in common of coal-mines, situate under estates adjoining each other, and of which estates they were seised in severalty, and a shaft had been sunk upon one of such estates by a tenant of the mines for the purpose of working them, it was held that all the tenants in common of the mines were entitled to participate in the profits derived in respect of the use of the shaft by the tenant in landing the coal from mines of adjoining coal-owners of which such tenant was also lessee. *Clegg* v. *Clegg*, 31 Law J. Rep. (N.S.) Chanc. 153; 3 Giff. 322.

The Court will as between tenants in common only interfere to restrain waste in cases of destructive spoliation or waste. *Arthur* v. *Lamb*, 2 Dr. & S. 428.

A B, one of several tenants in common, had been in the personal occupation of part of the property. In a suit by another tenant in common for partition and on account of rents,—Held, that unless A B were charged with an occupation rent, he could not be allowed for substantial repairs and lasting improvements made by him on any part of the property. *Teasdale* v. *Sanderson*, 33 Beav. 534.

If one tenant in common is excluded by his co-tenants, the Court, upon satisfactory evidence of the exclusion, will appoint a receiver over the whole

estate. *Sandford* v. *Ballard*, 33 Law J. Rep. (N.S.) Chanc. 450; 33 Beav. 401.

## THAMES CONSERVANCY ACT.

The corporation of London executed a bond conditioned for the payment of an annuity out of certain tolls which they were entitled to levy under acts for the improvement of the navigation of the Thames, and by the acts such annuities were made a charge on the tolls. The Thames Conservancy Act (20 & 21 Vict. c. cxlvii.) was afterwards passed to carry out, among many other things, an agreement between the Crown and the corporation as to the River Thames. By that act the conservancy of the River Thames was transferred from the corporation of London to a new body, called "The Conservators of the River Thames," and the power of receiving tolls was taken from the corporation and given to the Conservators:—Held, that the corporation of London could no longer be sued on their bonds, as the tolls out of which they were to pay were taken from them by act of parliament; and that the objection that the impossibility of performance was caused by their own act, could not be maintained, as the Thames Conservancy Act was of a public nature and affected public interests, and could not be looked upon (as some private acts are) in the light of a mere private agreement or contract between individuals. *Brown* v. *the Mayor of London* (Ex. Ch.), 31 Law J. Rep. (N.S.) C.P. 280; 13 Com. B. Rep. N.S. 828.

## THEATRE.

A booth used as a temporary and portable theatre is a "place" within the meaning of 6 & 7 Vict. c. 68. s. 11. *Fredericks* v. *Payne*, 32 Law J. Rep. (N.S.) M.C. 14; 1 Hurls. & C. 584.

The manager of a booth, used as a portable theatre, not being a patent theatre or duly licensed as a theatre, who, with a company of strolling players, caused to be acted therein a stage-play for hire, the booth being on a private piece of ground rented for the purpose of holding a pleasure fair, not legal or licensed in any way, is liable to a penalty under s. 11. Ibid.

The Metropolitan Police Act (2 & 3 Vict. c. 47.) s. 46. empowers the police to enter into "any house or room kept or used for stage-plays or dramatic entertainments, in which admission is obtained by payment of money, and which is not a licensed theatre," and imposes a penalty on every person "keeping, using, or knowingly letting any house, or *other tenement*, for the purpose of being used as an unlicensed theatre," and also on every person performing, or being therein, without lawful excuse; and the section also provides that a conviction under that act shall not exempt "the owner, keeper, or manager, of any house, room, or tenement" from any penalty for keeping a disorderly house:—Held, that a portable booth used by strolling players is not a tenement within this section. *Fredericks* v. *Howie*, 31 Law J. Rep. (N.S.) M.C. 249; 1 Hurls. & C. 381.

The appellant was convicted under 6 & 7 Vict. c. 68. (the Act for Regulating Theatres) for keeping a place for the public performance of stage-plays and for causing to be acted there certain parts in a stage-play without the licence required by that act. It was proved that the appellant was the occupier of a hall, which, though licensed for public dancing and music, was not licensed as a theatre, and that one end of that hall was fitted up with a stage, where, with lights and scenery and the other accessories of a stage, the appellant caused to be presented for the amusement of the public a performance sustained by living persons with a dialogue between them and a regular plot. This performance was distinguished only from an ordinary stage-play by all the actors except two (the dialogue between whom was wholly subordinate to the plot of the piece) being not bodily on the stage, but represented merely by a reflexion of their figures on a mirror at the back of the stage, so ingeniously contrived that to the spectators the appearance was that of persons actually upon the stage:—Held, that there had been a violation of the statute, and that the conviction was right. *Day* v. *Simpson*, 34 Law J. Rep. (N.S.) M.C. 149; 18 Com. B. Rep. N.S. 680.

## THELLUSSON ACT.

A testator bequeathed a sum of money to trustees to be invested, and the interest to be accumulated during the life of A B, upon whose death the capital and the accumulations were to be held in trust for the benefit of the wife of A B and her younger children:—Held, that this was not a bequest for the purpose of raising portions for younger children within the exception of the 2nd section of the Thellusson Act. *Watt* v. *Wood*, 31 Law J. Rep. (N.S.) Chanc. 338; 2 Dr. & S. 56.

Where a will, made before the Wills Act, directs an accumulation of the rents of real estate in excess of the period prescribed by the Thellusson Act, the heir-at-law, and not the residuary devisee, is entitled to the rents the accumulation whereof is rendered invalid by the latter act. *Smith* v. *Lomas*, 33 Law J. Rep. (N.S.) Chanc. 578.

A testator devised real estates charged with life annuities to trustees, upon trust, after the decease of the surviving annuitant, for sale; and he directed his trustees to stand possessed of his residuary personal estate, and of the money to arise from the sale of his real estates, and of the rents of his said estates until the same should be sold, and all accumulations thereof, and also the rents of the said estates after the same should become saleable, upon certain trusts therein mentioned. The testator then declared that in the mean time and until his real estates should be sold, the trustees should, after payment of the annuities, invest and accumulate the rents, &c., in the way of compound interest, and, when and so soon as the estates should be sold or become saleable, should stand possessed of the said rents, &c., and the accumulations thereof upon the several trusts, &c. thereinbefore declared concerning the same and concerning the money arising from the sale of the said estates respectively. One of the annuitants having survived the period (twenty-one years from the death of the testator) beyond which the trust for accumulation was invalidated by the Thellusson Act (39 & 40 Geo. 3. c. 98),—Held,

on appeal, that the gift of the rents until sale and all accumulations thereof was, upon the true construction of the will, tantamount only to a gift of the fund to arise from the accumulation directed to be made, and could not be held to embrace rents set free, by the operation of the statute, from the trust for accumulation; and that so far as the trust to accumulate was void, the gift itself became inoperative; and that the rents arising between the period when the accumulation was made to cease by the operation of the act and the period when the same was directed by the will to cease were undisposed of and belonged to the heir-at-law. *Green* v. *Gascoyne*, 34 Law J. Rep. (N.S.) Chanc. 268.

The Court is not at liberty to apply the Thellusson Act in such a manner as to accelerate the enjoyment of any gift or disposition contained in a will. The statute, while cutting down the trust for accumulation to the period prescribed, leaves the rest of the will the same in point of disposition as if no such operation had been performed by it. Ibid.

Where a will contains, first, an absolute gift, and then a superadded direction to accumulate in excess of the period allowed by the Thellusson Act, the absolute gift remains operative so far as the direction to accumulate is rendered void by the act, and the void accumulations pass under the absolute gift. *Combe* v. *Hughes*, 34 Law J. Rep. (N.S.) Chanc. 344; 34 Beav. 127; 2 De Gex, J. & S. 662.

A testator gave his residuary estate to trustees upon trust for his sons A and B and his daughter C, and to pay and divide it to and among them in certain shares, and he directed the shares of A and B to be paid to them immediately for their own use, but as to the share of C, he directed that it should not be paid to her, but that a portion of his government securities, equal to her share, should be retained by the trustees and allowed to accumulate during the life of her husband D, and that upon the death of D, should there be any child or children living, the property should be secured for their benefit and that of their mother, but should there be no child living, then the share of C might be paid to her for her own use; but if C should die before her share should become payable, then he directed that the trustees should stand possessed of it, in trust for A and B equally, C and D having both lived more than twenty-one years after the testator's death:—Held, by the Lords Justices, affirming substantially the decree made by the Master of the Rolls, that C was entitled to the income which had accrued from her share since the expiration of twenty-one years from the testator's death, and which during the joint lives of herself and D should accrue from it, and from accumulations made during the twenty-one years. Ibid.

## THREATS.

### *Demanding Money with Menaces.*

The prisoners pretended to S that they had authority to distrain for rent which S owed his landlord, and that they had a warrant from a magistrate to break open the door of the house of S, and stated that they would do so unless he gave them a certain sum; and they called in a policeman. S, believing their statement, followed them to a neighbouring public-house, and paid them the money. On an indictment charging that the prisoners with menaces demanded money of S with intent to steal,—Held, that it could not be stated as a matter of law on the above facts that the prisoners were guilty; that, to be within the act, the demand, if successful, must amount to stealing; that to constitute a menace within the act it must be of a nature and extent to unsettle the mind of the person on whom it operates, and to take away from his acts that element of free voluntary action which alone constitutes consent; and that it ought to have been left to the jury to say whether the conduct of the prisoners was such as to have had that effect on S. *R.* v. *Walton*, 32 Law J. Rep. (N.S.) M.C. 79; 1 L. & C. 288.

If a policeman, professing to act under legal authority, threaten to imprison a person, on a charge not amounting to an offence in law, unless money be given him, and the person, believing the policeman, give him money, the policeman may be indicted for the offence of demanding money with menaces, with intent to steal, although the offence is completed, and he might also have been indicted for stealing the money. *R.* v. *Robertson*, 34 Law J. Rep. (N.S.) M.C. 35; 1 L. & C. 483.

## TITHES.

[The annexation of tithes to district churches facilitated by 28 Vict. c. 42.]

### *Extinguishment of Tithes by Private Act.*

By a private act of parliament, passed in 1762, for carrying into effect an agreement between the landowner and rector for the commutation of tithes on certain lands in the parish of W, it was declared that certain rents therein specified should be vested in the rector, in lieu of and as full compensation for all tithes of corn, grain, hay, wool, lamb, and all other tithes whatsoever, except as after mentioned, arising from all or any of the lands in the said parish, save and except marriage, churching, and burial fees, "provided that nothing in the act should prejudice the right of the said rector, or his successors, to any marriage, churching, or burial fees, nor the right of tithes and customary stocking," in certain specified lands, "the modus in the Groves and Ancient Closes adjoining to the town, and all other petty and personal tithes not herein mentioned and relinquished, all which the said rector reserves, and they are hereby reserved to him and his successors in full right and in as ample manner as they have always been enjoyed." The Assistant Tithe Commissioner having decided that the said lands, called "the Ancient Closes," were not exempt from tithes,—Held, on motion for a prohibition, that the tithes of "the Ancient Closes" were not commuted or extinguished by the private act of 1762, and therefore the jurisdiction of the Commissioners was not taken away by s. 90. of the Tithe Commutation Act, 6 & 7 Will. 4. c. 71. *In re Wintringham Tithes, ex parte Lord Carrington*, 31 Law J. Rep. (N.S.) C.P. 274.

*Semble*—That, even if the tithes of wool and lamb were not included in the modus reserved to the rector, and were therefore extinguished by the act of 1762, such partial extinguishment of tithes arising out of the lands would not satisfy s. 90. so as to deprive the Commissioners of jurisdiction. Ibid.

*Extraordinary Charge on Land cultivated as Hop-grounds.*

In a parish in a hop district where the tithes had been commuted under the Tithe Commutation Act, 6 & 7 Will. 4. c. 71, certain lands, being waste lands at the time of the commutation, had no rentcharge in lieu of tithes apportioned on them. These lands were afterwards brought into cultivation as hop-grounds:—Held, by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench (32 Law J. Rep. (N.S.) Q.B. 20; 4 Best & S. 18), that these lands, not being liable to the ordinary rentcharge in lieu of tithes, were not lands whose tithes had been commuted under the act, and consequently were not liable to the extraordinary charge imposed by s. 42. on such lands when used as hop-grounds. *Trimmer* v. *Walsh* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 364; 4 Best & S. 40.

## TOLL.

[See THAMES CONSERVANCY ACT—TURNPIKE.]

## TOWNS IMPROVEMENT ACT.

[The protection of certain garden or ornamental grounds in cities and boroughs provided for by 26 Vict. c. 13.]

The right of drainage into the sea and public rivers, conferred by the Towns Improvement Clauses Act, 1847, is subject to the condition that no nuisance be created. *The Attorney General* v. *the Mayor, Aldermen and Burgesses of the Borough of Kingston-on-Thames*, 34 Law J. Rep. (N.S.) Chanc. 481.

The rights of the public in reference to the use of navigable rivers and the water thereof considered. Ibid.

## TRADE-MARK.

[The law relating to the fraudulent marking of merchandise amended by 25 & 26 Vict. c. 88.]

(A) WHAT CONSTITUTES A TRADE-MARK.
(B) RIGHT IN.
(C) INJUNCTION.
(D) ACCOUNT.

### (A) WHAT CONSTITUTES A TRADE-MARK.

Upon a motion for an injunction on behalf of the corporation called "The London Assurance," to restrain "The London and Westminster Assurance Corporation (Limited)" from using the latter title, the Court refused to make any order. *The London Assur.* v. *the London and Westminster Assur. Corporation (Lim.)*, 32 Law J. Rep. (N.S.) Chanc. 664.

The exclusive right established to the use of a trade-mark, although consisting of the name of a foreign province from which the raw material for the manufactured article was procured, and from which other persons might also procure similar material in the raw or manufactured state. *M'Andrew* v. *Bassett*, 33 Law J. Rep. (N.S.) Chanc. 561.

The use of a trade-mark for the period of about six weeks, during which it had become known in the market, held sufficient to confer an exclusive right thereto. Ibid.

M in August commenced selling sticks of liquorice of a new manufacture, marked "Anatolia." On the 13th of September some of the goods so marked were sent to B, with a request that he would make up liquorice in the same form and with the same stamp. Liquorice-juice had long been imported from Anatolia, but no one before M had used the word "Anatolia" as a mark:—Held on appeal, that the word "Anatolia" might be used as a trade-mark, and that M had acquired sufficient property in it to entitle him to an injunction against B. Ibid.

The essential qualities for constituting property in a trade-mark are: first, that the mark has not been copied, and involves no false representation; secondly, that the article has become vendible in the market. Ibid.

It is not necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; it is sufficient that the Court should be satisfied that there was, on the whole, a fraudulent intention of palming off the defendant's goods as those of the plaintiff. But in such a case, it is essential that the imitation should be necessarily calculated to deceive, and where it did not appear that any one had been in fact deceived, and a material part of the plaintiff's peculiar marks had been omitted, the Court, notwithstanding strong circumstances of suspicion, refused to interfere. *Woollam* v. *Ratcliff*, 1 Hem. & M. 259.

### (B) RIGHT IN.

J B, while trading as a manufacturer, acquired the right to use a particular corporate trade-mark containing the letters J B. He subsequently entered into partnership, and by the articles then executed, it was agreed that the trade-mark should be a partnership asset, and that it should be lawful for the parties thereto, at the end of the partnership, to use the mark for the remainder of their lives, either alone, or in partnership with any other persons. The firm having fallen into difficulties, all the assets and all the estate and effects joint and separate of the partners were assigned by them to trustees, who subsequently assigned to H B the assets of the old firm, including all the right which they could assign of using the trade-mark. Upon bill filed by H B to restrain J B from using the trade-mark, or granting the use of it to others,—Held, that J B was entitled to use it himself, or to allow any person in partnership with him to use it; but that an injunction must be awarded to restrain J B from granting the use of the trade-mark to any person not in partnership with him. *Bury* v. *Bedford*, 32 Law J. Rep. (N.S.) Chanc. 741.

Whether the trade-mark was one which could properly be assigned, *quære;* but held, that J B had by his acts precluded himself from setting up by way of defence that he had no power to assign it. Ibid.

If A has acquired property in a trade-mark, which is afterwards used by B in ignorance of A's right, A is entitled to an injunction, but not to an account or compensation, except in respect of any user by B after he became aware of the prior

ownership. *Edelsten* v. *Edelsten*, 1 De Gex, J. & S. 185.

The owner of a trade-mark will not be deprived of remedy in equity, even if it be shewn that all who bought goods, bearing the mark, from the defendant were well aware that the goods were not of the plaintiff's manufacture. It is enough if the goods were supplied by the defendant for the purpose of being sold again in the market, nor is it necessary to shew that any person was deceived, if the resemblance of the articles is such as would be likely to cause one mark to be mistaken for the other. Ibid.

Where the plaintiff attached to wire manufactured by him tallies marked with an anchor, and the defendant attached to his manufacture similar tallies marked with the device of a crown and anchor,—Held, that the plaintiff was entitled to an injunction. Ibid.

A firm consisting of three partners for many years used the letters B B H (being the initials of the three partners' names) with a device as a brand for the goods manufactured by them, and on one partner dying, the use of the brand was continued by the survivors. In 1858 one of the two survivors died under circumstances which, in the opinion of the Court, entitled the executor of the survivor to have the business sold as a going concern:—Held, that the right to use the brand did not form part of the saleable assets of the business. *Hall* v. *Barrows*, 32 Law J. Rep. (N.S.) Chanc. 548.

Distinction in this respect between a trade-mark indicating the locality where goods are made, and a trade-mark indicating the firm by which they are made. If the trade-mark had been of the former kind, it would have been saleable. Ibid.

A surviving partner has a right to use the name, and *pari ratione* the personal trade-mark, of the old firm. Ibid.

*Blanchard* v. *Hill* (2 Atk. 484) doubted. Ibid.

A corporation trade-mark granted by the Cutlers' Company to a non-freeman is assignable; but whether such a mark granted to a freeman is assignable, *quære*. *Bury* v. *Bedford*, 33 Law J. Rep. (N.S.) Chanc. 465.

If a personal trade-mark be in any respect less assignable than one referring to locality only or a mere device, the distinction must be limited to cases where the mark is so clearly personal as to import that the goods bearing it are manufactured by a particular person; and, *semble*, even in that case, the objection is rather to the right of using the mark than to its assignable quality. Ibid.

Upon the formation of a partnership with a person entitled to the benefit of a trade-mark, in the absence of express provision in relation to it, it becomes an asset of the partnership (per *Turner, L.J.*). Ibid.

J B, being a non-freeman of the Cutlers' Company, acquired by grant from that company a corporate trade-mark, consisting of the figure of a lion and the letters J B O S; he also acquired by purchase from William Ash the right to the exclusive use of a trade-mark, "Wm. Ash & Co." He subsequently entered into partnership, and by the articles then executed, it was agreed that the corporate trade-mark, used with such other mark as might be agreed upon, should be a partnership asset. It was also agreed that at the expiration of the partnership the several partners should have the free use and enjoyment of the corporate trade-mark for the remainder of their lives, either alone or in partnership with any other persons. The firm, after carrying on business, in the course of which both the corporate trade-mark and the mark "Wm. Ash & Co." were used, fell into difficulties, and the partners assigned all their estate and effects, both joint and separate, to trustees, upon the usual trusts for creditors. By the deed the trustees were empowered to sell the trade, plant, &c. as a going concern. They accordingly afterwards sold the concern to H B, and assigned to him the partnership property and the corporate trade-mark and the other marks of the firm, so far as they lawfully could. Shortly afterwards J B entered into an arrangement with B & Co., by which he authorized them to use the corporate mark, and he also used the corporate mark and the mark "Wm. Ash & Co." himself. Thereupon H B filed a bill to restrain him from so doing, and the Lords Justices, on appeal held, that the plaintiff was entitled to the exclusive use of both trade-marks, and granted an injunction accordingly. Ibid.

The jurisdiction of the Court in the protection of trade-marks rests on property, and fraud in the defendant is not necessary for the exercise of that jurisdiction. *Hall* v. *Barrow*, 33 Law J. Rep. (N.S.) Chanc. 204.

### (C) INJUNCTION.

The Court of Chancery will not grant an injunction to restrain the issue of goods bearing labels containing a false representation, when such falsehood is not an infringement of any right vested in the plaintiff. *Batty* v. *Hill*, 1 Hem. & M. 264.

The persons to whom prize medals have been awarded by the Commissioners of the International Exhibition, have not *ipso facto* any special property in the nature of a trade-mark in the words "Prize Medal." Ibid.

Therefore where a person, who had not obtained such a medal, issued his goods with labels affixed to them bearing the words "Prize Medal, 1862," the Court refused to interfere at the instance of a person who had obtained such a medal. Ibid.

Where A introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market, by a name not merely descriptive of the article, B will not be permitted to sell a similar article under the same name, and this although the peculiarity of the name in question has long been in common use as applied to goods of a different kind; and it will make no difference that the plaintiff has also a trade-mark which has not been taken by the defendant. *Braham* v. *Bustard*, 1 Hem. & M. 447.

The grounds on which a Court of equity interferes to protect the enjoyment of a trade-mark be amined. *The Leather-Cloth Co. (Lim.)* v. *the American Leather-Cloth Co. (Lim.)*, 33 Law J. Rep. (N.S.) Chanc. 199.

Though there is no exclusive ownership of the symbols which constitute a trade-mark apart from the use or application of them, yet the exclusive right to use such mark in connexion with a vendible commodity is rightly called property, and the jurisdiction of the Court to restrain the infringement of a

trade-mark is founded upon the invasion of such property, and not upon the fraud committed on the public. Ibid.

*Obiter*—The Court will not interfere for the protection of a trade-mark, unless the mark used by the defendant is applied by him to the same kind of goods as the goods of the plaintiff, and is such that it may be and is mistaken in the market for the trade-mark of the plaintiff. Ibid.

If a trade-mark contain a material mis-representation as to the character of the goods to which it is applied, the Court will not interfere to protect the use of it, even though the misrepresentation should be so obvious that no purchaser would be deceived. Ibid.

Thus, where a company having a patent for tanned leather cloth were in the habit of stamping as part of their trade-mark the words "Tanned Leather Cloth, Patented" on all their goods, whether tanned or not, it was held on appeal, that the use of those words on goods not tanned disentitled the company to relief against an infringement of the trade-mark. Ibid.

A company purchased all the property, utensils, goodwill of business, and trade-marks, &c. of a manufacturer:—Held, that this purchase would authorize the company, really carrying on business at the same place, to continue the use of the manufacturer's name and marks, so as to be protected therein against infringement of the same. *The Leather-Cloth Co.* v. *the American Leather-Cloth Co.*, 11 H.L. Cas. 523.

There may be a property in a trade-mark which, on the sale of the right to manufacture the goods which it designates, may also be sold and transferred. *Semble*—A paper descriptive of a trade does not constitute a "trade-mark." Ibid.

Where an advertisement, or trade-mark, states that which is not true, it cannot be made the subject of protection by the Court of Chancery. Ibid.

Persons of the name of Crockett manufactured leather cloth, and put on it a stamp, describing it as manufactured by them at "New Jersey, U. S.," and "West Ham, Essex," and as being patented and being tanned. The appellants bought their manufactured articles, their materials for manufacture, goodwill, and premises at West Ham, and their trade-marks. *Semble*—That on such a purchase the continued use by the purchaser of Crockett's original bill was not a fraud on their part, and if the use of it had been infringed, it might have been protected. But where in a stamp used by the defendants, the form of the printed words, the words themselves, and the pictured symbol introduced among them, so much differed from that of the plaintiffs', that any person with reasonable care and observation must see the difference, and could not be misled into taking the one for the other,—Held, that there had been no infringement. Ibid.

### (D) Account.

A defendant is liable in equity to account for the profits made by the user of a plaintiff's trade-mark, though, at the time of the user, he may have been ignorant of the rights, and of the existence of the plaintiff, and notwithstanding that, to entitle him to recover damages at law it may be necessary to prove a *scienter*. *Cartier* v. *Carlyle*, 31 Beav. 292.

A person innocently selling goods bearing the spurious trade-mark of another person, is not in equity liable to account for the profits made thereby, but the owner of the trade-mark is entitled to an injunction. *Moet* v. *Couston*, 33 Beav. 578.

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## TRESPASS.

[See Pleading—Way.]

### *Action for, when maintainable.*

The plaintiff, a bookseller, was employed by a society, established for the sale and publication of certain works, as their storekeeper and agent, originally upon the terms that he should have premises rent and tax free in a good situation, 35 per cent. on all books sold out of the shop, but not on certain other sources of income; that he might carry on a retail business in other New Church works and general literature, for his own benefit, and that the committee should guarantee him 150*l.* for the first year. The appointment was from year to year, by resolution of the committee, and on successive re-appointments of the plaintiff the terms of the resolution were somewhat varied, those of the last re-appointment being that he should be manager for the ensuing year, at a salary of 75*l.* a year, and six months' notice of separation on either side. Ultimately he was dismissed from his post, and notice given him to quit the premises immediately, and possession was taken by the defendants, and the plaintiff turned out. He then brought an action of trespass against the defendants, members of the committee who directed his expulsion, and on the above facts being proved at the trial, he was nonsuited:—Held, on motion for a new trial, that the nonsuit was right, and that the plaintiff's occupation of the premises was that of a servant. Also, per *Byles, J.*, if he were tenant at will, the will was determined. *White* v. *Bailey*, 30 Law J. Rep. (N.S.) C.P. 253; 10 Com. B. Rep. N.S. 227.

Plaintiff was possessed of land in the parish of W, in the county of E, in the declaration in an action of trespass described as "situate at W, in the county of E, and abutting on the river of L and on land in the possession of the defendant." The venue in the action was laid in the county of E. The plaintiff was also possessed of the greater part of the said parish of W, which formed the east bank of the river of L, the boundary of the county of E on the east, and of the county of M on the west. The defendant was in the occupation of the adjoining land in the county of M on the west bank of the river of L. The alleged trespass was committed on certain strips of land on the west bank of the river of L, which were accretions from the change of the course of the river of L, but whether the change causing these accretions had been gradual or sudden was not proved. Evidence was given of acts of ownership by the plaintiff and those through whom he claimed, over the land in question, and also evidence to shew that it formed part of the parish of W and of the county of E, although on the west bank of the river of L. Contradictory evidence was given by the defendant. The Judge left to the jury the question whether the land was in the county of E and parish of L, and whether it was in the occupation of the plaintiff or the property of the defen-

dant's landlord. The jury having found that it was in the county of E and in the parish of L, and that it was in the occupation of the plaintiff,—the Court refused to grant a new trial because the Judge had not directed the jury that if the change of the course of the river had been gradual, the presumption of law would have been that the land, being an accretion on the west bank of the river, would have been in the county of M, and the property of the defendant's landlord, as the owner of the adjoining land in the county of M. *Ford* v. *Lacey*, 30 Law J. Rep. (N.S.) Exch. 351; 7 Hurls. & N. 151.

*Quære*—Whether, where the course of a river has become changed, and there is no evidence whether the change was gradual or sudden, the presumption be that the change was gradual. Ibid.

Accretions from the gradual change of the course of a non-navigable river, where there are no fixed boundaries, will become the property of the owner of the adjoining land. Ibid.

Non-direction, where it does not occasion a verdict against evidence, is no ground for a new trial. Ibid.

If a sheriff's officer, without any direction from the execution creditor, or any interference by him, in executing a *fi. fa.* seize a stranger's goods, who makes a claim, and the officer takes out an interpleader summons, and the execution creditor appears and accepts an issue to try the ownership of the goods, the execution creditor does not thereby become liable to an action of trespass for the wrongful act of the sheriff's officer in taking the goods. *Woollen* v. *Wright* (Ex. Ch.), 31 Law J. Rep. (N.S.) Exch. 513; 1 Hurls. & C. 554.

In an action of trespass for placing bathing-machines on the plaintiff's land, which formed part of the sea-shore within the borough of H, it was not disputed that all persons had from time immemorial, till the passing of a local act, been in the habit of bathing without bathing-machines from any part of the sea-shore within such borough, but there was no proof of any usage to put bathing-machines on the *locus in quo*. By certain provisions of that local act Commissioners were empowered to license bathing-machines and to make by-laws for their regulation; and bathing, except from a bathing-machine, was prohibited from certain parts of such sea-shore, but which did not include the *locus in quo*. A subsequent act for applying the Public Health Act, 1848, to the said borough, transferred the powers of the Commissioners to a local board of health, and subjected all parts of the borough, including the *locus in quo*, to the said provisions of the local act. The local board duly made by-laws for regulating the bathing, and licensed the bathing-machines of the defendant, which he placed on the *locus in quo* without the plaintiff's permission:—Held, that the rights of the owner of the soil had not been taken away by the above statutes, and that therefore the plaintiff was entitled to maintain the action. *Mace* v. *Philcox*, 33 Law J. Rep. (N.S.) C.P. 124; 15 Com. B. Rep. N.S. 600.

*Plea of Justification.*

To trespass for breaking and entering and pulling down and destroying the plaintiff's house whilst he and his family were therein, and assaulting the plaintiff, and by so pulling it down endangering the lives and injuring the persons of the plaintiff and his family, and ejecting them therefrom, and taking the materials of the house,—the defendant, as to the breaking and entering and pulling down and destroying the house, and taking the materials, justified in the exercise of a right of common of pasture over the land on which the plea alleged the house was wrongfully erected, so that without pulling it down the defendant could not enjoy the right of common of pasture:—Held, by the majority of the Court, that the case was governed by *Perry* v. *Fitzhowe*, and that the plea did not answer the action. *Jones* v. *Jones*, 31 Law J. Rep. (N.S.) Exch. 506; 1 Hurls. & C. 1.

## TROVER.

(A) Conversion.
(B) Damages.

### (A) Conversion.

The plaintiff was owner of close A; the defendant was owner of closes B and C. Between A and B there was a fence which, as against the owner of A, the owner of B was bound to keep in repair, but which he had neglected to do. Between B and C there was a sufficient fence. The cattle of the plaintiff strayed from A through a gap into B, and then breaking down the fence between B and C were distrained by the defendant as he alleged damage feasant in C:—Held, in trover to recover the cattle, that the defendant had no right to distrain the cattle, as the first wrongful act had been committed by himself in leaving the fence between B and A insufficiently repaired, the natural result of which wrongful act was the damage complained of; and that the jury were properly directed that the state of the fence between B and C and whether or no the cattle were damage feasant was immaterial. *Singleton* v. *Williamson*, 31 Law J. Rep. (N.S.) Exch. 17; 7 Hurls. & N. 410.

From a fire in warehouses near the Thames melted tallow flowed down the sewers into the river; the plaintiff bought some from a man who had collected it when thus escaping, and he was stopped by the police while carrying it off, and was taken before a magistrate, who discharged him, but ordered the tallow to be detained by the police (under 2 & 3 Vict. c. 71. s. 29). The tallow, becoming offensive, was sold to the defendants; whereupon the plaintiff brought an action against them to recover it:—Held, that the plaintiff had no property in the tallow, but only a temporary right of possession which had been lawfully divested, and that he therefore could not maintain an action for the subsequent conversion, if any, by the defendants. *Buckley* v. *Gross*, 32 Law J. Rep. (N.S.) Q.B. 129; 3 Best & S. 566.

A deposited goods with B as security for a loan, payable upon a day certain. After default made by A, it was agreed that the time for payment should be extended indefinitely, A paying interest at the rate of 10*s.* a month. In the middle of the second month B gave notice to A to pay a certain amount, and in default that he should sell the goods deposited. The amount specified was more than that to which B was entitled for principal and interest at the time the

notice was given:—Held, that under the agreement for an indefinite extension of time B had no right to sell the goods pledged until, by taking the proper steps, the new arrangement was terminated, and that sending the above notice had not that effect. *Pigot* v. *Cubley*, 33 Law J. Rep. (N.S.) C.P. 134; 15 Com. B. Rep. N.S. 701.

If a principal ratifies the unauthorized purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion, although he had no knowledge of the circumstances which made the sale unlawful. *Hilbery* v. *Hatton*, 33 Law J. Rep. (N.S.) Exch. 190; 2 Hurls. & C. 822.

The plaintiff's ship was stranded on the African coast, and being unlawfully seized and sold by W, was purchased by T, the agent of the defendants, who were Liverpool merchants, without their authority. T informed the defendants of the purchase on their behalf and of the price; and they, without knowing the circumstances which made the sale unlawful, replied, "We duly received your letter informing us of your having purchased the brig, but you do not say from whom you bought her, nor whether you have the register with her. You had better, for the present, make a hulk of her. From your description of her, she is not out of the way in price if she has not sustained much damage":—Held, in an action of trover by the owner of the ship, that there was evidence of a conversion; for although the defendants did not know the ship had been unlawfully sold, yet if they ratified the purchase, they were liable. Ibid.

Wine, the property of the plaintiff, being in the warehouse of the defendant, a wharfinger, notice from the Lord Mayor's Court was served on the defendants attaching in his hands all the goods of H, from whom the plaintiff had purchased the wine, and at the same time the defendant was informed that the attachment had reference to the wine. The plaintiff demanded the wine from the defendant's clerk, producing the delivery warrant which had been issued by the defendant to B, a former owner, and indorsed by him to H, and by H to the plaintiff. The defendant's clerk said that there was a difficulty in consequence of the attachment, and referred the plaintiff to the defendant, whom he could not find. The plaintiff's attorney thereupon wrote, demanding the wine before eleven o'clock the next morning. The defendant's attorney replied, asking for time for inquiry; but a writ was issued before that answer was received:—Held (affirming the judgment below, 32 Law J. Rep. (N.S.) Exch. 201; 2 Hurls. & C. 72), that there was some evidence of a conversion; that the conduct and position of the defendant was evidence from which the jury might infer whether or not he had been guilty of a conversion of the wine, and that before arriving at a conclusion, it was proper for the jury to consider whether the defendant had a *bona fide* doubt as to the plaintiff's title to the wine, and whether a reasonable time for clearing up that doubt had elapsed before the action was commenced. *Pillot* v. *Wilkinson* (Ex. Ch.), 34 Law J. Rep. (N.S.) Exch. 22; 3 Hurls. & C. 345.

A deposited with B certain share certificates in a gas company as security for a loan, and afterwards, by deed, assigned all his personal estate to C and D, in trust for the benefit of his creditors. The assignees gave notice of the assignment to the company; but B omitted to give notice of his equitable lien:—Held that, notwithstanding the omission of such notice, C and D could not maintain trover against B for the share certificate. *Broadbent* v. *Varley*, 12 Com. B. Rep. N.S. 214.

(B) DAMAGES.

A deposited a dock-warrant for certain goods with B as a security for a loan to be repaid on a certain day, it being agreed that in default of payment B should be at liberty to dispose of the pledge. A became bankrupt, and B, *before* the day of payment, entered into an absolute contract for the sale of the goods; he handed over the dock-warrant *on* the day of payment, and the vendee took actual possession of the goods the day *after*:—Held, that this was a wrongful conversion of the goods by B. But held, also, *dissentiente Williams, J.*, that the measure of damages for which B was liable was not the full value of the goods, but the damage which A had actually incurred by the premature sale, which in this case was merely nominal. Held, per *Williams, J.*, that A was entitled to recover the full value of the goods. *Johnson* v. *Stear*, 33 Law J. Rep. (N.S.) C.P. 130; 15 Com. B. Rep. N.S. 330.

The defendant had obtained a judgment in the county court against the plaintiff. At the time the judgment was obtained he had in his possession goods belonging to the plaintiff, which he had no right to retain. After judgment in the county court the plaintiff demanded his goods, which the defendant refused to deliver up. After the demand, the defendant issued execution on the judgment in the court, seized and sold the goods in his possession, and applied the proceeds in satisfaction of the debt:—Held, that the plaintiff was entitled to recover, in an action for conversion, the full value of the goods, and that the jury ought not to take into consideration, in mitigation of damages, the fact that the goods had been subsequently applied in satisfaction of the plaintiff's debt to the defendant. *Edmondson* v. *Nuttall*, 34 Law J. Rep. (N.S.) C.P. 102; 17 Com. B. Rep. N.S. 280.

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## TRUCK ACT.

The plaintiff, an artificer, was employed by the defendants, manufacturers of hosiery goods, as a framework knitter, in making stocking-heels out of wool supplied by the defendants. The defendants regulated the amount of work to be done by the quantity of wool which they gave out each week. The plaintiff worked in a room in the defendants' factory, warmed and lighted by the defendants, with the defendants' frames and machines, and the yarn with which he worked was wound for him at the defendants' expense; the plaintiff found merely the labour. The plaintiff was paid for his work weekly, on the basis of 7*d.* per dozen heels, subject to a deduction of about 3*s.* 9*d.* per week, fixed charge, for the use of the frames, machines, room, fire, gas and winding, and for occasional small fines to which he was subject if absent from work. The agreement between the parties was verbal, according to the usage of the trade; and weekly settlements had been made pursuant to it, and the plaintiff assented to it for four years. He at length brought an action to recover

back from the defendants the aggregate amount of the deductions allowed in account, contending that the making such deductions was prohibited by the Truck Act, 1 & 2 Will. 4. c. 37. The defendants pleaded the deductions as a set-off. The Court of Queen's Bench, on the authority of *Chawner* v. *Cummins*, decided that the deductions were legal. That decision was affirmed in the Exchequer Chamber, that Court being equally divided—*Williams, J., Willes, J.* and *Keating, J.*, holding, in favour of the plaintiff, that the wages of the plaintiff was the amount at 7*d.* per dozen for heels, and that the fixed charges and fines were deductions from those wages, so that the plaintiff was not paid his full wages in the current coin of the realm, as required by the Truck Act in all cases, but those especially excepted by the act. *Pollock, C.B., Bramwell, B.* and *Byles, J.*, on the contrary, were of opinion that the wages of the plaintiff was the balance left after deducting the usual charges from the amount calculated at 7*d.* per dozen for heels; and that, as this sum was duly paid in coin, none of the prohibitions of the Truck Act applied. *Archer* v. *James* (Ex. Ch.), 31 Law J. Rep. (N.S.) Q.B. 153; 2 Best & S. 61, 67.

Where the decision of the Court below is affirmed, the Judges in the Court of Exchequer Chamber being equally divided, the respondent is not entitled to costs. Ibid.

If an artificer, engaged in an employment which comes within the provisions of 1 & 2 Will. 4. c. 37, receive of his own accord goods at a shop kept by his employer, and a corresponding amount be deducted by his employer from his wages at their next settling, this is a payment of wages in goods within the meaning of s. 3, and subjects the employer to the penalties of s. 9. *Wilson* v. *Cookson; Fisher* v. *Jones*, 32 Law J. Rep. (N.S.) M.C. 177; 13 Com. B. Rep. N.S. 496, 501.

If payment of wages has been made in goods, no subsequent payment of the wages in cash can purge the offence so committed; the provisions of the act which declare the payment void, and also illegal and punishable, being cumulative. Ibid.

Butty colliers working in partnership under a verbal contract with a colliery owner, by the day, by the ton, or by the yard, according to the nature of the work, and, though not allowed to underlet the work, employing others to assist them, for whose wages they are responsible, are not "artificers" receiving "wages" within the meaning of the Truck Act—So held, upon principle and on the authority of *Ingram* v. *Barnes*. Per *Pollock, C.B.*—The case is within the Truck Act or not, according as the contract is for mere labour, or for the result of labour. *Sleeman* v. *Barrett*, 33 Law J. Rep. (N.S.) Exch. 153; 2 Hurls. & C. 934.

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## TRUST AND TRUSTEE.



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### (A) TRUST.

#### (a) *Constitution.*

Where a man lived with a woman in the character of her husband, and obtained money from her that he might invest it, the Court refused, without positive proof, to declare he was not a trustee, or to permit him after eleven years to claim the money and the investments as his own, or to say that it was a loan, and to plead the Statute of Limitations in bar to the suit. *James* v. *Holmes*, 31 Law J. Rep. (N.S.) Chanc. 567.

Upon a balance of testimony, weight will be given to the character in which parties stand to one another. Ibid.

A testator entered in a memorandum-book, and signed a memorandum that he had decided to invest the future proceeds of an annuity, which had been absolutely assigned to him by his second son F, and that he intended to leave the proceeds at his death to F's daughter. An account also in the testator's handwriting was found of the investments of the annuity "from the period that I determined thus to appropriate this money." On his death-bed, the testator referred his eldest son to the account-book, and said that he wished the accumulations to be given to the daughter of F. The annuity and accumulations were undisposed of by the will:—Held, that there was no declaration of trust, and that the annuity and accumulations went to the next-of-kin. *In re Glover*, 2 Jo. & H. 186.

An executor, in his residuary account, stated that he had retained in trust the account of A B's legacy. He afterwards paid over the residue:—Held, that the executor had constituted himself a trustee for A B, and that his remedy for recovery was not barred by the Statute of Limitations, or the lapse of time:—Held also, that the legal personal representative of the testator was not a necessary party to a suit to recover the legacy against the assets of the executor. *Tyson* v. *Jackson*, 30 Beav. 384.

Parol declaration of trust of money handed over to a third party on trust, by a person *in extremis*, supported, but held invalid as to stock, for which a power of attorney had been given by the settlor, but which had not been acted on at her death. *Peckham* v. *Taylor*, 31 Beav. 250.

#### (b) *Construction.*

Real estate was devised to A in trust to sell, with power to give discharges. A was to pay the debts and hold the surplus on certain trusts, and he was appointed sole executor. A having renounced and disclaimed,—Held, that the heir-at-law, who had taken out administration, could sell the estate and give valid receipts. *Austin* v. *Martin*, 29 Beav. 523.

Where a testator devised real estate, after his just debts, &c. should be first paid thereout, to trustees, upon trust to sell after the decease of certain tenants for life, it was held, that the implied power of sale given to the executors did not make necessary their concurrence in the exercise by the trustees of their trust for sale. *Hodkinson* v. *Quin*, 30 Law J. Rep. (N.S.) Chanc. 118; 1 Jo. & H. 303.

By a trust deed, executed in May, 1841, a certain chapel at Ramsgate was conveyed to trustees upon trust at all times thereafter to permit the said chapel to be used, occupied and enjoyed as a place for public religious worship by the society of Protestant dissenters of the denomination called "Particular or Calvinistic Baptists," and by such other persons as should thereafter be united to the said society and admitted members thereof:—Held, that the doctrine of strict communion was not an essential doctrine of every Particular Baptist church; that it was a matter of order and practice which each church had an inherent right to vary; and that a large majority of the congregation of this chapel having arrived at the conclusion that unbaptized persons might be admitted to the communion, such a practice was not a breach of the trusts of the deed. *The Attorney General* v. *Etheridge*, 32 Law J. Rep. (N.S.) Chanc. 161.

A testator gave all his real estate to uses to secure an annuity to his wife, and subject thereto to the use of trustees, of whom his son B was one, for 800 years, and subject thereto he gave a particular house to his son T, and devised the residue of his real estate to T & B as tenants in common in fee. He then declared the trusts of the term to be to secure the annuity and then by sale or mortgage to raise sufficient for the payment of so much of his debts, funeral and testamentary expenses and legacies as his personal estate not specifically bequeathed should be insufficient to pay. He also gave legacies of 1,500*l.* each to his two daughters, the legacy of the second being to the trustees of the term in trust for her and her children, and all the residue of his personal estate to his sons T & B as tenants in common, and appointed them his executors. By a codicil the testator, gave the legacy of 1,500*l.* of one of the daughters who had died subsequently to the date of his will, to the trustees of the term in trust for her only child. The personal estate was amply sufficient for payment of the debts, funeral and testamentary expenses and legacies, all of which were paid by T & B, except the two legacies of 1,500*l.*, upon which they paid the duty, the word "received" being struck out of the legacy receipt in the usual way, and the words "retained in trust" left standing. The surplus of the personal estate was used by T & B for their own purposes, and they mortgaged the real estate to various persons for large amounts, and applied the mortgage moneys in carrying on their business. The child of the deceased daughter filed a bill against T & B, and subsequently against their assignees in bankruptcy, and the various mortgagees, claiming on his own behalf and that of his aunt and her children to have the legacies raised:—Held that, notwithstanding the original sufficiency of the personal estate at the time of the testator's death, the real estate was well charged with the legacies of 1,500*l.*, which, as they had not in fact been paid out of the personal estate, must be raised out of the real estate. *Howard* v. *Chaffer*; *Howard* v. *Robinson*, 32 Law J. Rep. (N.S.) Chanc. 686; 2 Dr. & S. 236.

By one of the mortgage transactions referred to, the term was treated as subsisting, and the mortgage money was paid to B, as surviving trustee of the term professedly, but the mortgagees knew that the advance was really to T & B for their private purposes: in the other cases, the advances were avowedly made to T & B, and the money was paid to them, the debts and legacies being treated as satisfied, but the mortgagees made no inquiry as to this, and in some cases had constructive notice that the legacies remained unpaid:—Held, that all the mortgagees must be postponed to the legatees. Ibid.

Held also, that the payment of duty and signature of the legacy receipt was no evidence of a valid appropriation of the legacies by T & B as executors. Ibid.

A testator gave the residue of his personal estate to his wife for her own absolute use and benefit, in the fullest confidence that she would dispose of the same for the benefit of her children, according to the best exercise of her judgment, and as family circumstances might require at her hands:—Held, that the widow was entitled for life with a precatory trust in remainder in favour of her children. *Shovelton* v. *Shovelton*, 32 Beav. 143.

A testator, whose wife was of unsound mind, gave his estate to trustees, in trust "to apply from time to time, at their uncontrolled discretion," such annual sum "for the maintenance, &c. of my wife as together with her own income shall not exceed 500*l.* per annum":—Held, that the discretion referred to the application, and not to the amount, and that the widow, who had recovered, was entitled to have her income made up to 500*l.* a year out of the testator's estate. *Bullock* v. *Bullock*, 34 Beav. 85.

(c) *Execution.*

(1) *In general.*

The trusts of a settlement were enforced, and the sale of an expiring term in an estate directed, though the person entitled to the reversion was unknown, and though a majority of the parties interested objected to the sale; but all were allowed to bid, and advertisements for the heir-at-law of the person entitled to the reversion were directed. *Edmonds* v. *Lord Foley*, 30 Law J. Rep. (N.S.) Chanc. 887.

Pending a suit, and although no decree has been made, it is proper that trustees should obtain the sanction of the Court to their exercise of powers of sale and leasing. *Turner* v. *Turner*, 30 Beav. 414.

Trustees for sale are justified in fixing a reserved bidding on a sale by auction. *In re Peyton's Settlement*, 31 Law J. Rep. (N.S.) Chanc. 440; 30 Beav. 252.

Where a professed nun, while in a French convent, executed a deed, conveying all her real and personal estate to trustees upon trust to sell and pay the proceeds to the superior priest of a certain congregation for the benefit of the congregation at his discretion, and covenanted to assign all her future property upon the same trusts, and subsequently, upon the nun's becoming entitled to a legacy under a will, the trustees of the will paid the same into court under the Trustee Relief Act, and a petition was presented by the nun and the trustees of the deed praying payment to the latter,—Held, by *Romilly, M.R.*,

that the fund ought not, without distinct evidence that the petition was her free and unbiassed act, to be paid out of court; but upon appeal, the Lords Justices directed the fund to be paid out either to herself or to the trustees she had appointed, and, considering that the trustees of the will were not justified in paying the money into court, refused them their costs. *In re Metcalfe's Will*, 33 Law J. Rep. (N.S.) Chanc. 308; 2 De Gex, J. & S. 122.

A contract made, by trustees for sale, for the sale of the trust property, conjointly with property not subject to the same trusts, will not be decreed to be specifically performed, unless it appear to the Court, both that due precautions have been taken for preventing injury to the trust premises by the conjunction, and also that the terms of the contract furnish means of ascertaining clearly the proportion of the proceeds of the sale to be attributed to the trust premises. But per *Turner, L.J.*—There is no general rule positively forbidding trustees to sell trust property conjointly with other property not subject to the trust, where the conjunction is beneficial and the proportion of the purchase-money attributable to the trust property admits of satisfactory ascertainment. *Rede* v. *Oakes*, 34 Law J. Rep. (N.S.) Chanc. 145.

A trust to raise by sale of a competent part of a sum of 3,387*l.* Bank annuities, a sum not exceeding 2,000*l.*, and pay the same to the plaintiff,—Held, not to be exhausted or fully performed by raising a sum of 1,391*l.* at the plaintiff's request. *Harrold* v. *Harrold*, 3 Giff. 192.

Trustees of a settlement of a policy of insurance being without funds to pay the premiums, assigned the policy to a creditor, and afterwards assigned the trust property to new trustees appointed in their room, but the policy of insurance was not mentioned in the assignment to the new trustees:—Held, that the new trustees were not entitled to recover the policy as against the creditor. *Johnson* v. *Swire*, 3 Giff. 194.

On a bill by a *cestui que trust* against trustees and executors, to make them liable for loss, alleged to have been sustained by the sale of the testator's business and stock-in-trade against the will of the plaintiff, to one person instead of another, who he alleged would have made a higher offer, the Court held that the trustees having acted with due deliberation, and in the honest exercise of their discretion, the trustees were not liable, and gave them their costs of the suit. *Selby* v. *Bowie*, 4 Giff. 300.

### (2) *Discretionary Trusts.*

A testator directed his trustees to raise, by mortgage of all or any part of his devised estate, any sum or sums of money, not exceeding 20,000*l.*, and to apply the same in liquidation of such of the debts, &c., of C S D M, as to them should seem expedient or proper. The trustees having refused to raise the money without the sanction of the Court, suits were instituted by the creditors and trustees, respectively, for the purpose of obtaining the benefit of the trust, and obtaining the sanction of the Court to the raising of the money:—Held, first, that the trustees had not, by their refusal to raise the money without the sanction of the Court, abandoned their power of selection among the creditors; secondly, that the power of selection among the creditors was not confined to debts in existence at the death of the testator; thirdly, that debts which, at the time of the testator's death, were barred by the Statute of Limitations, were excluded from the benefit of the trust. *Joel* v. *Mills; Hervey* v. *Mills*, 30 Law J. Rep. (N.S.) Chanc. 354.

By a marriage settlement the trustees were empowered to apply the income and capital of the trust estate for the use and benefit of such one or more of the wife and children of J P, and the issue of such children, as the said trustees in the exercise of a free and unlimited discretion should select and determine; but such provision for the wife to be by annuity depending on the life of J P. The trustees declined exercising their discretion, and the Court directed the fund to be divided equally between the wife and children and grandchildren, without making any provision as to an annuity to the wife. *Little* v. *Neil*, 31 Law J. Rep. (N.S.) Chanc. 627.

A discretionary trust for sale cannot (as may a power simply collateral) be exercised by an infant. *King* v. *Bellord*, 32 Law J. Rep. (N.S.) Chanc. 646; 1 Hem. & M. 343.

Bequest to trustees to apply the income or principal for the benefit of S J, widow and of her three children, in such proportion, &c., as the trustees, in their absolute discretion, should think proper, but, in case S J married again, her interest to cease. The trustees declined to act:—Held, that the fund must be divided equally between S J and her three children. *Izod* v. *Izod*, 32 Beav. 242.

Although the mere existence of a discretionary power in trustees over a fund affords no reason why the Court should not order payment of the fund into court, unless such payment into court would interfere with the exercise by the trustee of such discretion, yet, where it appeared that trustees were about, in the due exercise of a discretionary power, to deal with a fund, the Court refused to order payment into court, although the trustees had not actually parted with the fund. *Talbot* v. *Marshfield* 2 Dr. & S. 285.

### (*d*) *Breach of Trust.*

Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity the general rule is, that stale demands are not to be encouraged. *M'Donnel* v. *White*, 11 H.L. Cas. 570.

In taking accounts against a trustee, when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favour, especially if the demand against him is one which arose many years ago, and the beneficiary was at the time cognizant of all the matters connected with it. Ibid.

A, being greatly in debt, executed a deed of trust for the benefit of creditors, and among the property assigned under the trust deed was a lease for lives renewable for ever, on which the rent reserved was really a high rack-rent; the tenant complained, and the trustee, with the knowledge of A, though without his consent, but with the full assent of A's brother, to whom A had committed the management of his affairs, received from the tenant an abated rent; A complained of the abatement, but he took no steps to put an end to it:—Held, that the estate of the trustee could not, after the expiration of the

trust, be called on to make up the deficiency. Ibid.

While the trust was in existence, A, who had been absent from the country, returned, was informed of all that had occurred, and made an affidavit in a suit then pending, which had been instituted by one of his creditors. In this suit a receiver was appointed over one of the estates included in the trust:—Held, that from the date of this appointment the power of the trustee was at an end, and that, as by the law of Ireland, the receiver's duty related as well to the arrears then due from the tenants of that estate, as to those which would afterwards become due, and consequently, no steps having been taken to enforce payment from the trustee of arrears which, before the appointment of the receiver, he had suffered to accrue, his estate could not, after the lapse of many years, he made liable for those arrears. Ibid.

Where a trust is definite and clear, a *cestui que trust* will not be held to have sanctioned a breach of trust merely on the ground that while his interest was reversionary, he knew of the breach of trust, and did not interfere. *Life Assoc. of Scotland* v. *Siddall*, 3 De Gex, F. & J. 58.

A trustee of real estate devised his real estate to G T, subject to the payment of a legacy, so that the trust estate did not pass. G T, however, acted as trustee:—Held, that she must be deemed a trustee upon express trust, and that the Statute of Limitations was therefore no defence to a claim against her estate in respect of a breach of trust. Ibid.

G T improperly allowed part of a trust fund to be received by B N, the tenant for life. S, one of the reversioners, borrowed money from C, and mortgaged to him her share in the trust funds. B N, at the same time, gave C a bond and a mortgage of other property for the same debt, B N being a surety for S in this transaction. The debt having been paid out of B N's estate,—Held, that G T's representative could not claim to have this payment set off against the claim of S in respect of the misapplied part of the trust fund. Ibid.

Money was held on trust to be invested in the purchase of land to be settled, so that S, a married woman, would have been equitable tenant in tail in remainder. The money was improperly received by the tenant for life who bought with it freeholds and copyholds in his own name. After this, S and her husband joined in mortgaging her interest in the trust funds and the lands to be purchased with them, and a fine was levied to the use of the mortgagee. After this the purchased freeholds and copyholds were declared by decree to belong to the trust:—Held, that as regarded the copyholds the security was invalid as against S, but good as against her husband. Ibid.

One of three trustees, being in possession, with the consent of his co-trustees, of railway debentures executed to the three, sold them to a *bona fide* purchaser, and forged the names of his co-trustees to the deed of transfer, which was regularly entered in the books of the company. Upon a bill, filed by the other trustees, praying that the alleged transfer might be declared void with consequential relief, it was held that the possession of the debentures by one trustee gave him no implied authority to deal with them, and the transfer was declared to be void; and the entry thereof in the books of the company was directed to be cancelled, and the debentures to be delivered up to the plaintiffs. *Cottam* v. *the Eastern Counties Rail. Co.*, 30 Law J. Rep. (N.S.) Chanc. 217; 1 Jo. & H. 243.

Negligence cannot be imputed to trustees for leaving documents of title in the hands of one of their number and allowing him to receive the income, and no authority to deal with the property can be implied even in favour of a *bona fide* purchaser from such trustee. Ibid.

B, a trustee, laid out the trust-money, together with other money in his hands, upon mortgage in his own name, and executed a declaration of trust as to so much of the mortgage debt as represented the trust-money. He afterwards deposited the mortgage deed with his bankers as security for money advanced to him, and absconded:—Held, in the absence of negligence on the part of the *cestui que trust*, that the deposit of the deed passed no interest in the trust fund to the bankers. *Stackhouse* v. *the Countess of Jersey*, 30 Law J. Rep. (N.S.) Chanc. 421; I Jo. & H. 721.

As to what amount of negligence would be sufficient to deprive the *cestui que trust* of her priority —*quære*. Ibid.

As to the power of the Court to order the securities to be delivered up in such a case—*quære*. Ibid.

If a solicitor who is trustee of two funds for different *cestuis que trust*, shuffles one for the other for the purpose of concealing a fraud he has committed, a co-trustee, who has unwittingly been led to do an act which enabled the solicitor to deal with one of the funds, cannot claim a restoration of the fund dealt with, though it remain in the name of the fraudulent trustee. *Case* v. *James*, 30 Law J. Rep. (N.S.) Chanc. 749; 3 De Gex, F. & J. 257.

A trustee of a settlement, unknown to his *cestuis que trust*, sold the trust fund, and applied the proceeds to his own use. He represented that the money had been lent on mortgage, and they pressed for its re-investment. He afterwards induced his co-trustee of a second fund to join him in transferring it into his name, and take as security the transfer of a mortgage, which in the result proved to be a forgery. He then made a small addition to the fund out of his own moneys, and gave notice to the *cestuis que trust* of the first fund that it had been replaced, and they immediately put a *distringas* upon the stock. He afterwards died insolvent, leaving the stock standing in his name. Upon a bill by the surviving trustee of the second fund, against the *cestuis que trust* of the first fund, asking that the stock might be restored to him,—Held, by *Romilly, M.R.*, and affirmed on appeal, that the plaintiff had no remedy against the *cestuis que trust* of the first fund; that the *cestuis que trust* of the second fund, had they known the facts, might have stopped and reclaimed it prior to the notice; that the notice of re-investment to the *cestuis que trust* of the first fund amounted to a valid transfer, which made them as against the plaintiff purchasers for value without notice of the fraud; and that the plaintiff's bill must be dismissed, with costs. Ibid.

By a will appointing three persons, A, B and C, trustees, it was provided that each trustee should be answerable only for losses arising from his own defaults, and not for the acts or defaults of his co-trustees or co-trustee, and particularly that any

trustee who should pay over to his co-trustee, or should do or concur in any act enabling his co-trustee to receive any money for the general purposes of the will, should not be responsible for the misapplication thereof. In September, 1857, the three trustees signed a receipt for a portion of the trust fund, and in November, 1857, they signed a receipt for the residue thereof. On each occasion B and C concurred in allowing A to receive the amounts then respectively paid, in order that he might deposit the same respectively at interest in the joint names of himself and his co-trustees in a joint-stock bank until an eligible investment for the trust fund could be found. In 1859 B and C discovered that A never made any such deposit, but that he applied the trust fund as soon as he received it to his own purposes. Upon a bill by the *cestuis que trust* for the purpose of making B and C liable for A's misappropriation of the trust fund,—*Stuart, V.C.*, and, on appeal, *Westbury, L.C.*, held, that, according to the true construction of the will, the act and concurrence of B and C in enabling A to receive the trust fund did not make them liable for A's misapplication of it. *Wilkins* v. *Hogg*, 31 Law J. Rep. (N.S.) Chanc. 41; 3 Giff. 116.

A box, containing securities of the Spanish Government, the property in which passed by delivery, was deposited at a bank, in the names of three trustees. The Spanish Government having afterwards made proposals for a change in the securities, one of the three trustees, who was a stockbroker, was allowed to take the securities out of the box for the purpose of such conversion. He effected the conversion, but appropriated a part of the converted securities to his own use, and placed the rest in the box, which he returned to the bank. The fraud was not discovered for several years; the trustee kept the key of the box, and from time to time took out others of the securities, which he converted to his own use, until at last the box was empty:—Held, that the co-trustees were liable for the first breach of trust, it being their duty after the conversion to see that the securities were all deposited in the box, but that they were not liable in respect of the subsequent misappropriations, the defaulting trustee having properly been allowed to have access to the box for the purpose of from time to time tearing off coupons and obtaining the dividends. *Mendes* v. *Guedalla*, 31 Law J. Rep. (N.S.) Chanc. 561; 2 Jo. & H. 259.

A sum of 135,000*l.* was advanced to B on mortgage, in the name of S, who at the same time executed three declarations of trust, by which he declared that he held the mortgage on trust as to 105,000*l.* for E, as to 5,000*l.* for W, and as to 10,000*l.* for N, the rest of the money belonging to himself. N was the solicitor both for E and S, and was trusted by E with the investment of the 105,000*l.* E appeared to have trusted to N, and to have made no inquiries as to the precise mode of investment, and it did not appear that he knew of the existence of the declaration of trust in his favour. He denied having known that the security was not taken in his own name, and it was not shewn that he had any actual notice that it was not. S afterwards transferred the mortgage for value to C, who had no notice of the trust, and delivered the deed to him. The legal estate in the mortgaged property was during the whole of the transactions outstanding:—Held, that E, assuming him to have known S to be his trustee, was not bound to make any inquiry into the acts or conduct of S with regard to the security, and that his trusting to N and omitting to make any inquiry as to the person in whom the mortgage was vested or in whose possession it was, were not sufficient grounds for depriving him, as against C, of the benefit of the prior equitable title obtained by the declaration of trust, and that C's possession of the mortgage deed being obtained through a breach of an express trust on the part of S did not alter the case, and that in the absence of evidence that E had notice of the dealings of S with the security, E was entitled to priority over C. *Cory* v. *Eyre*, 1 De Gex, J. & S. 149.

Trustees in breach of trust lent trust-money to one of them, H F, and his partners in trade. H F and his partners gave their bond to H F and his co-trustees for the amount, payable with interest at 5*l.* per cent. No action at law could be maintained on the bond:—Held, in a suit to make the trustees liable for a breach of trust, that H F was only liable to pay 4*l.* per cent. on the loss which had occurred to the trust funds. *Fletcher* v. *Green*, 33 Beav. 426.

Contribution between trustees cannot be enforced in a suit instituted against them to repair a breach of trust for which they are all liable. *Fletcher* v. *Green* (No. 2), 33 Beav. 513.

The wrongful receipt and conversion of trust property place the receiver in the same situation as the trustee from whom he received it, and he is subject to the same liabilities as the trustee himself. *Rolfe* v. *Gregory*, 34 Law J. Rep. (N.S.) Chanc. 274.

In such a case relief is given on the ground of fraud and not of constructive trust; lapse of time, therefore, is no bar to the suit. Ibid.

A sum of 600*l.*, secured by a promissory note, was specifically bequeathed for the benefit of S R, a married woman, for her life, with remainder for her children. The executor of the will (S R's husband) delivered up the note to G, the debtor (who had full knowledge of the trust), in discharge of a private debt. Twenty years afterwards S R and her children instituted a suit against G for the recovery of the money:—Held by *Westbury, L.C.*, reversing the decision of *Kindersley, V.C.*, that the right of S R to a life interest in the money was not barred by lapse of time. Ibid.

Property was entrusted to E, upon certain terms. E mixed this with property of his own, and absconded. He was immediately afterwards made a bankrupt. Subsequently E was taken with money in his hands, which was clearly shewn to be the produce of portions of the mixed property. On a bill, filed by the *cestuis que trust*, against the assignees in bankruptcy,—Held, that the whole trust fund must be made good out of the money remaining in E's hands before the assignees could establish any claim on behalf of the general creditors. *Frith* v. *Cartland*, 34 Law J. Rep. (N.S.) Chanc. 301; 2 Hem. & M. 417.

*Semble*—The decision would have been the same even if the assignees could have shewn (which they did not) that the mixed fund had been reduced by payments made thereout by the bankrupt by way of fraudulent preference. Ibid.

The trustee of a sum of stock, being beneficially

entitled to one moiety undivided, assigned his interest to a mortgagee, who placed a *distringas* on the moiety. The trustee afterwards sold out a moiety and absconded. On a bill by the *cestui que trust* of a moiety, the Court held that he was entitled to the remaining moiety, but gave the mortgagee his costs. *Wilkins* v. *Sibley*, 4 Giff. 442.

Where a husband entitled to the interest of a fund for life, with remainder to his wife for life, induced the acting trustee to pay him the money on the written consent of the wife, the trustee having died, his estate was held liable to make good the moneys so paid on a bill filed by the widow and the surviving trustee. *Cresswell* v. *Dewell*, 4 Giff. 460.

## (B) TRUSTEE.

### (*a*) *Appointment.*

Where a deed appointing four persons trustees containing a power of appointing new trustees, and did not, either expressly or by implication, provide that upon any appointment of new trustees the original number should be kept up, an appointment of three new trustees in the place of two who were dead and two who had retired, was held to be valid. *Emmet* v. *Clarke*, 30 Law J. Rep. (N.S.) Chanc. 472; 3 Giff. 32.

An appointment of new trustees of a chapel cannot be made with a view of subverting the trusts declared by the deed of foundation or of ousting the *cestuis que trust* from possession of the estate. *Newsome* v. *Flowers*, 31 Law J. Rep. (N.S.) Chanc. 29; 30 Beav. 461.

If complaint is made of non-observance of the trusts created by a deed of foundation, it must be made upon information. Ibid.

Where, therefore, trustees had been appointed of a Baptist chapel for the purpose of obtaining possession for the benefit of a seceding congregation,—Held, that the new trustees must re-convey the chapel to trustees to be appointed by the *cestuis que trust*. Ibid.

A single woman of education and position may be appointed a trustee to carry the trusts of a will into execution. *In re Cambell's Trusts*, 31 Law J. Rep. (N.S.) Chanc. 821; 31 Beav. 176.

Where estates were given to trustees upon trust (after a trust for one for life with remainder for his children) to convey to a person in the event of the death of the tenant for life without issue, the Court, (on an application by the person contingently entitled under the Trustee Act, 1850, 13 & 14 Vict. c. 60.) appointed trustees in the place of original trustees who refused to act. *In re Sheppard's Trusts*, 32 Law J. Rep. (N.S.) Chanc. 23.

Application for the appointment of a new trustee in the place of a tenant for life, with power to appoint new trustee, who had been found lunatic, refused until a committee had been appointed, and had been served with the petition. *In re Parker's Trusts*, 32 Beav. 580.

The power of appointing new trustees conferred by the 32nd section of the Trustee Act, 1850, applies to the simple office of trustee, and it is not necessary to the exercise thereof that any estate or property should be vested in the trustee. *In re Boyce*, 33 Law J. Rep. (N.S.) Chanc. 390.

But, *semble*, there is no power under the act to appoint, in lunacy, a new trustee in the room of a lunatic trustee, except where some property is vested in him. Ibid.

A testator by his will appointed A B trustee thereof, and directed him after the death of the testator's wife to sell his real estate and hold the proceeds upon certain trusts. A B became lunatic. An order was made in Chancery and Lunacy appointing new trustees and vesting the real estate in them for such estate (if any) as was vested in A B. Ibid.

*Semble*—A direction to sell real estate, combined with a power to execute the necessary assurances for carrying the sale into effect, would give to the trustee an estate by implication. Ibid.

Where the Court, with a view to carrying out the trusts of a will, appoints a new trustee in the room of an infant trustee nominated by the testator himself, the appointment should be without prejudice to any application by the infant to be restored to the trusteeship on his coming of age. *In re Shelmerdine*, 33 Law J. Rep. (N.S.) Chanc. 474.

In a case where a testator had bequeathed a large fund to a single trustee, the Court, at the instance of the tenant for life of the fund, appointed an additional trustee at the cost of the corpus of the trust property. *Grant* v. *Grant*, 34 Law J. Rep. (N.S.) Chanc. 641.

A will by which property was given to three persons as trustees, contained a power providing that if the trustees thereby appointed should depart this life, or decline or become incapable to act in the trusts, it should be lawful for the surviving or continuing trustee or trustees, his executors, administrators, or assigns, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying, declining or becoming incapable to act therein. Two of the trustees disclaimed. The third acted, but subsequently, being desirous of retiring, appointed two new trustees, and conveyed the trust estates to them:—Held, that the appointment was invalid, the retiring trustee not being a continuing trustee within the terms of the power. *Travis* v. *Illingworth*, 34 Law J. Rep. (N.S.) Chanc. 665; 2 Dr. & S. 344.

The word "declining" in a power so worded covers the case of a trustee who after having acted refuses to act any longer. Ibid.

On a petition for appointment of new trustees of two trust funds, the costs were ordered to be paid out of the two funds rateably. *In re Grant's Trusts*, 2 Jo. & H. 764.

### (*b*) *Removal of.*

A trustee took the benefit of the Insolvent Act:—Held, that this was a good ground for his removal. *Harris* v. *Harris* (No. 1), 29 Beav. 107.

A bill was filed by a married lady by her next friend, seeking the removal of a trustee of her marriage settlement under the trusts of which she was entitled for life to the third part of the property settled, on the ground of dissensions between them, so that it was impossible they could act harmoniously together, and *Romilly, M.R.* made a decree for the removal of the trustee and the appointment of another; but *Knight Bruce, L.J.* and *Turner, L.J.* reversed that part of the decree, without prejudice to any question, whether the trustee should or should not at some future time be discharged from his office, —considering it to be the duty of the Court to ascertain to whom such dissensions were attributable.

*Forster* v. *Davies*, 31 Law J. Rep. (N.S.) Chanc. 276.

A trustee for sale of real estate having refused either to carry out a proper sale effected by his *cestuis que trust*, all of whom were *sui juris*, or to concur in the appointment of a new trustee, except upon the terms of being supplied with information respecting matters unconnected with the trust, he was, upon a bill filed, removed from the trust, and ordered to pay the costs of the suit. *Palairet* v. *Carew*, 32 Law J. Rep. (N.S.) Chanc. 508; 32 Beav. 564.

(c) *Powers, Rights, and Duties.*

An executor and trustee, who had acted but not proved, refused, and insisted that he was not bound, to account, and placed every impediment in the plaintiff's way. Having failed in his contention, the Court, on making a decree for an account, directed him to pay the costs of suit to the hearing. *Boynton* v. *Richardson*, 31 Beav. 340.

By a will an annuity was given and a legacy was directed to be accumulated by trustees for the benefit of an infant. The trustees, being in possession of the whole of the testator's estate, applied all the rents and profits in payment of the annuity. A suit was instituted for the payment of the legacy and for administration of the estate. The estate proved insufficient to pay all the costs of the plaintiff and of the defendant trustees; therefore only part of the costs of the latter were ordered to be paid out of the estate, and the whole costs of the plaintiff out of the remaining moneys. As a general rule, trustees have a right to their costs out of the estate; but the application of the rule depends upon the conduct of the trustees and their strict observance of the duties of their trust. *Beer* v. *Tapp*, 31 Law J. Rep. (N.S.) Chanc. 513.

A lady under an order of this Court was in receipt of 100*l.* a year, part of the income arising from an estate which a testator had ordered to be accumulated, and after the death of her mother, divided among herself and her brothers and sisters, who were numerous. By a settlement made upon her marriage, the lady assigned to trustees the whole of her share in the estate, and its accumulations for the benefit of herself for life, with remainder for her children; but she continued for eleven years to receive the 100*l.* a year under the order. The mother was still living. Upon a bill filed by the children of the marriage,—Held, that the order of the Court did not justify the trustees in not investing the 100*l.* a year paid to the lady; that it formed a part of the principal vested in them, and that they must replace the amount; but, notwithstanding that they had ceased to be trustees, they were entitled to be recouped out of the interest of the mother, under the trusts. *Barratt* v. *Wyatt*, 31 Law J. Rep. (N.S.) Chanc. 652; 30 Beav. 442.

A trustee putting in an answer improperly was refused the costs of the answer. *Eddowes* v. *Eddowes*, 30 Beav. 605.

A trustee has a primary charge (in priority of the general creditors) to be recouped out of the life estate of a deceased tenant for life, the amount of trust moneys wrongfully received by him and for the costs of the suit. *Williams* v. *Allen* (No. 2), 32 Beav. 650.

A trustee of a fund belonging to a deceased person refused to pay it over to his legal personal representative, on the ground that there was a question under the will of the deceased, whether it was not specifically bequeathed, and requiring the assent of the alleged specific legatees. He was ordered to pay it to the legal personal representative, together with the costs of the suit, to which suit it was held that such specific legatees were not necessary parties. *Smith* v. *Bolden*, 33 Beav. 263.

Trustees committed a breach of trust by lending trust moneys on mortgage. They instituted a suit to realize their security, in which the property was sold, and the produce paid into court and invested. In taking the accounts they were debited with the cash, and not with the investment. On further directions, the stock was ordered to be sold, and the produce, after payment of the costs, was paid to the trustees. The funds having risen, there was a gain of 251*l.* by the investment:—Held, that the trustees were entitled to the benefit of this sum in discharge of their liabilities. *Fletcher* v. *Green*, 33 Beav. 426.

Executors and devisees in trust to sell, having an option of postponing the sale for five years, were directed in such case to pay the income to the tenant for life. At the end of five years, they had paid no legacies, rendered no account, though frequently requested so to do, nor dealt with the estate, but claimed remuneration for their services. Ordered to pay the costs of a suit to administer the trusts of the will. *Wroe* v. *Seed*, 4 Giff. 425.

(d) *Liabilities and Disabilities.*

Even in the case of an express trust, a Court of equity will not allow a claim to be set up by *cestuis que trust* against the representatives of deceased trustees, when the means of resisting it, if unfounded, have perished, and when the trustees are charged with no act in breach of any duty, nor with the omission of any duty which they ought to have performed within twenty years before the filing of the bill. *Bright* v. *Legerton*, 30 Law J. Rep. (N.S.) Chanc. 338; 29 Beav. 60.

The rule that a trustee shall make no profit of his trust does not extend to his partner. Therefore, where a trustee, being a solicitor, employed his partner professionally in the matter of the trust, upon the terms of such partner being alone entitled to the profits, the Court allowed the professional charges. *Clack* v. *Carlon*, 30 Law J. Rep. (N.S.) Chanc. 639.

A man cannot take upon himself the character of trustee, and act partially as such, or deny his liability to replace trust property, if, through his negligence or want of attention, a sum of money which he has told his *cestuis que trust* or induced them to believe has been retained, and invested by him, has in fact been squandered by his co-trustee. *Horton* v. *Brocklehurst*, 29 Beav. 504.

A B, one of two trustees, rendered accounts in the name of the two, which stated that one-third of the income had been retained and invested, whereas in fact no such investment had been made, and A B alone had received and misapplied these moneys, which were lost by his bankruptcy. The other trustee, however, having at a meeting of the *cestuis que trust*, so acted as to sanction and adopt

the accounts, was held liable for A B's default. Ibid.

A fund was settled on husband and wife successively for life, with remainder to the husband absolutely. The husband became bankrupt, and the trustee purchased the husband's interest in the funds from the assignees, under an agreement between the trustee and the husband to divide the profit. The purchase-money was paid out of part of the funds:—Held, on the death of the wife, that the trustee could claim no beneficial interest in the purchase, and that the fund belonged exclusively to the representatives of the husband. *Vaughton* v. *Noble*, 30 Beav. 34.

The general principle that a trustee cannot make a profit for himself by the use of the trust property applies to an agent entrusted with a ship, or other chattel, for the purpose of using it for the owner's benefit. *Shallcross* v. *Oldham*, 2 Jo. & H. 609.

Trustees who paid over the trust fund to wrong persons, trusting to a marriage certificate, which turned out to be a forgery, were made responsible for so much of the trust fund as could not be recovered from those who had wrongfully received it. The father of the recipients who had sent the forged certificate of his marriage to the trustees was also made responsible for the money. *Eaves* v. *Hickson*, 30 Beav. 136.

By an assignment for benefit of creditors, full powers of borrowing money at interest from bankers and others were conferred upon the trustees of the deed. Two of the trustees carried on business as bankers in partnership with other persons, and the third was a clerk in the bank. An account was opened by the trustees with the bank, and advances were made upon this account, in respect of which the banking firm claimed to make annual rests and to charge interest on the balances according to their usual practice as bankers: — Held, that having regard to the fiduciary position of the trustee partners, only simple interest could be allowed. *Crosskill* v. *Bower*; *Bower* v. *Turner*, 32 Law J. Rep. (N.S.) Chanc. 540; 32 Beav. 86.

After an ineffectual attempt to sell by auction an estate devised in trust for sale, liberty was given to one of the trustees to purchase it at the price at which it had been bought in, upon its appearing beneficial to the parties interested. *Farmer* v. *Dean*, 32 Beav. 327.

Trustee *de facto* held liable to account as a trustee *de jure*. *Hennessey* v. *Bray*, 33 Beav. 96.

One of the inspectors, under a creditors' deed, of a newspaper to be carried on under it by the debtor himself, furnished the paper:—Held, that being in the position of a trustee, he could only charge the cost price. *Chaplin* v. *Young* (No. 2), 33 Beav. 414.

A testator directed his trustees and executors to settle 4,000*l.* consols upon his daughter E in case of her marriage; he also gave her, upon the death of his widow, one-third of his residuary estate, which was subsequently represented by a sum of 2,633*l.* 6*s.* 8*d.* stock. E, upon her marriage, in 1847, settled this fund. In 1859 the widow died. In December, 1859, the trustees of the will executed a settlement of the 4,000*l.* consols, constituting P and M trustees of that fund, which was duly transferred to them. Shortly afterwards P and M were also appointed trustees of the settlement of 1847. In March, 1860, the trustees of the will sold the 2,633*l.* 6*s.* 8*d.* stock, and paid the proceeds to P without any authority from M. Shortly afterwards, P, under a power of attorney from M, sold the 4,000*l.* consols, and received the proceeds. P invested a portion of each of the funds received, but he retained the balances in his hands, and ultimately became bankrupt. Upon a bill by E and her children, against the trustees of the will and against P and M, charging breach of trust in respect of both funds and deficiency in the investments to answer them, and seeking to make the former liable in respect of the payment to P alone,—Held, that the trustees of the will were liable at the suit of the plaintiffs in respect of the irregular payment to P; and that, having regard to the blended condition of the trust funds and the necessity of ascertaining how much of each fund was in a proper state of investment, the suit was not multifarious. *Margetts* v. *Perks*, 34 Law J. Rep. (N.S.) Chanc. 109.

The agent employed by a trustee is not accountable so long as his acts are merely acts of agency, but, where a solicitor got possession of the trust moneys, and allowed the executrix, who was entitled to the income only, to misapply the principal, the Court directed an account against him, as if he were a trustee. *Morgan* v. *Stephens*, 3 Giff. 226.

Where the trustees under a will refused to furnish the solicitor of the residuary legatee with an account, though they offered to permit the plaintiff herself, or a professional accountant, to inspect the accounts, the Court ordered them to pay the costs of a suit to administer the testator's estate. *Kemp* v. *Burn*, 4 Giff. 348.

A trustee for sale cannot purchase the trust property, but an ordinary trustee may purchase the trust property from his *cestui que trust*, though the burden of proving the propriety of the transaction lies on the trustee. *Luff* v. *Lord*, 34 Beav. 220.

In 1862 a trustee purchased from his *cestuis que trust* for 450*l.*, a legacy of 2,000*l.*, payable on the termination of a litigation which had been pending many years. The litigation ended in 1863. The Court supported the sale, though the vendor was in distressed circumstances, on the following grounds:—The vendor well knew his position, and employed his own solicitor; the proposals for the sale proceeded from the vendor, after unavailing attempts to sell elsewhere; the trustee was an unwilling purchaser, and the sale was only completed upon threats of the *cestui que trust* to file a bill for the specific performance; the assets out of which the legacy was to be paid were in litigation and doubt, so as to make the property unmarketable, and the legacy was subject to the right of the vendor's wife to a settlement, and to her right by survivorship. The rule that a solicitor trustee acting in the trust shall not be allowed profit costs, is not restricted to cases of express trust, but applies to the case of an executor or trustee though there be no express trust. *Pollard* v. *Doyle*, 1 Dr. & S. 319.

A trustee who buys up at an under price a charge on the trust property may, if for a long lapse of years the *cestui que trust* refuse to adopt the purchase, keep it for himself. *Barwell* v. *Barwell*, 34 Beav. 371.

There is no rule of equity which prevents one of

several residuary legatees buying the share of another or purchasing for less than the amount a charge on the share of another. Ibid.

A suit to set aside a transaction entered into openly twenty years previously cannot be sustained. Ibid.

In 1834, C B, one of several *cestuis que trustent*, mortgaged his share for 10,500*l*. In 1842, the trustees bought up this mortgage for 1,200*l*. for the benefit of C B's widow and family, but they were unable to find the purchase-money. Thereupon three other *cestuis que trustent* became the purchasers, and six years afterwards they became trustees. By an unexpected sale of the trust property in 1863, the whole mortgage money was paid. Upon a bill filed in 1864, by C B's widow,—Held, that she was entitled to no interest in this beneficial purchase. Ibid.

Trustees lent trust money on mortgage upon a valuation made on behalf of the mortgagor. The security proved greatly deficient:—Held, that the trustees were personally liable for the loss. *Ingle* v. *Partridge* (No. 2), 34 Beav. 411.

Trustees being authorized by their testator, embarked the assets in a partnership trade. In 1831, the active trustee became bankrupt, indebted (as was alleged) to the partnership, and, through it, to the testator's estate. In 1865, parties still under disability sought to charge a co-trustee with the loss occasioned by his not proving the alleged debt under the bankruptcy, but they did not prove the debt at the hearing. The Court considered that the right of proof could only be ascertained by taking the partnership account, and having regard to the lapse of time, the deaths of parties, and the trouble, expense, and difficulty, declined to direct any inquiry on the subject, and dismissed the bill without costs. *Scott* v. *Izon*, 34 Beav. 434.

(*e*) *Release of.*

Where a breach of trust has been committed from which a trustee alleges that he has been released, it is incumbent on him to shew that the release was given by the *cestui que trust* deliberately and advisedly, with full knowledge of all the circumstances and of his own rights and claims against the trustee, and without pressure or undue influence. But where a *cestui que trust*, shortly after attaining twenty-one, pressed for payment of a sum of money to which he was entitled, and four years afterwards accepted from one of the trustees a packet of deeds, which the co-trustee (the father of the *cestui que trust*) had deposited by way of security on the occasion of a misappropriation by him of the trust fund before the *cestui que trust* came of age, and at the request of his father signed and sent a release in writing (not under seal) to such trustee, and took no further steps till after his father's death, six years later, and ten years after he came of age, when, the security turning out insufficient, he filed a bill to have the deficiency made good by the surviving trustee; it was held, by *Westbury, L.C.*, reversing the decision of *Romilly, M.R.*, that all the requisites for constituting a valid release had been complied with, and the *cestui que trust* must be taken to have had full knowledge of the value of the security, notwithstanding he had never opened the packet of deeds. *Farrant* v. *Blanchford*, 32 Law J. Rep. (N.S.) Chanc. 237; 1 De Gex, J. & S. 107.

A trustee holding in trust a fund for three children, allowed their father to receive the income of their shares during their respective minorities, considering him to be unable to maintain them. Two of the children attained twenty-one in the father's lifetime, and received their shares of the capital. The father died, bequeathing his property to the three children equally, and appointed the trustee his executor. The youngest child attained twenty-one soon after his death, and within a few weeks received her share of the capital of the trust fund, and signed a receipt expressing her approbation of the mode in which the income had been applied during her minority. About half a year afterwards, she and her two sisters received their share of the father's estate, and gave a release by deed to the trustees. After this she filed a bill to charge the trustees with the dividends accrued on her share of the trust fund during her minority:—Held, that after having with a knowledge of the facts received from the trustee her share of her father's estate, which was primarily liable to the claim and given him a release, she could not maintain the claim against him. *Aveline* v. *Melhuish*, 2 De Gex, J. & S. 288.

(*f*) *Notice to.*

Where notice is given to the trustees of a settlement (through their solicitor) of an assignment of a reversionary interest thereunder, the solicitor must be the solicitor to the trustees at the time, and in relation to the property in question. *Rickards* v. *Gledstanes*, 31 Law J. Rep. (N.S.) Chanc. 142; Giff. 298.

(C) INVESTMENT OF TRUST FUNDS.

A power to invest trust funds "upon the security of the funds of any company incorporated by act of parliament" does not warrant their investment in preference railway shares. *Harris* v. *Harris*, 29 Beav. 107.

In the absence of any special circumstances which might render the transfer of a fund in court, asked for by the tenant for life, beneficial to those in remainder, irrespective of pecuniary calculations, the transfer ought not to be permitted if on pecuniary calculations it may be injurious to those in remainder. *Cockburn* v. *Peel*, 30 Law J. Rep. (N.S.) Chanc. 575; 3 De Gex, F. & J. 170.

Where, however, the fund is not in court, trustees making the transfer will be entitled to the protection of the Court, if they act *bona fide* and to the best of their discretion. Ibid.

Where there was a power to invest trust funds in government or real securities, the Court sanctioned an investment in Bank Stock and in East India Stock. *Bishop* v. *Bishop*, 30 Law J. Rep. (N.S.) Chanc. 624.

Upon a petition by a tenant for life of a trust fund under a settlement made by herself, the Court authorized a sale and re-investment in East India Stock or Bank Stock, notwithstanding opposition by the parties entitled in remainder on the ground that such re-investment would diminish the capital, but directed the cost of the application to be paid by the petitioner. *The Equitable Assur. Co.* v. *Fuller*, 30 Law J. Rep. (N.S.) Chanc. 497, 848; 1 Jo. & H. 379.

Under special circumstances, the Court, upon the

petition of a tenant for life, sanctioned a change of investment from New 3*l.* per cents. to Bank Stock, but refused to allow any part of the fund to be invested in East India Stock; and the fund being in court the costs of the tenant for life were directed to be paid out of the income, and those of the respondents out of the corpus. *In re Langford's Trusts*, 31 Law J. Rep. (N.S.) Chanc. 334.

Since the passing of 22 & 23 Vict. c. 35. and 23 & 24 Vict. c. 38, and the General Order of the Court of Chancery dated the 1st of February, 1861, trustees are justified in allowing money (not being money in court) invested in Bank Stock and East India Stock to remain as interim investments on those securities, although the instrument which creates the trust directs a positive conversion and investment in the public stocks or funds of Great Britain until the whole could be invested in land. As to the past and future income arising from such investments, that arising from the death of the testator in 1858, under whose will the trust was created, to the date of the Royal assent to 23 & 24 Vict. c. 38. (namely, the 23rd of July, 1860) must be calculated upon the assumption that the stocks in question had been converted at the death of the testator, and that the proceeds had been invested in consols, the tenant for life taking so much income as would represent the dividends of consols, and the difference between the amount of consols dividends and of actual income during that period being treated as accumulated for the benefit of those entitled in remainder under the will. As to the whole income from the 23rd of July, 1860, and thenceforth until land should be purchased, the tenant for life for the time being would be entitled to receive it. *Hume* v. *Richardson*, 31 Law J. Rep. (N.S.) Chanc. 713.

Trustees empowered to invest the trust funds upon the stocks, shares and securities of any company incorporated by act or charter, and paying a dividend, —Held, authorized to purchase such stock or shares of any company described in the will as bear a fixed rate of interest. *Consterdine* v. *Consterdine*, 31 Law J. Rep. (N.S.) Chanc. 807; 31 Beav. 330.

Held also, that shares invested in a company, the deed of settlement of which provided that no shares shall be registered in the names of two or more persons, is not a proper investment for trust funds. Ibid.

Upon bill filed for administration a discretion given to trustees is taken away. Ibid.

Trustees under a power in their testator's will invested the residuary estate in London and Westminster Bank shares. An administration decree having been made, the plaintiffs, who were remaindermen under the will, applied to have the fund invested in consols; and it appearing that one of the trustees desired the change of investment, but was willing to retire from the trust,—ordered that the fund be invested in consols, with liberty to apply with reference to any appointment of new trustees. *Butler* v. *Withers*, 1 Jo. & H. 332.

The 32nd section of 22 & 23 Vict. c. 35. enabling trustees in certain cases to invest the trust fund in Bank Stock or East India Stock, does not apply to a case where the trust fund is already invested in Bank annuities, and the trustee has no power independently of the act to vary any investment. *In re Warde*, 2 Jo. & H. 191.

A testatrix directed her trustees, who were also her residuary legatees, to invest such a sum in the public stocks or funds, or upon the security of freehold or copyhold estates in England, as would produce from the dividends or interest the annual sum of 150*l.*, which she directed to be paid to F W V for life, but in case he should assign or incumber the same, then, or upon his decease, the trustees were to hold the stocks, funds and securities upon trust for the absolute use of F V. The trustees, to meet the annuity, invested 3,530*l.* upon the mortgage of ground-rents reserved upon ten freehold houses newly erected, and let at 100*l.* a year each. The ground-rents were about one-sixth of the annual rental, and were estimated to be of the value of 4,300*l.* and upwards; the interest reserved was 5*l.* per cent., reducible to 4*l.* 5*s.* per cent. upon the same being punctually paid; and the deed provided that in the event of the covenants of the mortgagor being observed, the principal money should not be called in before the 22nd of October, 1867, and that it should not be paid off before that day:—Held, upon a bill by F V, impeaching the investment, and claiming to have a sufficient amount of 3*l.* per cent. consolidated annuities purchased to answer the 150*l.*: First, that although the amount lent was more than two-thirds of the estimated value of the ground-rents, the security must be considered sufficient, the ground-rents being themselves secured by the houses, which were of much greater value; secondly, that the trustees had a right to make the investment at 4*l.* 5*s.* per cent., provided they did so *bona fide* on good security; thirdly, that the circumstance that the money could not be called in for five years did not make the loan a breach of trust, though the plaintiff, if he should become absolutely entitled within the five years, would have a right either to a transfer of the mortgage or to have it realized, and to have the deficiency (if any) made good by the trustees. *Vickery* v. *Evans*, 33 Law J. Rep. (N.S.) Chanc. 261; 33 Beav. 376.

Further proceedings were stayed and the bill retained, with liberty to apply. Ibid.

Circumstances under which the Court will authorize the investment of trust funds in East India Stock. *Mortimer* v. *Picton*, 33 Law J. Rep. (N.S.) Chanc. 327.

The primary object of a trust being to secure a life annuity, the Court may properly, in the exercise of its statutory jurisdiction, direct the conversion of the trust fund into East India Stock, notwithstanding that the reversioner, who was the settlor, had sold a portion of his reversionary interest. Ibid.

### (D) TRUSTEE RELIEF ACT.

[See COSTS, IN EQUITY.]

A stakeholder may pay money into court under the Trustee Relief Act. *In re the United Kingdom Life Assur. Co.*, 34 Law J. Rep. (N.S.) Chanc. 554; 34 Beav. 493.

Trustees paid the ascertained share of a residue of a married woman into court, under the Trustee Relief Act. The Court refused to make the trustees pay the costs, observing that it was not desirable to act too strictly in such cases. *In re Brocklesby*, 29 Beav. 652.

A trustee who files a bill in a case in which he ought to have paid the money into court will only be

allowed the costs which would have been incurred under the Trustee Relief Act. *Wells* v. *Malbon*, 31 Law J. Rep. (N.S.) Chanc. 344; 31 Beav. 48.

Trustees, who had without sufficient reason paid a trust fund into court under the Trustee Relief Act, were ordered to pay the costs of a petition for its payment to the person entitled. *Foligno's Mortgage*, 32 Beav. 131.

A and B being each entitled to one-fifth of a reversionary fund, mortgaged their shares with a power of sale. B was a mere surety for A, and A afterwards assigned his share to B for his indemnity, with a power to sell and to give receipts for the share and the produce of the sale. The mortgagees sold the reversionary interest, and refused to pay the surplus to B without the concurrence and release of A, and they paid the fund into court under the Trustee Relief Act:—Held, that this was improper; and they were ordered to pay the costs of a petition to get the money out of court. Ibid.

Trustees who, after accepting the trust, had paid the trust fund into court, without sufficient reason, were refused their costs of an application to pay the income to the tenant for life. *In re Leake's Trusts*, 32 Beav. 135.

A fund was held in trust for A, an unmarried lady, for life, but to cease if by any means whatever it should vest or become payable to any other person. A afterwards married, and her life interest was settled to her separate use, without power of anticipation, by a settlement to which the trustees purported to be parties, but to which they never assented. The trustees thereupon paid the trust fund into court, under the Trustee Relief Act:—Held, that as the trusts which they had accepted had not been varied either by a marriage or the settlement, they were not justified in paying the money into court, and they were refused their costs of appearing on a petition for payment of the income to the tenant for life. Ibid.

Notwithstanding the Trustee Relief Act, a trustee may, in a proper case, file a bill to be discharged from his trust; and the surviving trustee of a settlement, who had for many years been subjected to litigation and trouble in respect of the funds, and had reached an advanced period of life, having filed such a bill, the Court directed his discharge, with costs of the suit as between solicitor and client. *Barker* v. *Peile*, 34 Law J. Rep. (N.S.) Chanc. 497; 2 Dr. & S. 340.

### (E) TRUSTEE ACT.

The Trustee Act, 1850, does not, by the 32nd section, give power to the Court of Chancery to remove a trustee who is unwilling to retire; but such a trustee is entitled to have his accounts taken in the presence of all parties interested, so that they may be bound, and to have any balance due to him ascertained and paid in the same manner as before the passing of the act. *In re Blanchard, and in re the Trustee Act*, 1850, 30 Law J. Rep. (N.S.) Chanc. 516; 3 De Gex, F. & J. 131.

A trustee, who is a solicitor, cannot be removed under the general jurisdiction of the Court of Chancery over solicitors, that jurisdiction being exercised only in respect of acts done by a solicitor in that character, or in some relation immediately arising out of it. Ibid.

Two trustees had power to appoint new trustees of stock. One of them became lunatic:—Held, that the Court of Chancery had no jurisdiction to order a transfer of the fund into court in a suit, but a petition in lunacy was also necessary. *Jeffreys* v. *Drysdale, in re Drysdale*, 30 Law J. Rep. (N.S.) Chanc. 612.

Trustees cannot obtain the advice of the Court upon questions of construction involving a diversity of opinion. Such questions must be argued. *In re Mary Hooper*, 30 Law J. Rep. (N.S.) Chanc. 795; 29 Beav. 657.

A mortgagee, having a power of sale upon non-payment of the money, with a trust to hand over the residue to the mortgagor, entered into possession, and subsequently died, giving his general estate to his executor, but leaving no heir-at-law. The Court made a vesting order under the 15th section of the Trustee Act, 13 & 14 Vict. c. 60. *In re Keeler's Mortgage Trust*, 32 Law J. Rep. (N.S.) Chanc. 101.

By an order made under the Trustee Act, real estate was inadvertently vested in an alien. The Court declined varying the order by inserting the name of a natural-born subject without the consent of the Crown, but the order was made upon a rehearing. *In re Giraud*, 32 Beav. 385.

Creditors who have obtained a decree for the administration of the estate of their deceased debtor, under which a contract for sale of his real estate has been entered into, and the purchase-money paid into court, are persons "beneficially interested" in the lands comprised in the contract within the scope of the Trustee Act, 1850, s. 37, and are entitled to apply thereunder. *In re Wragg*, 1 De Gex, J. & S. 356.

The Court has jurisdiction to make a vesting order of the legal estates in mortgage lands, where a transfer of the mortgage debt has been ordered by the Court, and it is doubtful whether the trustees of the debt have power to convey the legal estate. *In re Hughes's Settlement Trusts*, 2 Hem. & M. 695.

### (F) FRAUDULENT TRUSTEE ACT.

The prisoner was a trustee and treasurer and secretary of a savings bank. By the rules, which were duly certified, the secretary was to receive the money from the depositors, and pay it over to the treasurer. No rule pointed out what the treasurer was to do with the money; but by the statute 9 & 10 Geo. 4. c. 92, s. 10. he was to hold the money, and pay it over on due demand by the trustees and managers. By the eighth rule the several sums which the trustees were authorized to invest, under the statute 9 Geo. 4. c. 92, were to be paid and invested in the names of the Commissioners for the Reduction of the National Debt, and no sum was to be paid or laid out by the trustees in any other manner, except such sum as should necessarily remain in the hands of the treasurer for the exigencies of the institution. The prisoner received large sums from the depositors, and fraudulently appropriated part to his own use. He was indicted, under the statute 20 & 21 Vict. c. 54, in one set of counts, as a trustee of money for a public purpose, *i. e.* for the purpose of receiving and investing it for the benefit of the depositors in a savings bank; in another set as trustee for the benefit of the depositors in the savings bank, and charged with the fraudulent appro-

priation:—Held, that he was not a trustee for a public purpose, and therefore that the first set of counts could not be supported; but that the prisoner was rightly convicted on the second set as a trustee for the benefit of the depositors; and that he was liable under the statute as a trustee, under an express trust created by instrument in writing; since the set of rules of the savings bank was an instrument in writing within the meaning of the act, and the eighth rule contained an express trust to invest the moneys for the benefit of the institution, *i. e.* of the depositors. *R.* v. *Fletcher*, 31 Law J. Rep. (N.S.) M.C. 206; 1 L. & C. 180.

## TURNPIKE.

[The use of locomotives on turnpike and other roads, and the tolls to be levied on such locomotives, regulated by 24 & 25 Vict. c. 70.—The acts relating to the turnpike-roads in the neighbourhood of the metropolis north of the river Thames amended by 26 & 27 Vict. c. 78.—The law relating to the turnpike-roads in England amended, and certain Turnpike Acts in Great Britain continued by 26 & 27 Vict. c. 94.—The use of locomotives on turnpike-roads for agricultural purposes, &c., further regulated by 28 & 29 Vict. c. 83.]

(A) Exemptions from Toll.
- (*a*) *Volunteer Infantry.*
- (*b*) *Police Constables.*
- (*c*) *Passing less than* 100 *Yards along the Road.*
- (*d*) *Cattle going to Pasture.*
- (*e*) *Fodder for Cattle.*
- (*f*) *Steam Ferry-boat.*

(B) Tolls payable.
- (*a*) *Two full Tolls.*
- (*b*) *Return Toll.*

(C) Demise of Tolls; Waiver of Sureties.
(D) Composition of Tolls by Lessee.
(E) Repair out of Highway Rate.
(F) Penalty: Wheel-Carriage.

### (A) Exemptions from Toll.

#### (*a*) *Volunteer Infantry.*

The 32nd section of the Turnpike Act (3 Geo. 4. c. 126), which exempts from toll "any carriage conveying volunteer infantry, or any horse furnished by or for any person belonging to any corps of yeomanry or volunteer cavalry or infantry, and rode by him in going or returning from any place appointed for exercise, &c., provided such person shall be in the regulation uniform,"—extends to a carriage used by any member of a corps of volunteer infantry, substantially (though not exclusively) for his own conveyance to or from the place of military exercise. *Stephenson* v. *Taylor; Tunstal* v. *Lloyd*, 30 Law J. Rep. (N.S.) M.C. 145; 1 Best & S. 95, 101.

#### (*b*) *Police Constables.*

The bridge erected and the roads made by a company of proprietors, under the provisions of 36 Geo. 3. c. xciv., on which the company are authorized to take toll, subject to exemptions provided for in the act, are a "turnpike-bridge" and "turnpike-roads" within the meaning of 2 & 3 Vict. c. 93. and of 3 & 4 Vict. c. 88. s. 1; and, therefore, the exemption from tolls granted by the last-mentioned act to police-constables extends to such bridge and roads respectively. *Longland* v. *Andrews*, and *Longland* v. *Doling*, 34 Law J. Rep. (N.S.) Exch. 90; 3 Hurls. & C. 564.

#### (*c*) *Passing less than* 100 *Yards along Road.*

A person is liable to pay toll at a toll-gate on a turnpike-road though he has not travelled 100 yards on the road before coming to the gate, if, after passing through the gate, he uses the road for a space which, together with that he has passed over previously, exceeds in all the distance of 100 yards. *Horwood* v. *Powell*, 30 Law J. Rep. (N.S.) M.C. 203.

#### (*d*) *Cattle going to Pasture.*

The exemption from toll on a turnpike-road, contained in 1 & 2 Will. 4. c. 25. s. 1, in respect of sheep or cattle going to pasture, is not confined to farmers occupying farms in the locality of a toll-gate. And a person who was a cattle-dealer as well as farmer, and who, occupying two pasture-fields between which was a turnpike-road and toll-gate, removed sheep from one field to the other to pasture, in order to send them the next day fresher to market, and in so removing them passed them on the turnpike-road and through the said toll-gate, was held entitled to such exemption. *Warmby* v. *Deakin*, 32 Law J. Rep. (N.S.) M.C. 201; 14 Com. B. Rep. N.S. 124.

#### (*e*) *Fodder for Cattle.*

By s. 32. of 3 Geo. 4. c. 126. no toll is to be taken on any turnpike-road for *(inter alia)* any horse, beast, or any cattle, or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day *(inter alia)* hay, straw, fodder for cattle and corn in the straw, which has grown or arisen on land or ground in the occupation of the owner of any such hay, &c., or other agricultural produce, and which has not been bought, sold, or disposed of, nor is going to be sold or disposed of:—Held, that where a person sent by a horse and cart threshed barley, which had grown upon his farm, to the mill for the purpose of having it ground into meal, for feeding pigs upon the farm, and brought back meal the produce of barley which had previously been grown upon the farm, and taken to the mill to be ground, and which meal was to be used as food for the pigs, and the horse and cart had not been employed in any other way during the same day, the horse and cart were exempt from the payment of toll at a turnpike-gate through which they passed on each journey, inasmuch as the barley and also the meal came within the words "fodder for cattle." *Clements* v. *Smith*, 30 Law J. Rep. (N.S.) M.C. 16; 3 E. & E. 238.

#### (*f*) *Steam Ferry-boat.*

By s. 72. of 27 Vict. c. 3. (the Mutiny Act, 1864) Her Majesty's officers and soldiers on duty are exempted from payment of any duties and tolls in passing along or over any turnpike or other roads or bridges otherwise demandable:—Held, that this exemption does not apply to the case of a floating

bridge propelled from one side of a river to the other by steam-power, and kept in its course by parallel chains laid across the bed of the river. *Ward* v. *Gray*, 34 Law J. Rep. (N.S.) M.C. 146; 6 Best & S. 345.

### (B) TOLLS PAYABLE.

#### (*a*) *Two full Tolls.*

The Tiverton Roads Act, 1861 (24 Vict. c. xix), comprises within the trusts eighteen several roads. The 11th section empowers the trustees to demand and take "at the several and respective toll-gates which shall be upon or on the sides of the said roads such tolls as the said trustees shall direct, not exceeding," amongst others, "for every horse drawing any cart, waggon, &c., with wheels of a less breadth than four inches and a half, the sum of 6*d.*;" and "for every horse or mule, laden or unladen, and not drawing, the sum of 1½*d.*" S. 13. enacts that, "for *passing and re-passing* any number of times on the same day with the same horses, beasts, or carriages liable to toll through any of the toll-gates to be continued or erected by virtue of this act upon any road hereinafter particularly mentioned, no more than the number of tolls hereinafter limited with reference to such road shall be taken, that is to say, *two* full tolls, and no more, upon the road from A to B; *two* full tolls, and no more, upon the road from C to D; *two* full tolls, and no more, upon the road from E to F; *one* full toll, and no more, upon all the other roads comprised in this act." And the 14th section enacts that, "all horses, beasts, and cattle in respect whereof the tolls hereby authorized to be taken shall have been paid at any toll-gate on the said roads or on the sides thereof, shall, upon a ticket being produced denoting such payment, be permitted, in returning through the same toll-gate, and *in going and returning through such other toll-gate (if any) as the ticket for such payment shall free*, to pass toll-free at all times on the same day:—Held, that the 13th section does not authorize the trustees to demand two full tolls from a traveller passing through only one gate on a line of road upon which two full tolls are chargeable. Held also, that where a party has paid one full toll on passing through a gate, he is not chargeable with two full tolls on passing on the same day through another gate on another of the roads on which two full tolls are demandable; but that he is liable to a second single toll, there being nothing on the ticket to indicate that it frees any other gate. Held also, that a traveller who has paid one full toll on passing through a gate on one of the roads on which one full toll is payable, is not entitled to pass toll-free on the same day through a gate on another of the roads upon which one full toll is payable, the one full toll being by s. 13. payable upon "each" of the roads comprised in this act. Held also, that the 11th section of the local act specifically providing for progressive charges in respect of the diminished breadth of waggon-wheels, virtually repeals the 7th section of the general Turnpike Act, 3 Geo. 4. c. 126, and that the toll is limited to the sums mentioned in the local act. *James* v. *Dickenson*, 14 Com. B. Rep. N.S. 416.

#### (*b*) *Return Toll.*

A cart belonging to a market-gardener, and which was laden with garden produce packed in baskets, passed through a turnpike-gate, and paid the toll; the next morning it returned with a load of manure to be used on land, and with the empty baskets on the top of the load of manure,—Held, that under section 28. of 3 Geo. 4. c. 126, no toll was payable in respect of the cart or the load carried thereon. *Richens* v. *Wiggens*, 32 Law J. Rep. (N.S.) M.C. 144; 3 Best & S. 953.

By a local turnpike act (10 Geo. 4. c. cx), the following tolls were imposed, amongst others: "1, For every horse drawing any coach, caravan, or other such light carriage (except stage-coaches), 4*d.* 2, For every horse drawing any stage-coach licensed to carry not more than sixteen passengers, 5*d.*; and licensed to carry more than sixteen passengers, 6½*d.* 3, For every horse drawing any van or other such carriage for the conveyance of goods for hire or pay, 6½*d.* 4, For every horse drawing any caravan or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers." And a subsequent clause (s. 7.) provided that only one full toll should be taken for passing and re-passing on the same day. A, a carrier, was the owner of a four-wheeled van, in which he journeyed on certain days, and at stated times, between Bath and Chippenham, "carrying goods occasionally, and passengers occasionally, and sometimes both," for payment. He paid the annual duty of 2*l.* 6*s.* 8*d.* imposed by 16 & 17 Vict. c. 90. sched. D, "for every carriage used by any common carrier principally and *bona fide* for and in the carrying of goods, wares or merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the Commissioners of Inland Revenue":—Held, that A was not chargeable with return toll, and as the proprietor of a "stage-carriage," under the 9th section of the local act, which provided that "for or in respect of the horses drawing any stage-coach, stage-waggon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire or reward, for which toll should have been paid, and which should return on the same day through the same turnpike-gate or bar, the tolls thereby made payable should be paid for every time of passing and re-passing through every such gate or bar, in like manner as if no toll had been before paid thereat." *Eatwell* v. *Richmond*, 18 Com. B. Rep. N.S. 364.

By a local turnpike act (6 Geo. 4. c. cxliii), the following tolls (amongst others) were imposed: "For every horse or other beast drawing any coach, stage-coach, diligence, van, caravan, sociable, berlin, landau, chariot, vis-à-vis, barouche, phaeton, chaise-marine, calash, curricle, chair, gig, whisky, hearse, litter, chaise or other such like carriage, 9*d.* For every horse or other beast drawing any waggon, wain, cart or other such like carriage having the felloes of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, 6*d.*" And a subsequent clause provided that one toll only should be paid for passing and re-passing on the same day. A, a carrier, was the owner of a covered caravan (the single toll on which was admitted to be

6*d.*) with which he travelled between Cirencester and Cheltenham every Tuesday and Thursday, at a pace not exceeding four miles an hour. He used his caravan principally for carrying goods, for hire, but he frequently (as he did upon the occasion in question) conveyed therein also passengers, for hire. He was not licensed under the Stage Carriage Act, 2 & 3 Will. 4. c. 120, but paid the duty imposed by 16 & 17 Vict. c. 90. sched. D, "for every carriage used by any common carrier principally and *bona fide* for and in the carrying of goods, wares or merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the Commissioners of Inland Revenue": — Held, that A was the proprietor of a "stage-carriage conveying goods for pay or reward" within the 11th section of the local act, which provided that "the tolls thereby made payable for in or respect of horses or beasts drawing any stage-coach, diligence, van, caravan, or stage-waggon, or other stage-carriage conveying passengers or goods for pay or reward, shall be payable and paid every time of passing or re-passing along the said road," and therefore liable to the return toll. *Comley* v. *Carpenter*, 18 Com. B. Rep. N.S. 378.

By a local turnpike act (3 Geo. 4. c. lxv), the following tolls (amongst others) were imposed: "1, For every horse, &c. drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, calash, chair, phaeton, caravan, taxed cart, hearse, litter or other such carriage (except stage-coaches), a sum not exceeding 4½*d.* 2, For every horse, &c. drawing any stage-coach, licensed to carry in the whole, inside and outside, not more than nine passengers, a sum not exceeding 4½*d.* 3, For every horse, &c. drawing any stage-coach licensed to carry in the whole, inside and outside, more than nine, and not exceeding sixteen passengers, a sum not exceeding 6*d.* 4, For every horse, &c. drawing any stage-coach licensed to carry in the whole, inside and outside, more than sixteen passengers, a sum not exceeding 8*d.* 5, For every horse, &c. drawing any caravan, tilted waggon, tilted cart or other carriage employed in carrying passengers for a fare, a sum not exceeding 4½*d.* 11, For every stage-coach or other public carriage having more passengers than the same is licensed to carry, or having a greater weight of luggage upon the top of the same than is authorized by law, or having passengers riding upon the top of such luggage," double the usual toll. A subsequent clause provided that no person should pay toll more than once in any one day for passing and re-passing with the same horse or horses; and s. 40. provided "that the tolls should be payable for or in respect of all stage-coaches and other such public carriages licensed or not licensed, for every time of passing and re-passing through the same turnpike on the same day." A, a carrier, travelled to and from Ashcott and Bridgewater three times a week with a light covered spring van on four wheels, drawn by one horse (for which he paid duty under 16 & 17 Vict. c. 90. sched. D), which did not travel more than four miles an hour, and which was principally and *bona fide* used for the carrying of goods and merchandise, but occasionally also for conveying passengers for a fare, never more than six:—Held, that he was not liable under s. 40. of the local act, to return toll. *Pearson* v. *Tazewell*, 19 Com. B. Rep. N.S. 384.

### (C) DEMISE OF TOLLS; WAIVER OF SURETIES.

Trustees of a turnpike-road, under the 55th section of the general Turnpike Act, 3 Geo. 4. c. 126, put up tolls to farm, subject to a condition that a month's rent should be paid in advance, to be forfeited "if such taker shall refuse or neglect to execute the usual articles of agreement, with two sureties," by a given day, or "shall refuse or neglect to enter on the said tolls, or, having executed such agreement with sureties, and having entered upon the said tolls, shall not in all things fulfil and perform the covenants, &c. to be contained in such agreement." The defendant, who was the highest bidder, signed the following memorandum: "I do hereby agree to take the tolls of &c., and I do hereby agree, on my part, to fulfil the conditions for letting the tolls, and do hereby propose A and B as my sureties." This memorandum was signed by the defendant and by the clerk to the trustees (under s. 57), but not by the sureties. No other agreement was executed, and the defendant, though he paid the month's rent in advance, declined to enter upon the tolls:—Held, that the above memorandum constituted a valid demise of the tolls; the stipulation as to the sureties being a stipulation for the benefit of the trustees, which it was competent to them to waive. *Markham* v. *Stanford*, 14 Com. B. Rep. N.S. 376.

### (D) COMPOSITION OF TOLLS BY LESSEE.

The lessees of tolls are not prohibited by 3 Geo. 4. c. 126. s. 55, from making compositions with persons using the roads of the tolls of which they are lessees. *Stott* v. *Clegg*, 32 Law J. Rep. (N.S.) C.P. 102; 13 Com. B. Rep. N.S. 619.

### (E) REPAIR OUT OF HIGHWAY RATE.

The 4 & 5 Vict. c. 59. s. 1, which empowers the special sessions to order contributions out of the highway rates towards the maintenance of a turnpike-road in the parish when the trust funds are deficient, applies to any turnpike-road, whether in existence at the time of the passing of the act or not. *The Trustees of the Sunk Island Turnpike-road* v. *the Surveyors of Patrington*, 31 Law J. Rep. (N.S.) M.C. 8; 1 Best & S. 747.

A turnpike trust is within the act, although the statute, under which the road is made and the tolls taken, has other objects besides the making and maintaining the turnpike-road and enables the taking of other tolls, and all the tolls are made one common fund for the several objects of the statute. Ibid.

The 4 & 5 Vict. c. 59 (which makes it lawful for Justices in petty sessions, upon information that the trust funds are insufficient for the repairs of a turnpike-road within a parish, to examine the state of the funds of the trust, and to inquire into the state of the repairs of the road, and if they think necessary and expedient to order payment to be made out of the highway rate to the trustees of the road, the money to be wholly laid out on the actual repairs of the turnpike-road)—does not enable Justices to make an order towards the payment of repairs already done. *Brown* v. *Evans*, 34 Law J. Rep. (N.S.) M.C. 101.

Where by the private turnpike act the funds are to be applied, in the first instance, to the payment of interest and reduction of the principal sum borrowed, and after that to the repairs of the road, and the funds have not been applied to the repair at all, such case is within the 4 & 5 Vict. c. 59. Ibid.

The Justices making an order under the above act, in the absence of any proof to the contrary, need not inquire whether the trust funds have been properly applied. Ibid.

(F) PENALTY: WHEEL-CARRIAGE.

The 121st section of the general Turnpike Act, 3 Geo. 4. c. 126, imposes a penalty on any person "who shall haul or draw upon any turnpike-road any timber, stone or other thing otherwise than on a wheel carriage":—Held, that a rough skeleton of woodwork, about fifteen feet in length and four in breadth, running upon two wheels, which are placed rather nearer the back than front, so that the forepart, which is shod with iron, comes in contact with the road when going down hill, and slides along and retards the descent, is other than "a wheel carriage" within the section; but that in order to make a person using such a vehicle liable to a penalty, it must be loaded with something *ejusdem generis* with timber or stone, and that straw was not such a load. *The Radnorshire County Boards Road* v. *Evans*, 33 Law J. Rep. (N.S.) M.C. 100; 3 Best & S. 400.

## UNIVERSITY.

The power to punish by imprisonment or otherwise constitutes the person entrusted with that power a Judge of record. *Kemp* v. *Neville*, 31 Law J. Rep. (N.S.) C.P. 158; 10 Com. B. Rep. N.S. 523.

No action lies against a Judge for an adjudication, according to the best of his judgment, on a matter within his jurisdiction; and a matter of fact so adjudicated by him cannot be put in issue in an action against him founded on such adjudication. Ibid.

The plaintiff sued the defendant, Vice Chancellor of the University of Cambridge, for false imprisonment, and a plea set out the charter of the University, which empowered them by their officers to make search in the town for common women and other persons suspected of evil, and all such persons as they should upon such search find guilty or suspected of evil to punish by imprisonment or otherwise as to the Chancellor or Vice Chancellor should seem fit; and that such charter had been confirmed by statute as fully as if it had been repeated verbatim therein. The plea further alleged that the proctors, by command of the University, on a search in Cambridge, found the plaintiff and other women assembled in a carriage with some scholars, and then, reasonably suspecting the plaintiff of evil, that is, of so being in company with the said scholars for disorderly and immoral purposes, apprehended the plaintiff and brought her before the defendant, the Vice Chancellor, in order for her examination, whereupon the defendant did hear and examine the plaintiff, and was satisfied of the matters aforesaid, and caused her to be punished by imprisonment in a fit and proper place of confinement. The replication admitted the statute, but took issue upon the rest of the plea. The plaintiff at the trial proved the arrest, under the circumstances mentioned in the plea, and the imprisonment complained of in the Spinning House, being the usual place of confinement, and her treatment therein being the usual treatment; but she denied any disorderly purpose, and swore that the charge was not made, nor the witnesses examined in her presence, nor any reference made to certain persons referred to by her for her character, that no one was examined on oath, and that there was no warrant of commitment, so far as she knew. The charter was also proved as set out in the plea, and it was admitted by the plaintiff's counsel that the defendant, as Vice Chancellor, had acted according to the best of his discretion and judgment. The jury found that the proctors had reasonable ground for suspicion, that the defendant did hear and examine the plaintiff, but had not made due inquiry into her character, and that the punishment was undeserved:—Held, first, that the Vice Chancellor, in the exercise of the jurisdiction to him, was a Judge of a court of record. Secondly, that the jurisdiction attached when the proctors brought the plaintiff before him; and that as the charter defined no form of proceeding either for the hearing or the determination or the committal, no action of trespass lay against the defendant for the imprisonment complained of. Thirdly, that the proceedings before the defendant could be proved or disproved by the record thereof only, which might be made up at any time. Fourthly, that as there was no express provision in the charter enabling the defendant to administer an oath, no objection could be taken to the hearing on the ground that the witnesses were examined not upon oath. Fifthly, that no warrant of commitment was necessary. Sixthly, that the objection, that the place of imprisonment was unlawful because it was not proved to be a common gaol was unfounded, and that as it appeared to be the accustomed place, the Court must presume the usage lawful till the contrary was proved. Seventhly, that the finding of the jury that due inquiries were not made, was immaterial. Eighthly, that both upon the facts and upon the verdict no action could be maintained against the defendant. Ibid.

The University of London conferred upon the plaintiff a gold medal, as being the candidate who had obtained the highest number of marks in the examination of 1861 for the LL.D. degree. Two years afterwards, it was discovered by the Senate of the University, that, according to the construction put by the Senate on the regulations for the LL.D. examination, the Examiners had miscarried in the mode which they had adopted in ascertaining the highest number of marks; and the Senate thereupon determined to confer a second gold medal upon the candidate to whom according to their view the medal ought to have been awarded. The plaintiff filed his bill, alleging, in effect, that before becoming a candidate he made inquiry of the Registrar of the University, and had been informed by him that the examination would be conducted upon the principle and the marks ascertained in the mode upon and in which they were in fact subsequently conducted and ascertained, and that he had become a candidate and paid his examination fee upon that footing, and praying that the University might be restrained from awarding such other medal:—Held, upon demurrer, that

the Court had no jurisdiction to entertain the suit, the matter being one solely within the jurisdiction of the Visitor; and even if the matter was one which might, in its nature, fall within the cognizance of the Court, the plaintiff had not alleged any sufficient ground of equity. *Thomson* v. *the University of London*, 33 Law J. Rep. (N.S.) Chanc. 625.

## USE AND OCCUPATION.

K had let to the plaintiff, and the plaintiff had underlet to the defendant, a house, for a term ending the 25th of March. The defendant occupied the premises to the 25th of March, and for a half-year longer. Just before the 25th of March the defendant wrote to K, asking the latter to take him as tenant in future. K wrote the defendant, saying that the plaintiff had told him that the plaintiff intended keeping the premises on, but that he had given the plaintiff till the next day to give up possession if he wished to give them up, but that if plaintiff retained his present determination K would re-let them to the plaintiff; if not, he would treat with the defendant. In answer to another letter from the defendant K wrote again to him the day after, saying that the plaintiff had not given up possession; that he could not let the premises to the defendant; and that if defendant was in possession, that rested entirely between the defendant and the plaintiff. The plaintiff sued the defendant for use and occupation, for the half-year's rent accrued since the 25th of March. After action brought, but before trial, the plaintiff paid the rent for the half-year since the 25th of March. K (whose statement it was agreed should be taken to be true) on the trial stated, that he regarded the plaintiff as continuing his tenant after the 25th of March, on the ground that nothing had been done between the plaintiff and himself, either to renew or put an end to the tenancy; that he did not regard the defendant as his tenant, and had made no agreement with him:—Held, by the majority of the Court, (*Bramwell, B.* and *Channell, B. dissentientibus*), that there was evidence for the jury that the plaintiff was tenant to K after the 25th of March, and that the defendant continued to hold the premises under the plaintiff, and was liable to him for the half-year's rent. *Levy* v. *Lewis* (Ex. Ch.), 30 Law J. Rep. (N.S.) C.P. 141; 9 Com. B. Rep. N.S. 872.

Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to render him liable for another quarter. *Gray* v. *Bompas*, 11 Com. B. Rep. N.S. 520.

The Corporation of Oxford, to whom certain open land belonged, were in the habit of allowing annual races to be held upon part of it, under the management of a committee. Before the races, the plaintiff, an auctioneer, issued an advertisement—"Oxford Races. The ground for booths, &c. will be let by auction by Mr. J. F. (the plaintiff), on Monday next. Conditions for letting standings for booths, &c. The highest bidder to be the taker, and he shall, immediately the lot is knocked down, give the number of feet required, and pay for the same immediately after the letting." The defendant was the highest bidder for a lot of the land, and took possession of and occupied it during the races, without having previously paid for it. The plaintiff having brought an action in his own name for the hire of the land,—Held, (*Shee, J. dubitante*) that there was evidence on which the jury might find that the contract was with the plaintiff himself. *Fisher* v. *Marsh*, 34 Law J. Rep. (N.S.) Q.B. 177; 6 Best & S. 411.

## USURY.

Judgment entered up in 1852, on a warrant of attorney of the same date, bearing an indorsement that the said warrant was given to secure 4,500*l.*, with interest at 10*l.* per cent., provided that any equitable charge which the creditor might have on the lands of the debtor by registering the judgment should not be relinquished by taking the debtor into execution:—Held, that the judgment was not void on the ground of usury. *Boughton* v. *Jervis*, 3 Giff. 144.

## VACCINATION.

*Second Information for same Offence.*

The 16 & 17 Vict. c. 100. s. 2. enacts, that the father and mother of every child shall within three calendar months of its birth take it to the proper medical officer, unless previously vaccinated by some duly qualified practitioner; and by s. 9, the registrar shall, on registration of the birth, give notice of this duty, and if after notice the parent shall not have the child vaccinated accordingly, he shall forfeit a penalty not exceeding 20*s.* By 24 & 25 Vict. c. 59. s. 2, any proceedings for enforcing penalties on account of neglect to have a child vaccinated may be taken at any time during which the parent was in default:—Held, that a parent having been fined for neglecting to have a child vaccinated, no further proceedings could be taken, although the child remained unvaccinated. *Pilcher* v. *Stafford*, 33 Law J. Rep. (N.S.) M.C. 113; 4 Best & S. 775.

## VAGRANT ACT.

*Desertion of Wife or Children.*

A mother who, having obtained an order for the admission of herself and two children into the union workhouse, leaves her children at the gate of the workhouse, with the order in their hands, and returns to her usual residence, which is in the borough where the workhouse is situate, is not a person who runs away, leaving her children chargeable to the parish, within the meaning of the Vagrant Act, 5 Geo. 4. c. 83. s. 4. *The Guardians of Cambridge Union* v. *Parr*, 30 Law J. Rep. (N.S.) M.C. 241; 10 Com. B. Rep. N.S. 99.

In 1858 a man left his wife, they having parted by mutual consent, and the wife having means of support from a life interest in some property; in November, 1861, the wife became "chargeable,"

but the husband had only seen her on two occasions since 1858, and no knowledge that she was likely to become chargeable was brought home to him:—Held, that he could not be convicted as a rogue and vagabond under s. 4. of 5 Geo. 4. c. 83. for having "run away, whereby his wife became chargeable." *Sweeney* v. *Spooner*, 32 Law J. Rep. (N.S.) M.C. 82; 3 Best & S. 329.

*Quære*—Whether the wife was an admissible witness against the husband on such a charge. Ibid.

*Being in Dwelling-house for Unlawful Purpose.*

By an information, under 5 Geo. 4. c. 83. s. 4, the appellants were charged with being found at night in the dwelling-house of the respondent for "a certain unlawful purpose, to wit, for the purpose of feloniously stealing and converting to their own use certain provisions of and belonging to the respondent." It was proved that the appellants were in the house of the respondent with his servants, and the Justices found that they were there for the purpose of joining in the taking and consuming of the provisions which were the property of the respondent, without his knowledge or consent, and convicted them of the offence charged:—Held, that such conviction was bad, as the Justices did not find that the appellants were in the dwelling-house for the purpose of feloniously stealing and converting to their own use, &c., as charged in the information. *Semble*—That upon the evidence they might, if they pleased, have decided that they were so. *Kirkin* v. *Jenkins*, 32 Law J, Rep. (N.S.) M.C. 140.

## VENDOR AND PURCHASER.

[See SPECIFIC PERFORMANCE.]

[The proof of title to, and the conveyance of, real estates facilitated by 25 & 26 Vict. c. 53.—An Act for obtaining a declaration of title, 25 & 26 Vict. c. 67,—Certain sales, exchanges, partitions, and enfranchisements, by trustees and others confirmed by 25 & 26 Vict, c. 108.]

(A) CONTRACTS AND CONDITIONS OF SALE.
(B) DEPOSIT.
(C) TITLE.
(D) VENDOR'S LIEN.
(E) RESCISSION OF CONTRACT.
(F) INTEREST AND EXPENSES.
(G) PURCHASER.
  (*a*) *Rights.*
  (*b*) *Duties and Liabilities.*
  (*c*) *Conveyance to.*

### (A) CONTRACTS AND CONDITIONS OF SALE.

A purchaser will be compelled to complete a purchase, and to take a conveyance of an equitable interest from an official manager, appointed under the Winding-up Acts to wind up the affairs of a trading company, where the conditions of sale provide "that he shall accept a conveyance of the entire property from him, without requiring the concurrence of any of the shareholders, or of any other person." *The Official Manager of the Sheerness Well or Waterworks Co.* v. *Polson*, 30 Law J. Rep. (N.S.) Chanc. 326; 3 De Gex, F. & J. 36.

And such completion will be enforced, though the legal estate was outstanding, and though the conditions further provided, "that, if the purchaser required a conveyance of the legal estate, he should bear the expenses incidental to getting it in." And it was held, that the official manager was not bound to specify the persons in whom the legal estate was vested, but that he was bound, if possible, to obtain conveyances from such persons as the purchaser should name as having the legal estate. Ibid.

Held also, that the contract was completed when the official manager made a conveyance of the equitable interest. Ibid.

A lease for twenty-one years contained a proviso, that if the lessees should be desirous of purchasing the fee, and should give to the lessor, his heirs or assigns, notice of such desire, they should be entitled to become and be the purchasers of the premises at the price named; and the lessor, his appointees, heirs or assigns, would, on the payment of the purchase-money, do all acts for effectually conveying the premises to the use of the purchasers. The lessor died, having devised all his real estate to trustees, who disclaimed, and leaving an infant heir. The lessees having served on the infant and his guardian notice of their election to purchase, it was held that such notice was effectually served, and constituted a valid and binding contract, which the Court would not refuse to carry out on the ground that the infant could not give a discharge for the purchase-money. *Woods* v. *Hyde*, 31 Law J. Rep. (N.S.) Chanc. 295.

Upon the sale of real estate one of the conditions was as follows: "The admeasurements are presumed to be correct, but if any error be discovered therein, no allowance shall be made or required either way." It was stated in the particulars that the property sold contained an area of 7,683 square yards or thereabouts; but upon admeasurement, the area was found to be 4,350 only. Upon a bill by the purchaser against the vendor for specific performance with compensation for the deficiency in quantity,—Held, that on the construction of the above condition the purchaser was not entitled to compensation in respect of the mistake as to quantity, and a decree was made for specific performance on payment by the purchaser to the vendor of the full amount of the purchase-money, with costs. *Cordingley* v. *Cheesebrough*, 31 Law J. Rep. (N.S.) Chanc. 617; 3 Giff. 496.

By the terms of a contract for the purchase of real estate, it was stipulated that "a copy of the pedigree on which the claim of the vendor as heir-at-law to the last owner was based should be furnished to the purchaser, who should admit the right of the vendor as such heir-at-law, and should not require any further evidence of marriages, births, failure of issue, descents, intestacies, survivorships, or other matters of pedigree than such as were in the possession of the vendor." The vendor furnished a pedigree which was defective:—Held, upon the construction of the contract, that the purchaser had thereby admitted the vendor's right as heir-at-law to the last owner, and that he could not object to any defect in the vendor's pedigree purporting to shew such heirship. *Nash* v. *Browne*, 32 Law J. Rep. (N.S.) Chanc. 148.

Where a written agreement between a vendor and a purchaser did not express the intention of either of

the parties thereto, the Court, upon a bill by the purchaser against the vendor to set aside the agreement, admitted parol evidence to shew that there was a mistake in the agreement as to the subject-matter of the purchase, and accordingly set the agreement aside. *Price* v. *Lcy*, 32 Law J. Rep. (N.S.) Chanc. 530; 4 Giff. 235.

By the conditions of sale relating to leaseholds, it was stipulated that the production of the last receipt should be conclusive evidence that all the covenants had been performed:—Held, that the production of such a receipt prevented the purchaser from taking the objection that the lease had been forfeited by reason of the dilapidated state of the premises. *Bull* v. *Hutchens*, 32 Beav. 615.

Upon the sale of an estate by auction there was a condition fixing a period from the delivery of the abstract within which objections to the title were to be taken; and it was provided that all objections not made within the time named should be considered as waived, and the title accepted:—Held, although the condition did not expressly so stipulate, that time was of the essence of the contract. *Oakden* v. *Pike*, 34 Law J. Rep. (N.S.) Chanc. 620.

Observations and explanations as to what constitutes the "delivery of an abstract" and "deducing a title." Ibid.

A clause in an agreement for purchase, that purchaser is not to require any further proof of identity than that given by the title-deeds, exempts the vendor from producing further evidence, but he cannot force the title on the purchaser unless the evidence is complete upoo the deed. *Curling* v. *Austin*, 2 Dr. & S. 129.

On the sale of a house or stables in a *cul de sac*, the vendor is not bound to shew a title to the roadway. Ibid.

Trustees of real estate having no power of leasing, granted leases of it, and afterwards put it up for sale subject to the leases the existence of which it was admitted materially lessened the value of the property. The conditions of sale stated that the leases were made without authority, and provided that the purchaser should make no objection in respect of them. The purchaser refused to complete, on the ground that the conditions were not binding as being a stipulation that he should concur in a breach of trust:—Held, by *Knight Bruce, L.J.* (*Turner, L.J.* inclining to the same opinion), that the conditions precluded the purchaser from objecting to the title on the ground of the existence of the leases. *Nicholls* v. *Corbett*, 3 De Gex, J. & S. 18.

Property was sold which was represented as standing on a fine vein of anthracite coal:—Held, that the doctrine of "*caveat emptor*" applied, and that it was the business of the purchaser to inquire as to the extent to which the coal had already been worked. *Colby* v. *Gadsden*, 34 Beav. 416.

In May the plaintiff agreed to purchase an estate including hay and growing crops for 9,000*l*. The purchase was to be completed in June, when the plaintiff was to be let into possession, and if not then completed the plaintiff was to pay interest on the purchase-money. By subsequent agreement, November was substituted for June. The contract was not completed until the following February, and in the mean time the vendors had sold the hay and used the garden oroduce:—Held, that under the altered contract the plaintiff was not entitled to this hay or produce. *Webster* v. *Donaldson*, 34 Beav. 451.

### (B) DEPOSIT.

Where a deposit has been paid upon a parol agreement for the purchase of land, which is either abandoned or is incapable of being carried out, the purchaser is entitled to a return of the deposit. *Casson* v. *Roberts*, 32 Law J. Rep. (N.S.) Chanc. 105; 31 Beav. 613.

A bill by a vendor for specific performance being dismissed, and the purchaser not wishing for an order for return of the deposit unless it was ordered to be returned with interest,—Held, by *Knight Bruce, L.J.*, that the Court ought not to order a return of the deposit, but to leave the purchaser to his remedy at law. *Rede* v. *Oakes*, 2 De Gex, J. & S. 518.

A purchaser, under a sale by the Court, paid the deposit upon the purchase-money, and was adjudicated bankrupt before completion. His assignees declined to elect to complete the purchase. The conditions of sale contained no specific provision for a forfeiture of the deposit in the event of the purchaser's default; but they provided that, in case of non-completion, the purchaser should pay the deficiency, if any, upon a re-sale, and the costs occasioned by his default. Upon an application to the Court for an order to the effect that the deposit might be forfeited, and for a re-sale, and that such order and re-sale might be made without prejudice to the vendor's right against the purchaser or his assignees, in case the re-sale should be made at a less price than that first obtained, it was ordered that the deposit be forfeited, and that there should be a re-sale; but the Court declined to make any other order. *Depree* v. *Bedborough*, 33 Law J. Rep. (N.S.) Chanc. 134; 4 Giff. 479.

### (C) TITLE.

The plaintiff became the purchaser at a sale by auction of two lots of real property. One of the conditions of sale was, that within ten days the vendor should deliver to the purchaser an abstract of title; and another condition was that, if any requisition should be made with which the vendor was unable or unwilling to comply, the latter should be at liberty to rescind the contract, and return the deposit without any interest, cost or expenses. The property in question had formerly belonged to A, B & C, who were partners in trade. C died before the sale, and his executors had released to A and B all claim on the partnership property. An abstract of title was delivered within the ten days, shewing title in A, B and the executors of C, no notice being taken in it of the release by his executors. After the abstract had been delivered, the deed of release was discovered by the solicitor of the vendors, and an abstract of it was sent to the plaintiff. It bore a 35*s.* stamp, and the sum paid in consideration of the release was not expressed in it. The plaintiff objected that it was improperly stamped, and required that the executors should concur in the sale. The executors refused to do this, and the vendors thereupon gave notice to rescind the contract, and offered to return the deposit:—Held, in an action by the purchaser against the vendors, that the stamp was sufficient, and that the purchaser

was not entitled to require the concurrence of the executors in the conveyance. That the vendors had not complied with the condition which bound them to deliver an abstract within ten days; for that condition required them to deliver a full and fair abstract, whereas the abstract delivered was a misleading one, shewing a title in A, B and C's executors, the real title being in A and B. And it was held, that for this breach the purchaser was entitled to nominal damages. *Steer* v. *Crowley*, 32 Law J. Rep. (N.S.) C.P. 191; 14 Com. B. Rep. N.S. 337.

A registered order of the Court of Probate does not create a charge on lands. *Bull* v. *Hutchens*, 32 Beav. 615.

Where a purchaser accepts the title, he is only bound to the extent to which he has been made cognizant of it. *Bousfield* v. *Hodges*, 33 Beav. 90.

The vendor of a real estate died before completion intestate as to his real estate:—Held, that the legal personal representatives of the vendor might maintain a bill against the vendor's heir and the purchaser for a specific performance, and that, although the interest of the vendor was equitable, and the purchaser had since got in the legal estate. *Hoddel* v. *Pugh*, 33 Beav. 489.

The vendor, making title as heir, is not bound to produce affirmative evidence in his possession that the ancestor, from whom he traces descent, took as purchaser, but may rely on the statutory presumption until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase. *Dorling* v. *Claydon*, 1 Hem. & M. 402.

The purchaser of a lease, under a condition not to inquire into the lessor's title, cannot protect himself against a suit to set aside the lease as being invalid in equity on the ground that he is a purchaser for valuable consideration without notice. *Robson* v. *Flight*, 34 Law J. Rep. (N.S.) Chanc. 226.

Property comprising three separate parcels held under different titles, and the bulk of which was vested in several sets of trustees, was agreed to be sold with the concurrence of all whose consent to a sale was necessary, at one gross sum, with stipulations for commencement of title at various periods, not distinguishing the several portions of the property to which the different roots of title applied, the date of commencement of title being in one case as recent as 1845. Subsequently, an agreement was made between the vendors for the apportionment of the purchase-money. The purchaser afterwards refused to complete his purchase. A bill against the purchaser, for specific performance of the agreement, was dismissed by the Lords Justices, reversing the decision of the Master of the Rolls. *Rede* v. *Oakes*, 34 Law J. Rep. (N.S.) Chanc. 145; 32 Beav. 555.

A purchaser cannot on the ground merely of defect of title in his vendor sustain a suit in equity to have the agreement between them delivered up to be cancelled. *Onions* v. *Cohen*, 34 Law J. Rep. (N.S.) Chanc. 338; 2 Hem. & M. 354.

The first and second mortgagees of an estate had power of sale and of giving good receipts. They joined together in selling, and each received his portion of the purchase-money, for which they gave a receipt to the purchaser:—Held, that a title depending on this sale was perfectly good. *M'Carogher* v. *Whieldon*, 34 Beav. 107.

The defendant agreed to assign a life policy to the plaintiff. When the policy was effected, it was agreed that the payment of one-third of the annual premiums should be deferred until the death of the person insured, and be a charge on the policy:—Held, that this was an incumbrance on the policy which the defendant was bound to discharge. *Gataker* v. *Flather*, 34 Beav. 387.

S, being seised in fee of a messuage, and having other real and personal estate, devised the whole to W and H, their heirs, executors and administrators, upon trust that they or the survivor, or the heirs, executors or administrators of the survivor, should sell; and he declared that W and H, or the survivor, or the executors or administrators of the survivor, should hold the proceeds in trust to invest in real or government securities and pay the dividends to two persons and the survivor, and after the death of the survivor call in the principal and divide it among such of the testator's children as should be then alive. H survived W, and devised all his trust estates to C and D, whom he also appointed executors, and they sold the messuage to the defendant, and he having contracted to sell it to the plaintiff, the latter refused to complete the purchase on the above title, and brought an action to recover his deposit:—Held, that the plaintiff was entitled to recover, as the defendant's title was not such as to fulfil his contract, as, according to the decisions in Chancery, the devisees of H could not make a good title, the word "assigns" being omitted in the limitation of S's will (*Blackburn, J. dubitante*). *Stevens* v. *Austen*, 30 Law J. Rep. (N.S.) Q.B. 212; 3 E. & E. 685.

S bought the messuage in 1810 for 462*l.*, and H's devisees, in 1855, sold to the defendant for 73*l.* only, the contract price between the plaintiff and the defendant in 1859 being 350*l.*:—Held, that the price at which the devisees sold was apparently so inadequate as to amount to a breach of trust, and that the plaintiff, having notice, had a right to reject the purchase on this ground. Ibid.

E devised an estate to the defendants, upon trust to sell. E had held the estate subject to a settlement, by which the legal estate was in trustees, for the purpose of securing a life annuity to his wife. E died, and his widow consented to the sale taking place; and the estate was put up for sale, and sold to the plaintiff. Subsequently, the widow refused to join in the conveyance, and the defendants were, therefore unable to make out a title. An action having been brought by the plaintiff to recover damages for the loss of his bargain, the jury found that the defendants had acted *bona fide*, and that they had reasonable ground for thinking that they would be able to make a good title to a purchaser:—Held, by *Wightman, J.*, and *Blackburn, J.* (*dissentiente Cockburn, C.J.*), that the plaintiff could not recover damages for the loss of his bargain, although he was entitled to recover his deposit and the expenses of investigating the title. *Hopkins* v. *Grazebrook* commented on.—*Sikes* v. *Wild*, 30 Law J. Rep. (N.S.) Q.B. 324; 1 Best & S. 587—affirmed in Ex. Ch. 32 Law J. Rep. (N.S.) Q.B. 375; 4 Best & S. 421.

In a deed of conveyance in fee from the defendant

to the plaintiff of a house and premises then in the occupation of the defendant, "together with all lights, liberties, privileges, easements, and appurtenances to the premises belonging or in anywise appertaining or usually held and enjoyed therewith, or deemed or taken as part, parcel or member thereof," the defendant covenanted "that notwithstanding any act, deed, matter or thing whatsoever made, done or permitted by him, or any person claiming through him, the defendant hath now good title to convey the messuage and premises with the appurtenances." Some years before this conveyance the defendant, being then owner in fee and occupier of the same house, &c., which was then in the same state and condition, entered into a contract in writing with the owners of the adjoining premises that the cornice and spouts and three windows of the defendant's house overlooking the adjoining premises were encroachments, and agreed to pay an annual sum of 5*s.* so long as he was permitted to use the said cornice, spouts and windows. The defendant had never acquired any easement in respect of the cornice, spouts or windows by twenty years' user:—Held (affirming the judgment of the Court of Queen's Bench, 33 Law J. Rep. (N.S.) Q.B. 275; 5 Best & S. 325), that there was no breach of covenant for title by the defendant, for that he only conveyed the premises so far as he possessed or could convey them, and that his qualified covenant for title limited his covenant to that which he actually had, or but for any act of his would have had, and that he had not, and never would have acquired any easement in the windows, &c., inasmuch as the adjoining owners would have interfered to prevent him but for his acknowledgment. *Thackeray* v. *Wood* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 226; 6 Best & S. 766.

### (D) VENDOR'S LIEN.

In 1845, P entered into a contract for the sale to W, of a piece of land, part of an estate, for 8,295*l.*, of which sum a part was paid upon the execution of the agreement, and the remainder was to be paid in 1848, and in the mean time interest was to be paid half-yearly on the balance. On the treaty for the contract, P made material representations as to certain improvements he intended to make in the estate, on the faith of which W entered into the contract. After the contract the land contracted to be sold was mortgaged by P, the mortgagees having notice of the contract, and they afterwards gave notice to W of their mortgage. In 1848, P was declared bankrupt, and had not carried out the representations. In 1861 W instituted a suit against the mortgagees, who had foreclosed the equity of redemption, and prayed that he might be declared entitled to a lien on the property contracted to be purchased, for the instalment of the purchase-money paid, and interest:—Held, on appeal (affirming the decision of *Kindersley, V.C.*), that W had acquired a lien on the land as well in respect of the instalment paid as in respect of the interest which he had paid on the unpaid balance of the purchase-money, and that he had properly continued to make payments of interest to P, after notice of his mortgage, as the mortgagees had not interfered to prevent his so doing; and further that, as W's condition had not been altered since the execution of the contract, he was, notwithstanding the time that had elapsed since such execution, entitled to six years' interest on the instalment, and on the interest paid under the contract. *Rose* v. *Watson* (House of Lords), 33 Law J. Rep. (N.S.) Chanc. 385; 10 H.L. Cas. 672.

Upon a sale of a debt proved in an administration suit, the purchaser gave a bond for the purchase-money, payable by instalments:—Held, that the vendor had not lost his lien on the debt for the payment of the unpaid purchase-money. *Collins* v. *Collins* (No. 2); *Downes* v. *Downes*, 31 Beav. 346.

Where the Court had declared that certain devised estates were devised subject to incumbrances charged thereon, and a vendor had a lien for unpaid purchase-money on one of such estates, the Court held that under the circumstances of the case the vendor's lien stood precisely in the same position as any other incumbrance, and that it must be paid out of the particular estate on which it attached. *Barnwell* v. *Iremonger*, 2 Dr. & S. 255.

### (E) RESCISSION OF CONTRACT.

An advowson was sold, and after the sale the purchaser found that there was a mortgage on the living in respect of money advanced to build a new parsonage-house; it was held, that this did not form a ground for rescinding the contract for the advowson, or for allowing to the purchaser a deduction from the amount of the purchase-money. *Edwards-Wood* v. *Marjoribanks* (House of Lords), 30 Law J. Rep. (N.S.) Chanc. 176.

If a vendor of leaseholds makes time the essence of a contract, and on the day specified for the completion of the purchase insists upon the money being paid, he may, in the event of the purchaser's neglect, omission or refusal to comply with such request, avail himself of a power in the contract to annul the sale, though two objections to the title, which he had given his written undertaking to remove, remained unsatisfied, and though he had executed a deed which he had delivered to his solicitor as an escrow, assigning the premises to the purchaser. *Hudson* v. *Temple*, 30 Law J. Rep. (N.S.) Chanc. 251; 29 Beav. 536.

A vendor cannot refuse to complete a contract, if the purchaser is willing to waive objections on the title, and he cannot annul a sale under a power reserved to him, without answering requisitions on the title; and where after a suit commenced the vendor answered the requisitions and enabled the purchaser to accept the title,—Held, that the vendor must pay the costs. *Turpin* v. *Chambers*, 30 Law J. Rep. (N.S.) Chanc. 470; 29 Beav. 104.

Though the time named for completing a contract for sale of land is not essential in the eye of a Court of equity, it is competent to a purchaser, by a proper notice, to limit a time for completion or rescission of the contract; but if the Court sees that the means exist of completing within a reasonable time, and that the time limited by the notice is not sufficient to enable completion, it will, as a general rule, not give effect to the notice. *Wells* v. *Maxwell*, 33 Law J. Rep. (N.S.) Chanc. 44; 32 Beav. 408.

The plaintiff purchased at a sale by auction certain property described in the particulars and conditions of sale as follows: "Four freehold ground-rents of 19*l.* 4*s.* each, viz., 15*l.* ground-rent and 4*l.* 4*s.* garden-rent, amounting to 76*l.* 16*s.* per year, arising from the four capital residences of the annual value

of 384*l.*, held by four leases granted to Mr. William Reynolds for a term of ninety-five years each (wanting ten days), from the 29th of September, 1844, with reversion to the property in about eighty years." In accordance with the conditions of sale, the plaintiff paid the defendant, the auctioneer, the sum of 282*l.* as a deposit and in part payment of the purchase-money. The vendors in making out this title produced a counterpart of a lease granted by one R. Roy to one W. Reynolds (the other three leases being similar). This lease demised a piece of land, with a messuage erected thereon, at "the yearly rent of 15*l.* of lawful money, payable," &c., and thereby "for the considerations agreed, and also in consideration of the further rent thereinafter reserved, and of the covenants and agreements of Reynolds, Roy covenanted and agreed with Reynolds that for the term of ninety-five years Reynolds should "have the right to enter in and upon and use and enjoy as a pleasure-ground or garden the piece of land adjoining," &c. The deed contained a covenant by Reynolds to pay to Roy the yearly sum of 15*l.*, and that he would also "pay the further yearly rent of 4*l.* 4*s.* for and in respect of the right of user thereinbefore granted of the said garden or pleasure-ground": —Held, by the majority of the Court of Exchequer Chamber (affirming the judgment below, 31 Law J. Rep. (N.S.) Exch. 465; 1 Hurls. & C. 302), that the garden-rent of 4*l.* 4*s.* was not a freehold ground-rent within the meaning of the particulars of sale; and that the plaintiff, therefore, had a right to rescind the contract and recover back the deposit. *Evans* v. *Robins*, 33 Law J. Rep. (N.S.) Exch. 68: *nom. Robins* v. *Evans*, 2 Hurls. & C. 410.

### (F) INTEREST AND EXPENSES.

A purchaser is liable to pay interest on his purchase-money from the time when he could prudently have taken possession; but held that he could not prudently have taken possession even when a good title was shewn, if he had no assurance that a person having a charge would concur in the conveyance. Interest was therefore only given from the date of a decree. *Wells* v. *Maxwell*, 33 Law J. Rep. (N.S.) Chanc. 44; 32 Beav. 550.

The agreement for the sale of an estate, after fixing a day for completion, provided that if from any cause whatsoever the purchase should not be completed on the day named, the purchaser should pay interest from that day until completion. The title shewn was bad, and a suit became necessary to rectify a mistake in a marriage settlement before the vendor could make any title:—Held, in a suit for specific performance, that the purchaser was concluded by the agreement, and that he must pay interest upon the purchase-money from the day therein named. *Lord Palmerston* v. *Turner*, 33 Law J. Rep. (N.S.) Chanc. 457; 33 Beav. 524.

The plaintiff purchased land of the defendants, subject amongst others to the following conditions of sale: "Fourth, that within twenty-one days from the date of the sale the vendors shall deliver an abstract of title to the purchaser; seventh, that if any purchaser make any objections or requisitions in respect of the title within thirty-five days from the day of sale, the vendors shall be at liberty at their election either to answer such objection or to rescind the sale on repaying the deposit without interest, and without incurring any liability to pay any of the expenses for investigating the title; eighth, that all rights of the vendors to hold the purchaser to have waived all objections or requisitions not made within the time specified as aforesaid, and such right of the vendors to rescind the contract shall not be deemed to be waived or in any manner affected or prejudiced by any negotiation as to any objections or requisitions or attempt to obviate or comply with the same." The sale took place on the 30th of July, 1861, and a deposit of 100*l.* was paid to the vendors' solicitor. The abstract of title was not delivered until the 2nd of November. On the 8th of November the vendees' solicitor wrote to the vendors' solicitor, stating that the vendors, who were trustees, in his opinion "had no power to sell, and that it was not worth while going into the title"; he also wrote on the 28th, desiring "to know whether the vendors would rescind the contract or insist upon specific performance." On the 30th of November the vendors' solicitor answered, "That he was satisfied that they had power to sell, and that his clients would expect the vendee to complete the purchase." The vendees thereupon incurred expenses in investigating the title, and it turned out that the trustees had no power to sell, and they, on the 21st of December, 1861, declined to complete the purchase, and claimed to be paid interest on their deposit and the expenses of investigating the title. A further correspondence was continued until the 17th of November, 1862:—Held on these facts, that the vendors could not elect to rescind the contract under the seventh condition, and that there was no negotiation within the meaning of the eighth condition, and that therefore the vendee was entitled to recover interest on the deposit and the expenses of investigating the title. *Gardom* v. *Lee*, 34 Law J. Rep. (N.S.) Exch. 113; 3 Hurls. & C. 651.

### (G) PURCHASER.

#### (*a*) *Rights.*

A vendor of a reversion furnished to the purchaser particulars of the value of the reversion; and the purchaser relying on those particulars made no inquiry into the real value, and bought at the fair market price of the property (assuming the particulars to fairly represent the value). The sale was supported by the Master of the Rolls, and, on appeal, by the Lords Justices, upon a bill filed by the vendor to set aside the sale as having been made at an undervalue. *Perfect* v. *Lane*, 31 Law J. Rep. (N.S.) Chanc. 489; 3 De Gex, F. & J. 369.

A purchaser of property insured against fire does not by the mere fact of purchase acquire a right to the insurance moneys. *Poole* v. *Adams*, 33 Law J. Rep. (N.S.) Chanc. 639.

A contract was entered into with a trustee for sale for the purchase of a house which was insured against fire in the trustee's name, after which, and before completion of the purchase, the house was burnt down. The insurance company paid the insurance money to the trustee, who, without the concurrence of his *cestuis que trust*, allowed the purchaser to deduct the amount from the purchase-money upon completion of the sale. The trustee having become bankrupt, and a bill having been filed by the *cestuis que trust* against the purchaser,—Held, that in the absence of any provision in the contract the pur-

chaser was not entitled to the benefit of the money received from the insurance company, and that the *cestuis que trust* were entitled to a lien upon the property for the amount deducted, as being unpaid purchase-money. Ibid.

Possession by a purchaser given or permitted by the vendor, without receipt of rents and profits by the purchaser, does not render the purchaser liable to pay the purchase-money into court; but he will be ordered to give up possession or to pay the purchase-money into court. If the common decree for specific performance and for inquiry as to title be made, with no special directions, the purchaser may under it raise objections which he had abandoned before suit. And the Court will not add any special inquiry on the subject to the decree, nor direct the chief clerk to state special circumstances. And on further consideration the Court will, upon the question of costs or interest, look only at the evidence in the cause, and not at the proceedings and evidence in chambers or on interlocutory motion. *Curling* v. *Austin*, 2 Dr. & S. 129.

(*b*) *Duties and Liabilities.*

A real estate was devised to trustees upon trust to sell, invest the produce and pay the dividends to a husband and wife for life, and after the death of the survivor then to her children as she should appoint. The estate was not sold, and the wife, having nine children, appointed the estate to the six younger, and all the nine joined with the husband and wife in raising money upon annuities, and, finally, in selling the estate to the annuitant. The trustee refused to join in any of the deeds, but he paid the rent of the estate to the purchaser during the life of the surviving tenant for life; after whose death he refused to make any further payments. Upon a bill by the purchaser against the trustee and the *cestuis que trust*, to obtain a conveyance of the legal estate, they alleged that the deed was executed by them under pressure, that none of the children received any part of the money paid for the annuities or for the purchase of the reversion; that the youngest was under age at the time she executed the purchase deed, and that she had refused to confirm it:—Held, that the purchaser must prove the transaction fair and perfect, before the Court would interfere to give a complete title; that there was no proof of the owners of the reversion having received any consideration; that it was not necessary to consider whether the youngest child was of age; and the bill was dismissed against the defendants without costs, but as against the trustee with costs. *Hannah* v. *Hodgson*, 30 Law J. Rep. (N.S.) Chanc. 738; 30 Beav. 19.

Purchasers of land from a building society must not delude themselves with the idea that the directors and the trustees of the society can convey a good and valid title; they are bound to call for the title-deeds, as in the event of their taking a defective title they must bear all the consequent risks. *Peto* v. *Hammond*, 31 Law J. Rep. (N.S.) Chanc. 354; 30 Beav. 495.

A building society purchased a piece of freehold land, and the vendors upon payment of one-fourth of the purchase-money conveyed the land to the trustees of the society in fee, and signed a receipt for the whole of the purchase-money. The directors of the society and the trustees at the same time signed an agreement to pay the remaining purchase-money by instalments, and declared that in the mean time the deed should remain in the hands of the vendors, and that in default of payment they would execute a legal mortgage to secure the unpaid purchase-money. Default was made, and an action was brought to recover the purchase-money, and on a claim filed, a decree was made to carry the agreement into effect. The society, immediately on the execution of the conveyance by the vendors, sold the land in lots to divers persons, who, without looking into the title, paid their purchase-money and took a conveyance in fee from the trustees. The society omitted to pay the instalments of the purchase-money; and upon a bill filed by the original vendors against the whole of the allottees and sub-purchasers of the land,—Held, that they were bound to pay the purchase-money and redeem the mortgage, or otherwise that the whole of the estate must be sold; but that if any party redeemed the land, the others must contribute towards the money paid for redemption, or otherwise that the land of the party omitting to pay his contribution must be sold to discharge what was due in respect of his allotment. Ibid.

A purchaser in fee of a piece of land cannot, by the purchase of a lease granted of the same land, avoid covenants which his vendor had taken from his tenants over a wide area in aid of covenants which he had entered into with third parties. *Jay* v. *Richardson*, 31 Law J. Rep. (N.S.) Chanc. 398; 30 Beav. 563.

M, seised in fee of an estate, demised a plot of land for the Q Hotel, and covenanted not to let any house, &c., or any land for erecting a house, to be used as an hotel, or for the sale of beer, &c., within a quarter of a mile of the Q Hotel plot. He also let other plots of land, the tenants of which covenanted that they would not use or permit any building, &c. to be used for the sale of beer, &c., without the authority of M, his heirs or assigns. M afterwards sold his estate, and the reversion in fee of one of the plots was purchased by R, who shortly afterwards purchased the lease granted by M of that plot, and began to build an hotel for the sale of beer, &c.:—Held, upon a bill by the owner of the Q Hotel, that he was entitled to an injunction, during the continuance of his lease, to restrain R from using any building erected on his land as an hotel or for the sale of beer. Ibid.

(*c*) *Conveyance to.*

A conveyance made under 21 & 22 Vict. c. 72. "Sale and Transfer of Lands, Ireland, Act") is, by s. 85, "for all purposes conclusive evidence" that all previous proceedings leading to such conveyance have been regularly taken. Where, therefore, proceedings had been taken for the sale of certain estates, and their sale and re-sale had been directed in a manner which, when presented to the notice of the House of Lords, was declared to be marked with great irregularity, but the party complaining had not brought the matter before the Court of Appeal until after the conveyances had been executed, it was held that the House was precluded by the provisions of the statute from affording the appellant relief against the consequences of such irregularities. *Power* v. *Reeves*, 10 H.L. Cas. 645.

## VENUE.

*In Local Action a Part of the Declaration.*

An action for damage arising from a public nuisance on real property, as on a public highway, is a local action; and if there is no local description in the body of the declaration, the county in the margin must be taken to be repeated in the declaration, and it is a material allegation; and on a plea traversing the existence of the highway, proof that the highway is in another county is a fatal variance and ground of nonsuit. *Richardson* v. *Locklin*, 34 Law J. Rep. (N.S.) Q.B. 225; 6 Best & S. 777.

*When changed.*

It is no ground for changing the venue in an action for a libel contained in a local newspaper, that the defendant, the proprietor, possesses much influence in the county in which the venue is laid, and has since the commencement of the action evinced a disposition to exercise it to the plaintiff's prejudice. But the Court intimated that they would interfere, if the defendant should before the trial publish anything in relation to the matter of the action reflecting upon the plaintiff. *Walker* v. *Brogden*, 17 Com. B. Rep. N.S. 571.

*When retained or brought back.*

The mere circumstance of the plaintiff being an officer in the navy, and hoping to be shortly appointed to a ship, which would disable him from attending to give evidence at the trial if the venue were changed,—Held, sufficient to induce the Court to retain the venue where laid; although it was sworn that all the defendant's witnesses resided at the place to which it was sought to change it. *Channon* v. *Parkhouse*, 13 Com. B. Rep. N.S. 341.

Where the affidavit, on the common application to change the venue, has been answered by the plaintiff, shewing special grounds against a change, it is in the discretion of the Court, under all the circumstances, to determine where it is most convenient that the trial should take place. And where the result of the change will be to put off the trial until a time when an important and material witness for the plaintiff will not be able to attend, the application will not be acceded to merely because it is suggested that the trial in the county where the cause of action arose, and where the plaintiff resides, will be less expensive. *Ross* v. *Napier*, 30 Law J. Rep. (N.S.) Exch. 2.

Where a party, at whose instance the venue has been changed, abuses his position by retaining counsel in such a manner as to deprive his adversary of the means of procuring counsel, the Court or a Judge will not interfere. *Curtis* v. *Lewis*, 5 Best & S. 568.

Twenty witnesses and a horse on one side against ten on the other,—Held, not such a preponderance of "inconvenience" as to induce the Court to bring back the venue from the place where the cause of action (if any) arose. *Blackman* v. *Bainton*, 15 Com. B. Rep. N.S. 432.

## VESTRY.

*Right of Voting.*

By 58 Geo. 3. c. 69. s. 3. every inhabitant present at a vestry, "who shall in such last rate have been assessed or charged upon or in respect of any annual rent or rents, profit or value, amounting to 50*l.* or upwards, whether in one or in more than one sum or charge, shall have and be entitled to give one vote for every 25*l.* of annual rent," &c.:—Held, that where a man is rated for property held by him in his individual capacity, and also for property held by him as executor, the two may be lumped together so as to give him an additional vote for an additional 25*l.* of annual value. *R.* v. *Kirby*, 31 Law J. Rep. (N.S.) Q.B. 3; 1 Best & S. 647.

*Manner of Voting.*

By 33 Geo. 3. c. 162. and 3 Will. 4. c. xxxiii. certain provisions were made for assessing and collecting poor and other rates in the parish of St. G, Camberwell. After the passing of the act, certain districts were taken out of the parish:—Held, that in the absence of any enactment to the contrary, the provisions contained in the above statutes would still apply, so far as the rates in the mother parish were concerned. *R.* v. *Roberts*, 32 Law J. Rep. (N.S.) M.C. 153; 3 Best & S. 495.

The churchwardens of the parish of G gave notice that a vestry would be held on &c., to make a rate for the purpose of repairing the fabric of the parish church; that a shew of hands would be taken upon each proposition and amendment which might be submitted to the meeting; that if a poll should be demanded the meeting would be adjourned to the 8th of July, when the poll would be taken on all the propositions and amendments made at such meeting at one and the same time; that the poll should be kept open till &c., when the poll should close, and the result should be final and conclusive. At the first meeting a rate of 2*d.* in the pound was proposed, and an amendment was moved that no rate should be granted; the majority were in favour of the amendment: and on a poll being demanded, the meeting was adjourned and the poll taken upon the day named, upon the motion and the amendment. At the close of the poll the chairman declared that there was a majority in favour of the motion, whereupon a voter proposed to move another amendment, but was not allowed to do so:—Held, that the amendment being in fact a negative of the original motion, there was no occasion to put the motion separately to the meeting, and that the proceedings were regular and the rate good. Ibid.

## VEXATIOUS INDICTMENT ACT.

By 22 & 23 Vict. c. 17. s. 1. no bill of indictment for certain specified offences shall be presented or found by any grand jury, unless some one of certain conditions have been performed:—Held, that it is not necessary that the performance of any of such conditions should be averred on the face of the indictment, or proved before the petty jury. *Knowlden* v. *the Queen*, 33 Law J. Rep. (N.S.) M.C. 219; 5 Best & S. 532.

One of such conditions is, that the prosecutor or other persons presenting the indictment has been bound by recognizance to prosecute or give evidence against the person accused. Another condition is, that the person accused has been bound by recog-

nizance to appear to answer to an indictment to be preferred against him for such offence. Three persons (the plaintiffs in error) were severally bound by recognizance to appear at the next Court of Oyer and Terminer to be held for the Central Criminal Court district, and there to surrender themselves and plead to such indictment as might be found against them for or in respect of the charge of conspiracy to cheat and defraud. The prosecutors were also bound over to appear at such next court, and to prefer or cause to be preferred a bill of indictment against the persons accused for the offence of conspiracy to cheat and defraud, and duly to prosecute such indictment, and give evidence thereon. At the next court an indictment was preferred and found, and the plaintiffs in error appeared. In consequence of the absence of a material witness for the prosecution, the trial was put off, and the recognizances duly respited. Before the next court was held, the Solicitor General directed an indictment for a conspiracy to defraud to be preferred against a fourth person, and a second indictment was preferred and found against all four, upon which the plaintiffs in error appeared, but refused to plead. A plea of not guilty having been entered for them, they were tried and convicted:—Held, upon a writ of error, that judgment must be given for the Crown. Ibid.

## VOLUNTARY SETTLEMENT.

A mere voluntary deed of gift, the nature of which is not fully understood by the donor, may be set aside after the donor's death, at the suit either of the heir-at-law of the donor or of persons claiming under the will of the donor. *Anderson* v. *Elsworth*, 30 Law J. Rep. (N.S.) Chanc. 922; 3 Giff. 154.

Where, therefore, a voluntary deed, containing no power of revocation, was executed by a lady of upwards of seventy years of age, who had been in a very infirm state of body and mind, but from which she had recovered at the date of the deed, depriving herself of all her property in favour of a niece with whom she was living when she executed the deed, and to whom the donor had a clear intention of leaving all her property, to the exclusion of her other relations, but such deed was not either explained to the donor or understood by her, and it appeared that she understood that under the deed she would be left in the enjoyment of an estate for her life in the property, the subject of the deed, such deed was set aside after the death of the donor at the suit of persons claiming under a will prior in date to the deed. Ibid.

A B voluntarily covenanted to surrender copyholds on trusts for his children:—Held, that equity would not compel any act to be done for the purpose of carrying the covenant into effect. *Tatham* v. *Vernon*, 29 Beav. 604.

A B devised his real estate to trustees to the use of his wife for life, with remainder to his son C D for life, with remainders over. A B afterwards gave the H estate to C D, and signed a memorandum as follows: "H, together with my other freehold estates, are left in my will to my dearly beloved wife; but it is her wish, and I hereby join in presenting the same to our son C D, for the purpose of furnishing him with a dwelling-house." C D took possession of the H estate, and with the approbation of A B expended 14,000*l.* on the erection of a dwelling-house thereon. Upon the death of A B, it was held, by *Westbury, L.C.* (varying a decision of the Master of the Rolls), that C D was entitled to have a conveyance to himself of the fee simple of the H estate. *Dillwyn* v. *Llewellyn*, 31 Law J. Rep. (N.S.) Chanc. 658.

M, in consideration of natural love and affection for his niece, by deed transferred to L fifty bank shares then belonging to him, with the certificates or scrip of the same, and the dividends, upon trust during his life, or until the niece's marriage, to apply the dividends for her use and benefit; and in the event of his death before her marriage, to transfer the shares to her, with trusts for her issue in the event of her marrying in the settlor's lifetime. At this time L already held a general power of attorney from the settlor to transfer the stock of any incorporated company which might be standing in his name; and soon after the date of the deed the settlor gave him the certificates of a large number of shares he held in the same bank, including the shares mentioned in the deed, and he executed a special power to him to receive the dividends on all the shares in the bank then in his name. This was the only transfer ever made to L of the fifty shares. The power of attorney was never left with the bank, as was needed by its rules, but under other special power L received the dividends, and sometimes paid them to the niece and sometimes to the settlor, who handed them over to her. *Stuart, V.C.* decided that M had effectually settled the shares, and had constituted himself a trustee for his niece; but upon appeal the Lords Justices held, that M continued up to his death both legal and beneficial owner of the shares, and had not by the deed conferred the ownership on any other person, and had not constituted himself a trustee for his niece, or made any contract enforceable against him or his estate. *Milroy* v. *Lord*, 31 Law J. Rep. (N.S.) Chanc. 798.

A voluntary settlement which conveys real estate to a trustee for the settlor for life, with remainder to her nephew absolutely, will not be set aside upon unsupported allegations of fraud, undue influence, intimidation and coercion. *Toker* v. *Toker*, 32 Law J. Rep. (N.S.) Chanc. 322; 31 Beav. 629.

A voluntary settlement of an equitable interest in leaseholds established against a person to whom the settlor had, after taking an assignment of the legal interest to himself *simpliciter*, devised the property. *Gilbert* v. *Overton*, 33 Law J. Rep. (N.S.) Chanc. 683; 2 Hem. & M. 110.

*Bridge* v. *Bridge*, 16 Beav. 315; 22 Law J. Rep. (N.S.) Chanc. 189, observed on. Ibid.

J M, by a voluntary settlement, assigned his personal estate to trustees upon trust for himself for life, and after his decease "upon trust to pay thereout all the debts then owing by the said J M, and also all legacies or sums of money, not exceeding in the whole the sum of 400*l.* sterling, which the said J M, by his will or any codicil thereto, or by any writing signed by him, shall give or direct to be paid," and subject thereto upon trust for his son, W R M absolutely:—Held, that voluntary bonds executed by T M, though with the express intention of defeating *pro tanto* W R M's interest, were debts within the meaning of the settlement, and must be paid out of the settled property. *Markwell* v. *Mark-*

*well; Markwell* v. *Bull*, 34 Law J. Rep. (N.S.) Chanc. 55; 34 Beav. 12.

A feme sole made a voluntary assignment, by deed, of her reversionary interest in stock held under a settlement. The deed was irrevocable. It was duly executed by herself and attested, but was not communicated either to the trustees of the paramount settlement, or to the trustees of the deed itself, or to any of the parties who were to take under it. The lady subsequently destroyed the deed, and made a different disposition of the stock by a codicil to her will:—Held, by *Romilly, M.R.*, that, the trust fund not having been legally transferred, nor the trust communicated to and recognized by the trustees of the original settlement, the assignment was incomplete and ineffectual. But the Lords Justices reversed the decision, holding that, the assignor having done all that she could for transferring her interest, the assignment was complete and effectual, notwithstanding the absence of notice. *In re Way's Trusts*, 34 Law J. Rep. (N.S.) Chanc. 49; 2 De Gex, J. & S. 365.

Held also, there being no evidence before the Court distinctly impeaching the deed, that it must be treated as valid; but the solicitor who prepared it having made an affidavit and omitted to state whether he explained to the settlor the irrevocable nature of the assignment, leave was given to file a bill (within a fortnight, to set aside the deed. Ibid.

If the debt of a creditor by whom a voluntary settlement is impeached existed at the date of the settlement, and the remedy of the creditor is defeated or delayed by the existence of the settlement, the fact that the settlor retained sufficient money to pay all the debts owing by him at the time of making the settlement will not take the case out of the operation of 13 Eliz. c. 5. *Spirett* v. *Willows*, 34 Law J. Rep. (N.S.) Chanc. 365.

But where the voluntary settlement is impeached by subsequent creditors, it is necessary for them to shew, either that it was made with express intent to "delay, hinder or defraud creditors," or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts. Ibid.

A voluntary settlement made by a sister on her brother and his family, subject to a limitation to her for life, with remainder to her issue, was set aside on the ground that the brother, on whom the burden was cast, had not proved the necessary requisites to support it. *Sharp* v. *Leach*, 31 Beav. 491.

If a voluntary deed fail to carry into effect the intentions of the parties, it cannot be reformed except with the consent of the donor. *Phillipson* v. *Kerry*, 32 Beav. 628.

A voluntary deed was set aside after the death both of donor and donee. Ibid.

A B executed a voluntary settlement of real estate to uses in favour of his four children, and he covenanted that the estate should remain to those uses, and for quiet enjoyment. A B afterwards mortgaged the settled estate with his own unsettled estates and died:—Held, that the children were entitled to throw the mortgages on the unsettled estate, and, as against legatees, to prove under the covenants against the settlor's assets, for the damage they had sustained by the mortgage. *Hales* v. *Cox*, 32 Beav. 118.

## VOLUNTEERS.

[The acts relating to the Volunteer Force in Great Britain consolidated and amended by 26 & 27 Vict. c. 65.]

## WARD OF COURT.

Where a ward of court, who was entitled to a fund on attaining twenty-one, married without the consent of the Court, and no settlement was made on the marriage, and afterwards, having attained twenty-one, together with her husband petitioned the Court for the payment of the fund to her husband, the Court refused to make an order for payment to the husband, but directed a reference as to a settlement. *Gynn* v. *Gilbard*, 1 Dr. & S. 356.

The payment into court under the 32nd section of the Legacy Duty Act of a legacy bequeathed to an infant, does not constitute such infant a ward of court. *In re Hillary*, 2 Dr. & S. 461.

## WARRANT OF ATTORNEY.

A debtor in embarrassed circumstances gave to a favoured creditor (within three months before the commencement of imprisonment) a warrant of attorney, under which the creditor afterwards entered up judgment and seized the debtor's goods. The debtor subsequently petitioned the Insolvent Court and was declared insolvent, and an assignee was appointed:—Held, that the warrant of attorney was voidable as against the assignee, under 1 & 2 Vict. c. 110. s. 59, but that the assignee could not treat the seizing and selling of the goods as an act of conversion committed against himself as assignee, and proceed upon it as in trover against the execution creditor. *Young* v. *Billiter* (House of Lords), 30 Law J. Rep. (N.S.) Q.B. 153; 8 H.L. Cas. 682.

*Quære*—Whether the assignee had under the circumstances any remedy at law. Ibid.

An action will not lie upon the implied contract contained in the defeasance of a warrant of attorney. An attempt to enforce a warrant of attorney nearly twenty years old by a motion to enter up judgment thereon in the Court of Queen's Bench, having been defeated by the bankruptcy and certificate of the defendant, an action was afterwards brought in this court upon the implied contract contained in the defeasance:—The Court set aside the proceedings as being against good faith. *Sherborn* v. *Huntingtower*, 13 Com. B. Rep. N.S. 742.

## WARRANTY.

### *On Sale of Human Food.*

There is no implied warranty that an article exposed for sale as human food is fit for that purpose. A meat-salesman in Newgate Market who exposes for sale a carcase of meat, does not thereby impliedly warrant that it is fit for human food; and if the carcase, in consequence of the existence of a latent defect, of which the salesman is ignorant, and of which he has not the means of knowledge, be in fact unfit for human food, the salesman is not liable to a penalty under s. 52. of the 14 & 15 Vict.

c. xci. for selling it, nor, in the absence of any fraud on his part, will an action on the case for deceit lie against him, nor will an action to recover the price lie by a purchaser who, believing it to be fit for human food, has purchased it to sell to retail customers. *Emmerton* v. *Matthews*, 31 Law J. Rep. (N.S.) Exch. 139; 7 Hurls. & N. 586.

*Of Title.*

Where goods are sold in a shop by a shopkeeper in the ordinary course of his business, such shopkeeper is understood by his conduct to affirm that he is the owner of such goods, and to warrant the title; and therefore, in case of defect of title and of the purchaser being deprived of the goods by the true owner subsequently claiming them, the money paid for the purchase may be recovered back from such shopkeeper. *Eichholz* v. *Bannister*, 34 Law J. Rep. (N.S.) C.P. 105; 17 Com. B. Rep. N.S. 708.

*On Sale of Articles for Specific Purpose.*

A, after inspection of the separate parts, bought of B soap frames which were by the contract warranted to be "new frames, with all nuts and bolts complete and perfect." In an action for a breach of this warranty, the declaration alleged that the plaintiff warranted the frames to be fit for the purpose of making soap: and at the trial it was proved, and found by the jury, that though new and having the proper number of nuts and bolts, the frames were not reasonably fit for the purpose of making soap:—Held, that the evidence sustained the declaration. *Mallan* v. *Radloff*, 17 Com. B. Rep. N.S. 588.

Upon the sale of an ascertained article, a known machine, the component parts of which have been inspected by the buyer,—*quære*, whether there is any implied warranty that the thing is fit for the purpose for which it professes to have been contructed. Ibid.

*By Representation on Sale of a Horse.*

The defendant, who had a horse for sale at a commission stable, meeting the plaintiff at Tattersall's, and being informed by him that he had been looking at the horse, said, "He is a good harness horse. He belonged to Baron R, who sold him because he could not match." The plaintiff went again to the stable, and, after having had the horse put into the break, agreed to purchase him for 65*l*. There was no suggestion that the defendant had intentionally misrepresented the horse; but he turned out to be a kicker. The jury having found that the representation made at Tattersall's was part of the contract, and amounted to a warranty that the horse was quiet in harness, the Court refused to disturb the verdict. *Percival* v. *Oldacre*, 18 Com. B. Rep. N.S. 398.

## WASTE.

[See INJUNCTION—TENANT FOR LIFE.]

The tendency of the authorities upon the subject of injury to real property is to break down the old distinction that existed between waste and trespass. *Turner* v. *Wright*, 33 Law J. Rep. (N.S.) Chanc. 451; 8 Law J. Dig. 650; 2 De Gex, F. & J. 234.

Where a defendant is in possession of an estate, and a plaintiff claiming possession of it seeks to restrain him from cutting down trees and digging sods, and other such like acts, the Court will not interfere, unless the acts complained of amount to such flagrant instances of spoliation as to justify the Court from departing from the general rule. Ibid.

Where a plaintiff is in possession and the person doing the acts complained of is an utter stranger, not claiming under colour of right, then the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; though if the acts tend to the destruction of the inheritance, the Court will grant an injunction. Ibid.

But where a plaintiff in possession seeks to restrain one who claims by an adverse title, the tendency of the Court will be to grant an injunction; at least when the acts committed do or may tend to the destruction of the estate. Ibid.

Where, therefore, a person, not being in possession of an estate, claimed it as heir-at-law, and entered upon it, cut down trees, and cut sods, and threatened to repeat his conduct in order to establish his alleged title as against the possessor, who by himself and his ancestors had been in possession of the estate for upwards of eighty years, it was held, upon a bill filed by the possessor against the claimant that as the acts of the defendant might be injurious to the inheritance, he must be restrained by the injunction of the Court from committing them. Ibid.

Classification of the authorities on the subject. Ibid.

An estate was devised to A in fee with an executory devise over in the event, which happened, of his dying under twenty-one without issue:—Held, that a fund produced by the sale of timber on the estate, cut and sold by order of the Court in the lifetime of A, was the personal property of A. *Dyer* v. *Dyer*, 34 Law J. Rep. (N.S.) Chanc. 513; 34 Beav. 504.

## WATER AND WATERCOURSE.

(A) OBSTRUCTING WATERCOURSE.
(B) POLLUTING UNDERGROUND WATER.
(C) ABSTRACTING WATER.
(D) RIGHTS IN ARTIFICIAL WATERCOURSE.

### (A) OBSTRUCTING WATERCOURSE.

Declaration, that the plaintiffs, being possessed of a colliery, did, by the leave and licence of the owner and occupier of certain land near to the colliery, make a watercourse therein for carrying water pumped from the colliery, and that the defendant obstructed the watercourse. Plea, that the plaintiffs made the watercourse in the defendant's land with his leave and licence, until the defendant revoked such leave and licence, and because the plaintiffs continued to use the watercourse the defendant obstructed the same. The plaintiffs new assigned for an obstruction of a watercourse made on the land of L with his licence and consent; and the defendant pleaded to the new assignment, that he was possessed of land adjoining to the land of L, and that the water in the watercourse was wrong-

fully discharged into the defendant's land; and that without entering on L's land and there obstructing the watercourse, the defendant could not prevent the water from being discharged on his land; wherefore, to prevent it, the defendant obstructed the watercourse on L's land. Replication, that the obstruction so made by the defendant, at the place where it was made, was not necessary for preventing the water from being so discharged, and that the obstruction was made much higher up than the defendant's land, so as to prevent the water flowing down a great part of the watercourse on L's land, and might have been lawfully made lower down, and so as not to have caused the damage to the plaintiffs complained of; and that the defendant's obstruction was an unnecessary and unreasonable mode of preventing the water from being discharged on the defendant's land, and did the plaintiffs unnecessary damage:—Held, that the replication was an answer to the plea. *Roberts* v. *Rose*, 33 Law J. Rep. (N.S.) Exch. 1.

A person having the right to enter on the land of another to abate a nuisance, or to prevent an injury to his property, has a right to abate the nuisance or cause of the injury with reference to the convenience of the other, the greatest convenience to third persons being subordinate to the interests of the person whose land is entered. *Roberts* v. *Rose*, 33 Law J. Rep. (N.S.) Exch. 241; 3 Hurls. & C. 162—affirmed in Ex. Ch., 35 Law J. Rep. (N.S.) Exch. 62.

A watercourse on the land of L. was so constructed that the water wrongfully flowed over the defendant's land adjoining. In order to stop the flow, it was necessary to enter on L's land. The defendant accordingly entered L's land and dammed up the water, so that it was penned back, and flooded the mines of the plaintiffs, who had made the watercourse on L's land with his licence, but for their benefit:—Held, that the fact that the defendant could have stopped the watercourse lower down in L's land, and in a more reasonable way, doing less damage than stopping it where the water was thrown back on the plaintiffs' land, did not give the plaintiffs a right of action, it appearing that if the water had been stopped lower down, L would have been prejudicially affected. Ibid.

*Quære*—Whether the defendant, as against L, had a right to enter L's land. Ibid.

By the 158th section of the Burnley Improvement Act, 1854 (17 Vict. c. lxvii), it is enacted, that, if any person shall build, erect, or place any building, erection, or thing within fifteen feet of the centre of the bed of the stream of the Brun, he shall be summoned before Justices, who may order the removal of the obstruction, and impose a penalty on the offender. *Colbran* v. *Barnes*, 11 Com. B. Rep. N.S. 246.

In 1857, a flood washed away the bed of the river, and in 1859 the respondent, who had mills or works adjoining, and was owner of the land on both sides of the stream, restored the bed to its original level by laying large stones across side by side, without any cement or other fastening:—Held, that this was not a "building, erection, or thing," within the 158th section, and therefore that the Justices were justified in declining to convict. Ibid.

### (B) POLLUTING UNDERGROUND WATER.

The plaintiff was the possessor of an ancient mill, which was supplied with water in the manner following: at the foot of the M Hills there was a natural cavern into which the water, produced by the rainfall upon the hills, had run from time immemorial by underground passages, and after traversing the floor of the cavern in a defined stream, ran by an underground passage from the said cavern into an open natural basin, and from thence into an open and defined stream which flowed to the mill of the plaintiff. The rainfall from the hills flowed through certain "swallets" or rents in the rock, and thus reached the cavern below. The defendant erected certain works upon the summits of the hills, to which he conducted pure water for the purpose of carrying on such works. In the course of its passage through the works, and from being used therein, the water became foul, and while in that state passed through the swallets, and thus eventually found its way into the mill of the plaintiff, who suffered injury thereby:—Held, that the defendant was liable to an action by the plaintiff in respect of such injury. *Hodgkinson* v. *Ennor*, 32 Law J. Rep. (N.S.) Q.B. 231; 4 Best & S. 229.

### (C) ABSTRACTING WATER.

The prosecutor was the owner of an estate which had been purchased by the testator, under whose will he claimed in 1838. It was situate upon a bed of gravel, which was itself imbedded in a basin of clay extending under the estate and under the lands adjoining. Water, which rose through the gravel bed by means of natural springs, was collected in a small pond, and thence overflowing the edge of the clay basin formed a rivulet which supplied other ponds, and was used by the prosecutor for watering his gardens and horses. The defendants, as Commissioners of Sewers, in the course of making a sewer in April, 1855, cut through the two beds of gravel and clay at a short distance from the estate, and the effect of the cutting was to drain the springs in the gravel, and to prevent them from finding their way into the pond and from supplying the rivulet and the other ponds:—Held, on the authority of *Chasemore* v. *Richards*, that the prosecutor was not at common law entitled to compensation from the Commissioners in respect of the abstraction of the water. *R.* v. *the Metropolitan Board of Works*, 32 Law J. Rep. (N.S.) Q.B. 105; 3 Best & S. 710.

By s. 50. of 11 & 12 Vict. c. 112. it is provided that where any work done by the Commissioners in pursuance of the provisions of the act shall "interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby," &c. By s. 69. it is provided that full compensation shall be made out of the rates, as the Commissioners shall direct, to all persons sustaining damage by reason of the exercise of the powers of the act:—Held, by *Wightman, J.* and *Mellor, J.*, that the prosecutor was not entitled to recover compensation under either of these sections. By *Cockburn, C.J.*, that he was so entitled under s. 50, as he had a right to the water after it had risen, and as that right had been interfered with and prejudicially affected. Ibid.

A riparian proprietor derives his rights in respect of the water from possession of land abutting on the

stream; and if, by a deed which conveys only land not abutting on the stream, he affects to grant water rights, the grant, though valid as against the grantor, can create no rights for an interruption of which the grantee can sue a third party in his own name—per *Pollock, C.B.*, and *Channell, B.—dissentiente Bramwell, B.* The abstraction of water from a natural stream, openly and under a claim of right for a period of twenty years, for the use of a tenement not abutting on the stream, will create no easement to have pure water flow down the stream to the point of abstraction. *The Stockport Waterworks Co.* v. *Potter*, 3 Hurls. & C. 300.

(D) Rights in Artificial Watercourse.

A watercourse, though artificial, may have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and, therefore, in an action by one riparian proprietor against another for the pollution and diversion of a watercourse, it is a misdirection to tell the jury, that, if the stream were artificial and made by the hand of man, the plaintiff could have no cause of action. *Sutcliffe* v. *Booth*, 32 Law J. Rep. (N.S.) Q.B. 136.

The plaintiff, who was the occupier of certain clay-works, had enjoyed for twenty years without interruption, the use of a watercourse, called the clear-water leat, which brought water to such works. Part of this water had been collected from natural springs, from whence it had been brought over the defendant's land by an artificial channel made by the plaintiff's predecessor at the clay-works. The rest of the water had been obtained by the plaintiff from a stream brought artificially to the surface by the operation of miners who had not permanently abandoned their right to the same. The plaintiff claimed also a prescriptive right by twenty years' uninterrupted user to another watercourse, called the foul-water leat. There was evidence at the trial that the plaintiff's predecessor at the clay-works had leave from the tenant and owner of the land which had since become the defendant's, to cut such watercourse from a brook down to the clay-works, on the terms of paying a peppercorn rent, and of such tenant being at liberty to stop it whenever there was a scarcity of water for his own purposes:—Held, that as to such foul-water leat there was evidence on which a jury might find the plaintiff's enjoyment thereof was not under a claim of right, but precarious, and that therefore a twenty years' user by the plaintiff under such circumstances, though without interruption, was not an enjoyment as of right within the meaning of the Prescription Act, 2 & 3 Will. 4. c. 71. Held also, that as to that part of the water in the clear-water leat which had an artificial origin from mining, the plaintiff could not by twenty years' user acquire an easement therein under 2 & 3 Will. 4. c. 71, but that as to that part which had been collected from natural springs the plaintiff had, as against the defendant, acquired by user a right to its flow, notwithstanding that the land in which such supply was obtained was within the district of tin-bounds, and subject therefore to the contingent rights of the owners of such bounds, who have by custom a right to use all water in their district for mining operations. Held further, that the plaintiff as such occupier of the clay-works to which the water was brought, had a sufficient interest to enable him to maintain his claim to a prescriptive right to the flow of such water. *Gaved* v. *Martin*, 34 Law J. Rep. (N.S.) C.P. 353; 19 Com. B. Rep. N.S. 732.

## WATERMEN'S ACT.

Under section 54. of 22 & 23 Vict. c. cxxxiii. a penalty is imposed upon any person, not being a freeman licensed in pursuance of the act, or an apprentice, qualified according to the act, to a freeman or to the widow of a freeman, who shall, at any time, act as a waterman or lighterman, or ply or navigate any wherry, passenger boat, lighter, vessel, or other craft upon the River Thames, from or to any place or places within the limits of the act for hire or gain. The limits of the act are defined to be, from Teddington Lock to Lower Hope Point:—Held, that a person, not being a licensed freeman, or an apprentice to a freeman or the widow of a freeman, and who navigates a barge for hire within the limits of the act, is liable to the penalty, although such barge has started upon its voyage from a place outside the limits, and might, under 7 & 8 Geo. 4. c. lxxv., have been navigated as a "western barge" by such a person without incurring any penalty. *Doick* v. *Phelps*, 30 Law J. Rep. (N.S.) M.C. 2; 3 E. & E. 244.

## WATERWORKS CONSOLIDATION ACT.

[Certain provisions frequently inserted in Waterworks Acts consolidated by 26 & 27 Vict. c. 93.]

A local board of health, empowered by their private act to supply a town with water at certain rates, supplied an ornamental fountain (which had been presented to the town by one of the inhabitants, and erected in one of the public streets) with water for the use of cattle in the cattle market on market-days, and for horses, if yoked, when passing to and fro. The board had a fixed charge per horse for water supplied to persons keeping horses, who might choose to have water laid into their stables. The respondent, in order to evade payment of this charge, took his horses from his stable to the fountain to drink. Upon a complaint against him for so doing, under the Waterworks Clauses Act, 1847, s. 39—which enacts, that "every person who, not having agreed to be supplied with water by the undertakers, shall take any water from any place containing water belonging to the undertakers, other than such as may have been provided for the gratuitous use of the public, shall forfeit," &c.—the magistrates being of opinion that the local board had no power to erect a fountain on the public highway, except for the gratuitous use of the public, and that therefore the water supplied to such fountain came within the exception in the above clause, refused to convict:—Held, that the decision of the magistrates was wrong, for that whether the fountain were a public nuisance or not, the board were at liberty to supply it with water on their own conditions. *Hildreth* v. *Adamson*, 30 Law J. Rep. (N.S.) M.C. 204; 8 Com. B. Rep. N.S. 587.

A waterworks company were by their special act (with which was incorporated the Waterworks Clauses

Act, 1847,) authorized to make and maintain the reservoirs, aqueducts and other works therein described in the line and situation, and on the levels, and upon the lands delineated on the deposited plans and described in the books of reference and defined on the sections, and to enter upon, take, purchase, and use such of the lands, &c. mentioned in the plans and books of reference as they might deem necessary for all or any of those purposes. The works authorized, so far as they related to a particular field which was situate within marked limits of deviation, were described as "an aqueduct, constructed in tunnel or otherwise, as shewn on the original plans," which plans indicated no surface works upon the field, but merely shewed that it was intended to construct, at a depth of at least forty feet under the same, an aqueduct in tunnel. After the special act was passed, the company served the owners of the field with a notice to treat for the purchase of it, with the view of sinking shafts in order to obtain an additional supply of water, and also of erecting thereon permanent pumping engines for raising water from beneath its surface. Upon a bill filed by the owners of the field against the company for an injunction to restrain the company from proceeding to summon a jury to assess the value of the field, and from using it for any other purpose than the construction of an aqueduct,—Held, by *Westbury, L.C.*, reversing the decision of *Stuart, V.C.*, that the company were not authorized to take or use the field permanently for any other purpose than that indicated upon the deposited plans. A public company claiming statutory powers must prove clearly and distinctly from their act of parliament, the existence of those powers; and if there is any doubt as to the extent, that doubt must operate for the benefit of the landowner. *Simpson* v. *the South Staffordshire Waterworks Co.*, 34 Law J. Rep. (N.S.) Chanc. 380.

## WAY.

Land was granted by indenture under this description: "all that piece or parcel of land or ground situate, lying and being in the parish of C, in the county of B, measuring in width from east to west thirty feet, which said piece or parcel of land or ground hereby appointed and conveyed is intended, &c., and is more particularly delineated and described in the map or plan thereof drawn in the margin of these presents, &c., the fences of which said piece or parcel of land or ground hereby conveyed on the east and west sides are to be made and maintained by the said B M (the vendor), his heirs, appointees or assigns." In an action brought for an alleged trespass to this land, evidence was given to shew that, before the deed was executed, the ground had been staked out by the grantee under the direction of the grantor, and that the breadth of the space between the fences was in no part equal to thirty feet:—Held, that after these facts had been proved, it was for the Judge to interpret the deed and to say what passed under it. *Skull* v. *Glenister*, 33 Law J. Rep. (N.S.) C.P. 185; 16 Com. B. Rep. N.S. 81.

G, the lessee of certain premises, and entitled to a way between a highway and these premises as appurtenant to them, carried building materials along the way to these premises, and from thence conveyed them to other premises of which he was the owner, and there made use of them for building cottages. G, having been sued in trespass by the grantor of the way:—Held, that the jury were properly directed to say whether the acts above mentioned were a colourable use of the way. Ibid.

*Semble*—per *Erle, C.J.*, that where the defendants were charged at the trial with wantonly and recklessly breaking down a fence, a deed by which that fence was conveyed to them (although without proof of title in the grantor) was admissible in evidence in reduction of the damages. Ibid.

On a severance of two tenements, no right to use ways, which during the unity of possession have been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to shew an intention to create the right to use these ways *de novo*. *Pearson* v. *Spencer*, 1 Best & S. 571.

The same rule in this respect applies to a will as to a deed. Ibid.

Where property devised or granted is landlocked, and there is no other way of getting at it without being a trespasser, so that it cannot be enjoyed without a way of some sort over the land of the testator or grantor, a way of necessity is created *de novo*. Ibid.

The ground on which the way of necessity once created is, that a convenient way is implied by grant as a necessary incident. Ibid.

The way of necessity once created must remain the same way as long as it continues at all. Ibid.

Where a portion of land is devised in such a manner as to be landlocked, the extraneous facts shewing that by that devise the testator intended to create a convenient way of some over-adjoining property of his own, the line of the way must be discovered from the language of the will, understood with reference to the state of the property. Ibid.

*Quære*—In what manner the way is to set out, if the premises before severance were so occupied as to afford no indication of what was the usual way in the testator's time, and the devise is silent on the subject. Ibid.

## WEIGHTS AND MEASURES.

[The use of the metric system of weights and measures rendered permissive by 27 & 28 Vict. c. 117.]

Earthenware vessels, unstamped but ordinarily used as containing a certain quantity according to Imperial measure, are "measures" within s. 28. of 5 & 6 Will. 4. c. 63, and if found unjust are liable to be seized, and the dealer in whose premises they are found is liable to penalties, under that section, for having them in his possession. *Washington* v. *Young* affirmed. *R.* v. *Aulton*, 30 Law J. Rep. (N.S.) M.C. 129; 3 E. & E. 568.

Upon the conviction of a railway company under 5 & 6 Will. 4. c. 63. s. 28, for having in their possession a weighing machine which upon examination thereof, duly made by the inspector of weights and measures, was found to be incorrect:—Held, that a machine which from its construction was liable to variation from atmospheric and other causes, and

required to be adjusted before it was used, was not incorrect upon examination within the meaning of the statute, if examined by the inspector before it had been adjusted. *The London and North-Western Rail. Co.* v. *Richards*, 2 Best & S. 326.

The appellants (a railway company) kept a weighing machine, which for a fortnight had been so out of repair that, when anything was weighed by it, the weight appeared to be four pounds more than was really the weight:—Held, that the appellants were liable to be convicted under 5 & 6 Will. 4. c. 63. s. 28. for having in their possession a weighing machine which on examination was found to be incorrect or otherwise unjust. *The Great Western Rail. Co.* v. *Bailie*, 34 Law J. Rep. (N.S.) M.C. 31; 5 Best & S. 928.

## WEST INDIA RELIEF ACT.

The West India Relief Act (2 & 3 Will. 4. c. 125.) gives, for moneys advanced by the Commissioners on mortgage upon the application of a mere tenant for life, absolute priority over all existing charges. *Laurence* v. *the West India Relief Commissioners*, 34 Beav. 234.

## WILL.

[See DEVISE—LEGACY—SETTLEMENT—TENANT FOR LIFE.]

[The Law with respect to Wills of Personal Estate made by British Subjects amended by 24 & 25 Vict. c. 114.—Better Provision made respecting Wills of Seamen and Marines by 28 & 29 Vict. c. 72.]



### (A) CONSTRUCTION OF WILLS.

#### (*a*) *General Points.*

A testator devised real estate to one for life, with remainder to trustees for a term to raise the clear sum of 10,000*l.* for his younger son; and, subject thereto, he devised the estate in strict settlement. The personal estate not specifically bequeathed was insufficient to pay the debts, and thereupon the devised estate and specific legacies became liable to contribute rateably towards the deficiency:—Held, that, as between the youngest son and the persons taking the estate subject to the term, the whole amount of contribution of the real estate was to be borne by the latter. *Raikes* v. *Boulton*, 29 Beav. 41.

A testator having contracted to purchase a real estate, devised it to his son Andrew and his issue, and he bequeathed his residue in moieties between his sons Andrew and George; but he directed that 10,000*l.* should be debited against Andrew's moiety as an equivalent for the real estate devised to him. Before the testator's death the contract was rescinded:—Held, that no deduction ought to be made from Andrew's moiety of the residue. *Nugee* v. *Chapman* (No. 1), 29 Beav. 288.

The word "then," used twice in the same sentence in a will, construed in the first instance as pointing to the event, and in the second as an adverb of time. *Gill* v. *Barrett*, 29 Beav. 372.

A testator devised an estate to his sons, Phineas and John, equally during the life of Phineas, and until the youngest child attained twenty-one; and on the death of Phineas, and on the youngest child attaining twenty-one, to sell it, and to pay one-half of the money to John and his heirs, and the other half among the then living children of Phineas. But (said the testator) in case of John's death, without lawful issue, before the said division takes place, then I give his half share to and amongst my then living grandchildren, share and share alike. John died without issue in 1827. Phineas died in 1858:—Held, that the grandchildren were to be ascertained at the death of Phineas, and that the representatives of a grandchild who died in 1856 took no share. Ibid.

A testator, after giving all his real and personal estate to trustees, in trust for his children, directed his trustees, when any of his daughters should attain twenty-one or marry, to raise and settle not exceeding 5,000*l.* for each such daughter, in part of her presumptive share, in trustees of her own nomina-

tion, in trust for her for life, with remainder for her children; and if all such children should die under twenty-one, in trust for the testator's next-of-kin. S, one of the daughters, having attained twenty-one, settled her 5,000*l.* upon herself and children, with a trust in default of children for the next-of-kin of the testator, according to his will. S died without having had any child:—Held, that the next-of-kin of the testator living at his death were entitled to the fund as joint tenants. *In re Aspinall's Settlement Trusts*, 30 Law J. Rep. (N.S.) Chanc. 321.

A testator created arbitrators, and declared that if any dispute arose between his devisees it should be referred to them, and that if any devisee took proceedings at law or in equity his estate should go over:—Held, that such a clause was repugnant and inconsistent with the gifts; that it could not oust the jurisdiction of the Court; and that it was not an objection to the title of an estate. *Rhodes* v. *the Muswell Hill Land Co.*, 30 Law J. Rep. (N.S.) Chanc. 509; 29 Beav. 560.

Bequest of "everything to my trustees under my marriage settlement, adding the name of J P to the same, for the benefit of my wife and children":—Held, that the testator's estate was held subject to the trust of his marriage settlement. *Pybus* v. *Cottrell*, 30 Beav. 106.

A testator bequeathed his residue in trust for his sisters and their issue, and he afterwards by the same instrument appointed his wife his residuary legatee:—Held, that the latter clause did not revoke the former. *Davis* v. *Bennett*, 30 Beav. 226.

A testator directed his trustees to give to A B the option of purchasing his Lancashire estates at the price mentioned in his conveyance, but the offer was to be considered declined unless accepted within a month from the offer being made:—Held, that no valid offer was made until the price had been stated to A B. *Lord Lilford* v. *Keck* (No. 1), 30 Beav. 297.

A testator gave to E R all his property, real and personal, except 500*l.* a year, which he gave to R H:—Held, that the 500*l.* a year was given to R H in perpetuity, and that he was entitled absolutely to so much capital as, being invested on government securities, would produce that income. *Hill* v. *Potts*, 31 Law J. Rep. (N.S.) Chanc. 380; 2 Jo. & H. 634.

A bequest to trustees of a specific fund, for purposes mentioned in the will, with a direction "that it shall be liable to, and applicable by, the trustees to the payment of the debts, testamentary and other expenses and legacies,"—Held, not only to exonerate the residuary estate ftom debts, &c., but also to render the specific fund liable to the costs of a suit for the general administration of the estate. *Webb* v. *Beauvoisin*, 32 Law J. Rep. (N.S.) Chanc. 217; 31 Beav. 573.

The selection by a testator of a particular portion of his personal estate for payment thereout of debts will exonerate the residuary personal estate from its liability. *Vernon* v. *Earl Manvers*, 32 Law J. Rep. (N.S.) Chanc. 246; 32 Beav. 623.

A testator directed real estate to be purchased and settled in strict settlement, and declared that his trustees should stand possessed of his personal estate upon such trusts, &c. as were thereby declared concerning the lands directed to be purchased, or as near thereto as the rules of law and equity would permit, provided that the personal estate should not vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years:—Held, first, that the trusts of the personalty were not executory; secondly, reversing the decision of the Master of the Rolls, that the proviso suspending the absolute vesting of the personalty during the minority of tenants in tail applied only to such tenants in tail as took by purchase, and was, therefore, not void for remoteness, and that the effect of the trust was to vest the personal estate in the first tenant in tail (an infant), subject to its being divested in the event of his dying under twenty-one. *Gosling* v. *Gosling*, 32 Law J. Rep. (N.S.) Chanc. 233; 1 De Gex, J. & S. 1.

A testator devised his real estates unto and equally between his daughter and granddaughter for their respective lives, with benefit of survivorship; and from and after the decease of the survivor the testator gave his real estates unto and to the use of all and every the child and children of his said daughter and granddaughter "lawfully to be begotten," equally as tenants in common in tail. *Almack* v. *Horn*, 32 Law J. Rep. (N.S.) Chanc. 304; 1 Hem. & M. 630.

The granddaughter survived her mother, and died leaving issue:—Held, that, in the absence of special circumstances, the granddaughter was entitled under the above devise to a share with her children after the determination of her life estate. Ibid.

A testator authorized the trustees of his will, in case his nephew F and his clerk C should elect to carry on his business, to permit them so to do, without any payment for goodwill, upon their giving bond for payment of the value of the stock-in-trade, &c. by half-yearly instalments extending over not more than ten years:—Held, upon F and C electing to carry on the business, that there was a specific bequest to them of the goodwill, and that upon making provision for payment of the testator's debts and the value of the stock-in-trade, &c., they were entitled to the business from the time they made their election. *Fryer* v. *Ward*, 32 Law J. Rep. (N.S.) Chanc. 433; 31 Beav. 602.

The business was carried on upon premises partly freehold of the testator and partly leasehold, and before any lease of the former was granted to F and C notice was given to take the premises under the powers of an act of parliament:—Held, that F and C were not to be regarded as having become entitled to a lease of the freehold portion of the premises, and that the whole compensation in respect of the value thereof (irrespective of value of goodwill) belonged to the testator's estate. Ibid.

*Semble*—A bequest of the goodwill of a business carried on by the testator on his own freehold, entitles the legatee to such limited occupation only of the premises as may be necessary to enable him to obtain the benefit of his bequest, but not necessarily to have a lease of the premises. Ibid.

By marriage settlement, dated in 1838, real estate was conveyed to such uses as M B N (the intended wife) should by deed or will appoint, and in default of appointment to certain uses for the benefit of the children of the marriage, with an ultimate remainder to the use of M B N in fee; and it was provided that all property which during the coverture should

come to or vest in the husband in right of the said M B N, or in the said M B N, by descent, devise, limitation, gift or otherwise, should be settled to the same uses. M B N, by her will, made shortly after the settlement, devised and bequeathed all the residue of her property, "except such real and personal estate as might remain subject to the trusts of her marriage settlement, by reason of no specific disposition thereof having been made by her under the power therein contained." In 1854 M B N purchased real estate out of the savings of her separate property, and it was conveyed to the same uses and trusts as those declared by the settlement of 1838, omitting only the use in favour of children:—Held, that the exception in the will referred only to the property subject to the trusts of the marriage settlement at the date of the will, and that the real estate subsequently purchased by M B N passed under her will. *Hughes* v. *Jones*, 32 Law J. Rep. (N.S.) Chanc. 487; 1 Hem. & M. 765.

*Quære*—Whether section 24. of the Wills Act would apply to an exception out of a devise.

A testator directed his executors to distribute between his wife and sons, of whom there were six, such portions of his plate, &c., as they should judge expedient, and to sell the rest. The will carried the proceeds of such sale to three of the sons, to whom the residue was left in equal shares. The only executor who proved was one of the sons, who distributed portions of the plate, &c., unequally, taking the largest share himself. The distribution, however, was made in accordance with a letter written by the testator, and with the consent of the adults interested, and of one of the guardians of the infants, and the *bona fides* of the distribution was not questioned:—Held, that the distribution was authorized by the will. *Davis* v. *Davis*, 1 Hem. & M. 255.

A devise of the residue of real estate upon contingent or future trusts, does not carry with it the intermediate income; but such income results to the testator's heir-at-law; and the 1 Vict. c. 26. has made no difference in the law in this respect. *Hodgson* v. *the Earl of Bective*, 32 Law J. Rep. (N.S.) Chanc. 489; 1 Hem. & M. 376.

A similar rule applies to a contingent or future bequest of any particular portion of the personal estate, as chattels real. Ibid.

*Secus*—As to a bequest of the residue of personal estate, which, though contingent or future, carries with it all the intermediate income. Ibid.

W T, by his will, dated 1853, devised real estates at L and M to trustees, to the use of his widow for her life, with remainder to the use of the trustees during the life of his daughter, in trust for his daughter, with remainder to the use of the sons of his daughter born in the testator's lifetime (except Lord K, or the eldest son for the time being of his daughter, being the heir or heir apparent of the Earl of B), successively for life, with remainder to their first and other sons successively in tail male, with other remainders, and an ultimate remainder to the testator's right heirs. And the testator devised and bequeathed the residue of his real estate and chattels real to trustees, upon the same uses and trusts as were thereinbefore expressed or declared to take effect, on the determination of the estate limited to the trustees during the life of the testator's daughter, concerning the estates at L and M. And the testator bequeathed the residue of his personal estate to trustees upon trust to sell and convert, and until the proceeds should be invested in real estates to invest and pay the income, in such manner as the rents of the real estates to be purchased would be payable. And he directed his trustees to invest two equal third parts of the residuary personal estate in real estates, and to settle the estates so purchased upon the same uses and trusts as were thereinbefore expressed or declared to take effect, on the determination of the estate limited to the trustees during the life of the testator's daughter, concerning the estates at L and M. And the testator directed the remaining third part to be laid out in real estate to be settled upon Lord K for life, with remainder to his first and other sons in tail male, with remainder to the same uses as were declared of the real estate to be purchased with the other two-thirds. At the time of the testator's death and thenceforward to the hearing his daughter had had only one son, Lord K:—Held, that until the birth of other issue of the daughter the rents and profits of the residue of the real estate resulted to the heir-at-law, and that the intermediate income of the chattels real fell into the general residue of the personal estate; but, that the intermediate income of the two-thirds of the personal estate was subject to the same trusts for investment as the two-thirds themselves. Ibid.

A testator gave a fund to his wife for life, and after her death to his seven sons and daughters, or such of them as should be living at the death of his wife, and the issue of such of them as should be then dead leaving issue share and share alike, the issue not to take larger shares among them than their respective parents would have been entitled to if living. One of the testator's sons who survived him died in the lifetime of the widow:—Held, by *Turner, L.J.*, affirming the decision of *Stuart, V.C.*, that the son took a vested interest, and that her representative was entitled to a share of the fund. *In re Pell's Trusts*, 3 De Gex, F. & J. 291.

A testator sold to his daughter's husband a business which the testator had purchased for sums secured by promissory notes payable five years after date. The testator also became security for the husband to a banking company. The husband became bankrupt, and the testator proved his debt under the bankruptcy. Afterwards, he made his will, giving his property upon trusts for his children, but declaring that in case he should have made any advance of money to any of his children or to the husbands of his daughters, such child should not be entitled to receive any part or share of the testator's property until he, she or they should have brought into hotchpot such sums of money as should have been so advanced, with interest. Before the promissory notes became due, but after the testator had been obliged to pay the debt to the banking company for which he was surety, he died:—Held, first, that the amounts due on the promissory notes were not advances to be brought into hotchpot; secondly, that the money paid to the banking company was an advance, and was not extinguished or deprived of that character by the bankruptcy, but must be brought into hotchpot. *Auster* v. *Powell*, 1 De Gex, J. & S. 99.

Lands were devised to J W P in fee simple, with an executory devise over if he died without issue

male, and the testator prohibited on pain of forfeiture the cutting of timber except for necessary repairs. J W P cut down timber for other purposes:—Held, affirming a decision of one of the Vice Chancellors, that forfeiture was not the only remedy, but that the estate of J W P was liable to make good for the benefit of the executory devisee the value of the timber cut, and that this additional remedy did not take away the former remedy. *Blake* v. *Peters*, 32 Law J. Rep. (N.S.) Chanc. 200; 1 De Gex, J. & S. 345.

A legatee for life of renewable leaseholds for lives was directed to keep them "fully estated":—Held, that the whole expense of renewals during his life was to be wholly borne by him. Ibid.

A testator bequeathed his residuary personal estate, consisting partly of ships, to his sister B (a married woman), subject to the legacy thereinafter bequeathed to T, and the commission directed to be paid to him, and subject to the directions thereinafter contained as to the conversion of ships. He appointed H and T his executors, gave T a legacy for his trouble, and directed his executors not to sell any of his ships for seven years from his death (unless the keeping them unsold should cause loss), and to work them employing as much of his residuary estate as should be necessary for that purpose; and he gave T an allowance of 500*l.* a year for his trouble while he should assist in managing them. By a codicil he stated that he wished B to have the residue, but directed that it should be invested in such manner as his executors should think fit, "in trust for her sole benefit during her lifetime," and that after her death it should be divided between her surviving children:—Held, that the direction to keep the ships unsold for seven years was not revoked by the codicil, and that while they remained unsold B took the actual income for her separate use. *Green* v. *Britten*, 1 De Gex, J. & S. 649.

A testator entitled to a freehold lease for three lives was in the habit of insuring each of the lives and renewing the lease at a fine when a life dropped. By his will he empowered his trustees to pay the premiums to renew the lease, and to obtain other policies on the new lives on the plan then adopted. Subject as above, he directed his trustees to accumulate the income of his real and personal estate for twenty-one years, and at the end of that period to stand possessed of all the property and accumulations in trust for A for life, remainder to her children successively in tail. A had two children, the eldest of whom died an infant in A's lifetime; the other was still living. During A's life one of the lives dropped, the trustees renewed the lease and insured the new life, after doing which a large surplus of the moneys received on the policy remained in hand. A having died, the representative of the deceased tenant in tail claimed this surplus and the subsisting policies:—Held, that a valid trust was created for keeping on foot the policies subsisting at the death of the testator, and by means of them renewing the lease and effecting fresh policies on the new lives, and that the personal estate was primarily liable to keep on foot the policies subsisting at the death of the testator, but not the future policies; and that, subject to the above trust, the personal estate of the testator vested absolutely in the first tenant in tail, who was also entitled to the moneys under the dropped policy, after providing for payment of the future premiums on the two remaining old policies, and paying the expenses of effecting the new policy, but was not entitled to a transfer of the two remaining old policies, for that the moneys to arise from them were primarily liable to the expenses of renewing the lease and obtaining new policies. *Meller* v. *Stanley*, 2 De Gex, J. & S. 183.

A testator gave three annuities,—the first "free from income or property-tax or any other deduction," the second "free from all deductions," the third "free from deduction":—Held, that all the annuities were free from income-tax. *Turner* v. *Mullineux*, Jo. & H. 334.

On a bequest of all testator's personal estate, upon trust to lay out 2,000*l.* in the purchase of an estate to be held on certain trusts, and upon trust to invest the residue of the personal estate, and stand possessed of 1,500*l.* part of testator's said estate, on certain trusts followed by bequests of pecuniary legacies *simpliciter*, and a concluding gift of all the residue and remainder of testator's estate and effects whatsoever and wheresoever, and whether in possession, reversion, remainder, or expectancy,—Held, that the residuary clause passed the real estate, charged with the pecuniary legacies, but not charged with the gifts, directed out of the investment of the personal estate. *Gyett* v. *Williams*, 2 Jo. & H. 429.

Held also, that the 2,000*l.* was to be set apart in priority to the other gifts. Ibid.

A testator by his will directed that his trustees should stand possessed of the residue of the proceeds of the conversion of his real and personal estate, after payment of legacies, upon trust as to one-third for F B for life, with remainder to his children who should attain twenty-one, as tenants in common; and if there should be no such child the testator directed that on the decease of F B the same trust moneys should sink into and form part of his residuary real and personal estates, and be held and applied accordingly. The testator gave the other two thirds to other persons: F B died without children:—Held, that there was an intestacy as to the one-third given to F B for life. *Lightfoot* v. *Burstall*, 33 Law J. Rep. (N.S.) Chanc. 188; 1 Hem. & M. 546.

The decision in *Humble* v. *Shore* (7 Hare, 247) approved. Ibid.

The testator gave all his real and personal estate to trustees, upon trust, except as to money due to him from A E, to convert by sale and invest in the funds, and "pay the interest thereof unto his wife" for life, with remainder over:—Held, that the widow was entitled to the interest arising from the debt from A E. *Dobson* v. *Banks*, 32 Beav. 259.

A farmer bequeathed "the whole of the consumable and other provisions, farming stock and effects, farming implements, growing crops and tenant right" in or upon his dwelling-house and farm at his death to trustees, to carry on the farm "until the 6th of April next subsequent to or following the time of my decease," and after that day to transfer the consumable and other provisions, farming stock and effects, &c., then upon his house and farm, to his son. He declared that his trustees were not to sell "the farming stock and effects" except in the ordinary course of management of the farm, and that the money produced thereby should fall into his residue. The

testator died about four o'clock on the 5th of April, at which time there was on the farm, besides the ordinary farming stock, a large quantity of corn and wool of the last year's produce, and an excess of fat sheep and stock of the value of 3,314*l.*:—Held, that these passed to the son. *Harvey* v. *Harvey*, 32 Beav. 441.

By his will a testator said he proposed to bequeath his residue by a codicil, "or otherwise to allow the same to go to his next-of-kin according to the Statute for the Distribution of the Estate of Intestates. He made no codicil:—Held, that he died intestate as to the residue, and that his widow took her share thereof. *Ash* v. *Ash*, 33 Beav. 187.

The words "entitled to an estate for life" in a will held to mean entitled in possession. *Burdett* v. *Hay*, 33 Beav. 189.

The testator devised to the plaintiff a life interest in remainder in the S estate, and he also bequeathed to him a charge of 250*l.* issuing out of it, which was to be paid to him at twenty-one. The will contained a proviso that in case the plaintiff should become entitled, under the provisions of the will, to an estate or interest for his life in the S estate, the legacy should sink into the estate:—Held, that this meant "entitled in possession, and have the beneficial enjoyment of the estate." Ibid.

A testator director a sale of his estate and a sufficient sum to be laid out in the funds to produce annuities for his nieces, and he gave his residue to his wife for life:—Held, that the surplus income, after paying the annuities which accrued, prior to the sale and investment being made, was liable to make up the fund necessary to produce the annuities, and that it did not belong to the widow. *Anderson* v. *Anderson*, 33 Beav. 223.

A testator bequeathed his residuary estate "to the hospitals of London," and in other parts of his will used the word "London" in the popular sense, and not as applying to the City:—Held, that neither the City, nor the old Bills of Mortality, nor the Metropolitan Boroughs, nor the Registrar General's new district, nor any other defined district, could be adopted as the proper limits for the operation of the bequest, but that the word "London" must be construed in a popular sense as comprising all houses standing in a continuous line of streets within the cities of London and Westminster and the borough of Southwark; and that in a case of doubt as to any particular hospital, the question as to its right to participate must be decided with reference to its own particular circumstances. *Wallace* v. *the Attorney General*, 33 Law J. Rep. (N.S.) Chanc. 314; 33 Beav. 384.

In residuary gifts the decisions shew a strong inclination of the Court, in all cases where it is possible, to make the gift vested. *Pearman* v. *Pearman*, 33 Beav. 394.

A bequest "to pay and divide" to children, "as and when" they attain a certain age, is ambiguous, and these words are not to be treated as equivalent to a gift to such of the children as should attain that age. Ibid.

Gift "to pay and divide" residue amongst children "as and when" they attained twenty-one, with a maintenance clause not co-extensive with minority, —Held, vested. Ibid.

Although parol evidence is admissible to rebut a presumption of law against the words of a will, yet where the presumption arises from a rule of construction of words, simply *qua* words, no parol evidence can be admitted. *Barrs* v. *Fewkes*, 34 Law J. Rep. (N.S.) Chanc. 52.

Gift by a testator of real and personal estate to trustees on trust for his brothers and sisters for life, with a direction, after the decease of the survivor of them, to sell and to divide the proceeds unto and equally between all his nephews and nieces, grand-nephews and grand-nieces to take *per capita*, with power to apply the presumptive shares for advancement and maintenance,—Held, that all the class, including those born after the testator's decease, were entitled *per capita*. *In re the Trustee Relief Act, in re Partington's Trusts*, 3 Giff. 378.

A testator by will bequeathed his residue equally among his seven children, and by a codicil revoked the share given by his will to one of his sons, and gave the same to his trustees upon trust, at their uncontrolled discretion to apply the same, or such parts thereof as they should think proper, for the personal maintenance and support or otherwise for the benefit of his said son, or otherwise to apply the same in augmentation of the shares of the testator's other children. The trustees did not exercise the power, but paid the share in question into court under the Trustee Relief Act:—Held, that there being no gift in favour of the person who would be benefited by the exercise of the power, as in *Brown* v. *Higgs* (8 Ves. 4), no gift could be implied, and therefore that there was an intestacy with respect to the share. *In re Eddowes*, 1 Dr. & S. 395.

Testator made a minutely specific provision for his wife for life, and then directed that all his property at her death should be sold and divided between his children *nominatim*, "or such of them as shall be living at my decease, and the issue of such of them as shall have died in my lifetime or the lifetime of my said wife":—Held, first, that in a fund not described, part of the testator's estate, the widow did not take a life estate by implication; secondly, that the class to take it was unascertained till the death of the widow, and the income of it was undisposed of and went according to the statute. *Stevens* v. *Hale*, 2 Dr. & S. 22.

By will a testator gave seven cottages specifically described together with other property also specifically described. By a codicil he recited the gift by the will referring in terms to the property described, other than the seven cottages; he then revoked the gift of the property described in the recital, and gave the property "included in the hereinbefore mentioned devise" in a different manner and upon other trusts:—Held, that the gift of the seven cottages was not revoked, but they passed under the devise upon the trusts named in the devise. *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & S. 96.

The trusts of the will were, in part to provide an annuity of 1*s.* per week to each of the testator's sons charged on the devised property. By the codicil reciting these trusts he charged the property devised by the codicil with the sum of 1*l.* per week to each of his two sons:—Held, that this was not a cumulative legacy, but merely a reference to the old gift, and that it was charged primarily on the seven cottages, and as a subsidiary security on that which passed by the codicil. Ibid.

A testator gave the produce of his real estate to his daughter Eliza for life so long as she should remain single, but in case she should marry then he gave one-half of the income to his daughter Eliza, and one-half to his daughter Mary (a married woman with children), and after the death of Mary he gave one-half of the trust moneys to her children, and the other half to the children of Eliza, and if Mary should die without children the whole to Eliza's children, and if Eliza should die without children the whole to Mary's children, and if both should die without children, then over. Eliza never married:—Held, that upon her death the children of Mary took the whole corpus and income, subject only to be divested if Mary should die without having any children. *Eaton* v. *Hewitt*, 2 Dr. & S. 184.

A testator directed his just debts and funeral and testamentary expenses to be paid as soon as possible, but not out of the money in his house, or owing to him on bills or notes or on government securities; and devised his freehold, leasehold and copyhold estates upon trust to pay his debts, funeral, testamentary and legal expenses, and subject thereto as to one-half, he gave the income to his wife for her life, and at her death directed it should go into and form part of his residuary estate; and as to the other half, he directed it to accumulate till 1875, when he directed it should fall into his residuary estate. And as to the residue of his estates, whether real or personal, the testator devised the same amongst his son, his daughter-in-law and all his grandchildren, share and share alike:—Held, that the grandchildren living at the death of the testator would alone take; that legal expenses included the costs of a suit for administration, that the personal estate was exonerated from payment of debts, and that adult grandchildren could claim the immediate enjoyment of their shares, notwithstanding the accumulation clause. *Coventry* v. *Coventry*, 2 Dr. & S. 470.

A testator gave his residuary estate amongst his nephews and nieces, and after directing the share of his niece E G, and also a sum of 1,000*l.* which he had given her, to be held upon certain trusts, with an ultimate gift over from the benefit of which, as respected the 1,000*l.* he excluded a niece, M L, directed the shares of other nieces (including a niece M B) and also certain sums of 1,000*l.* given to them to be held for their separate use respectively for their lives, and then for their children living at their respective deceases: "but in case all the children of his said other nieces, or of any or either of them should die either in their respective lifetimes, or after their deceases, under age and without leaving lawful issue," then upon trust "to pay, assign and transfer" their shares "equally amongst all and every his nephews and nieces who should be living at such time or times, and to the issue of such of them as might be then dead, in equal shares and proportions (such issue to be entitled to its parent's share only) except as to the sums of 1,000*l.* given to his other nieces, which he directed should not survive to his niece M L, but be paid *in the same manner as he had directed the* 1,000*l. given to his niece E G in case of her decease without issue, or their all dying under age and without issue.*" The gift over of E G's 1,000*l.* was not made to take effect on E G's death without issue, but "in case all the children of E G should die either in her lifetime or after her decease under age, and without leaving lawful issue." M B died without ever having been married:—Held, that the gift over took effect as to her share and 1,000*l.*; and *semble*, that even without the aid of the explanatory reference to the gift over of E G's 1,000*l.*, the gift over would have taken effect. *Lanphier* v. *Buck*, 34 Law J. Rep. (N.S.) Chanc. 650; 2 Dr. & S. 484.

Held also, first, that the word "issue" meant children of the nephews and nieces, and not issue generally; secondly, that the gift to the issue of the nephews and nieces was an original gift, and not a gift by substitution; thirdly, that it was not necessary that the children who took a share should survive the tenant for life or, the gift being original, their parents; and, fourthly, that the children took as joint tenants. Ibid.

A testator was tenant for life of two estates with remainder to his wife for life, with remainder to their first and other sons in tail male, with remainder to himself in fee. By his will (made before the Wills Act), he devised one of these estates, "in default of issue of his body, and subject to the life interest of his wife," to trustees in trust for his brother E for life, with remainder to his first and other sons in tail male. And the testator devised his other estate, "in the same terms," to the same trustees, upon trust to raise money to pay his debts, and subject thereto in trust for his brother R for life, with remainder to his first and other sons in tail male. The testator died without issue:—Held, that by the words "in default of issue," the testator, in the case of the estate devised to pay debts, clearly referred not to a general failure of issue, but to a failure at the time of his death; that the same construction must prevail as to the other estate; and consequently that both estates were well devised. *Bagot* v. *Legge*, 34 Law J. Rep. (N.S.) Chanc. 156.

The will further provided that in case R, or any son of his body, should succeed to a particular family estate, then the trusts before declared for the benefit of R and such son of his body so succeeding should cease, and the estate should be in trust for the persons who, by virtue of his will, would become next entitled to the same. R became tenant for life of the family estate, and his son tenant in tail in remainder:—Held, that R only had "succeeded" to the family estate, and that his son became entitled to the estate devised by the will. Ibid.

A testator, in February, 1827, devised real estate upon trust, after the death of the survivor of his sister and three other persons, to sell and pay the proceeds to "such person or persons as should then be the nearest in blood to him as descendants from his great grandfather J S, and whose kindred with the testator originated from J S." At the date of the will the testator, who was then sixty-seven, and his sister, who was seventy years of age, were the only lineal descendants of J S. Both died without issue. On the ground, mainly, that the word "originate," as there used, imported, in consonance also with its use in another part of the will, the source from which the kinship was to be derived,—Held, in affirmation substantially of the decree made by the Master of the Rolls (but *dissentiente Knight Bruce, L.J.*), that the nearest in blood to the testator, at the decease of the survivor of the tenants for life, out of

all the persons who could trace kinship with the testator through kinship, whether lineal or collateral, with J S, were beneficially entitled under the will. *Best* v. *Stonehewer*, 34 Law J. Rep. (N.S.) Chanc. 349; 34 Beav. 66; 2 De Gex, J. & S. 537.

A testator gave all his personalty for the use of his wife, not doubting but she would exercise due discretion and economy in expending the same; the whole of the property to be under the care of his said wife and his other executor, who were requested to pay out of the same all his debts and funeral and testamentary expenses. And after the decease of his wife he gave the residue of his personal estate, to be equally divided between five persons named:—Held, that the "residue" meant so much as remained after payment of debts, &c., and the wife was only entitled for life to that residue, with remainder over. *In re Brooks's Will*, 34 Law J. Rep. (N.S.) Chanc. 616; 2 Dr. & S. 362.

A testator gave a fund to trustees upon trust to pay the interest to his daughter for life and then to her children; and if his daughter should die without issue, then he directed the fund to be paid unto and among his four sons, share and share alike. But in case any or either of his sons should be then dead, he directed that the share of him or them so being dead should be paid to his or their child or children, share and share alike. The testator's daughter survived the sons and died without having had children, —Held, that it was not necessary in order to entitle children of the deceased sons to take that they should have survived the tenant for life, but that, the gift to them being substitutional, it was necessary they should survive their respective fathers; and, consequently, that the shares of sons who died leaving children vested, on their deaths, in their children who were living at their respective deaths. *In re Turner*, 34 Law J. Rep. (N.S.) Chanc. 660; 2 Dr. & S. 501.

Where a testator directed the annual interest of his residue to be divided into as many shares as there were living children of T and L W, share and share alike, as they should come to age, and in case any one should die without children, his share to devolve on survivors successively, till the whole interest came into the hands of the grandchildren and great-grandchildren of T and L W,—Held, that the children of T W living at his death, were entitled to the income only, that there was a gift by implication to these children absolutely, with a gift over of the share of any grandchild who had died, without having had issue, not absolutely but according to the gift of the original share. *Wetherell* v. *Wetherell*, 4 Giff. 51.

Gift for life followed by a gift to the surviving children of B and C "or their heirs or assigns":—Held, that *Cripps* v. *Wolcott* did not apply, and that the period of survivorship was the death of the testator:—Held, also, that "heirs and assigns" could not be read "next-of-kin," and that all who survived the testator took vested interests. *In re Hopkins's Trust*, 2 Hem. & M. 411.

The rule, that where there is a disposition affecting the whole income for life and then a distribution directed at the end of the life, and a gift over in case of death without children; the period of distribution is to be taken as the period at which the contingency is to be determined (laid down by the Master of the Rolls in *Edwards* v. *Edwards*, 15 Beav. 357), applies to the case where a life estate is given in a portion of the whole income, but the whole, together with the accumulations, is given (subject to a gift over on death without issue) upon the determination of that estate. *Dean* v. *Handley*, 2 Hem. & M. 635.

Gift by will to M C for life, and after her death, to "all and every the children of the said M C, who shall survive me":—Held, to include children of M C born after the death of the testator. *In re Clark*, 3 De Gex, J. & S. 111.

The rule as settled by modern authorities is that the word "survivor" is to be construed strictly and is not to be read "other," unless the rest of the will should render the more liberal and less literal construction essential for the purpose of carrying into execution the objects expressed by the will. A testator gave one-third of his real and personal estate to each of his three daughters for life and after their respective deaths to their respective children. But in case any or either of the three daughters should die without leaving any child, or if all should die under twenty-one, then the share of the daughter "so dying should be for the separate use of the surviving daughter or daughters and their children *per stirpes*":—Held, that "surviving" ought to be construed "other." Consequently, one having died, leaving children in 1803, and a second in 1837, leaving a child, and the third in 1864 leaving no child, it was held, that the share of the last was divisible, *per stirpes*, amongst the children of the two former. *Hodge* v. *Foote*, 34 Beav. 349.

Personal estate held exonerated from the payment of "funeral and testamentary expenses and debts." A testator bequeathed his leasehold and personal property (except plate) to his wife absolutely; and he devised his real estate in trust to sell, and out of the produce to pay "his funeral and testamentary expenses and debts" and to "the residue," and pay the income to his wife for life with remainder over:—Held, that the "funeral and testamentary expenses and debts" were primarily payable out of the produce of the real estate. The costs of a special case, to obtain the opinion of the Court on the true construction of a will, held not to be "testamentary expenses." *Gilbertson* v. *Gilbertson*, 34 Beav. 354.

"Entitled" construed "entitled in possession." *Turner* v. *Gosset*, 34 Beav. 593.

Subject to prior life and possible absolute interests, there was a bequest of a portion of the residue to A B, with a gift over to his children or other issue in case of his decease before he should "become entitled":—Held, that this meant "entitled in possession." Ibid.

*(b) Misdescription and Defective Enumeration.*

Where some subject-matter is devised as a whole, and then words of description are added which do not completely exhaust all the particulars included in the general devise, but seem to limit and restrict it, the entirety, expressly and definitely given, shall not be prejudiced by the imperfect enumeration of particulars; nor shall a clear enumeration of particulars be overruled by an apparently general devise. *West* v. *Lawday*, 11 H.L. Cas. 375.

A person was possessed under one and the same lease for lives renewable for ever, of lands denominated, B, C, F and G, all situated in the county of

Kerry. He granted out the lands of G for lives with a covenant for perpetual renewal, reserving thereout a perpetual fee-farm rent. Some years after this grant he made his will, which recited that he was possessed of a lease for lives, renewable for ever, of certain lands in the county of Kerry," which said lands are denominated B, C and F, all situated in the parish of &c., in the county of Kerry." He directed that "the aforesaid lands" should be sold, and after payment of his debts be equally divided between J W and S L. After giving several legacies, he made J W "residuary legatee of all my real and personal estate and effects":—Held, reversing the decision of the Master of the Rolls and the Lords Justices of Appeal in Ireland, that the estate of G did not pass under the general devise, but went to the residuary legatee. Ibid.

A testator, a native of Great Britain, domiciled in Russia, and possessed of real and personal property in that country, and also of a large sum of consols in the English funds, made his will in the Russian form, which commenced with the words: "I dispose of all my movable and immovable property, honestly acquired by myself in the following manner"; and after directing a sale of his real estate, proceeded—"The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me, shall be divided into ten equal parts," and after disposing thereof and appointing executors, in conclusion contained the following words: "and as all my movable and immovable property is mine own, and honestly acquired by myself, so nobody has a right to interfere with my dispositions and contest the same under any pretence whatever; and likewise, no one has a right to interfere with or contest the proceedings and dispositions of my executors":—Held (affirming the decisions of the Lords Justices and of *Wood, V.C.*), that the testator died intestate as to his beneficial interest in the English funds. *Enohin* v. *Wylie* (House of Lords), 31 Law J. Rep. (N.S.) Chanc. 402; 10 H.L. Cas. 1.

*(c) Ambiguity and Uncertainty.*

A will contained the following devise: I give and bequeath to my son Edward Fleming all that dwelling-house, &c., now in the occupation of my son John, during his natural life, and at his death to descend to my grandson Henry Fleming, and his heirs. The testator had two grandsons named Henry; the claimant, who was the son of the testator's son Edward, and the defendant, who was the son of the testator's son John:—Held, that there was an ambiguity in the will, as to which of the two grandsons the testator meant to devise the house, and parol evidence was admissible to explain it. *Fleming* v. *Fleming*, 31 Law J. Rep. (N.S.) Exch. 419; 1 Hurls. & C. 242.

A name and a description of a legatee were given in a will, which, taken together, could not be applied to any one person; evidence of the state of the family was admitted, and an affidavit of the solicitor who prepared the will was offered to shew what had been the cause of the mistake:—Held, that this affidavit was not admissible in evidence. *Drake* v. *Drake*, 8 H.L. Cas. 172.

A testator devised a life interest in an estate to his "sister Mary Frances T D"; he had no sister, but he had a sister-in-law, of that name. After making other devises and bequests, he gave the residue equally among four persons, one of whom was thus named and described, "my niece Mary Frances T D." He had no niece who bore those two names conjointly; he had nieces who bore one or the other of those names:—Held, affirming the judgment of the Court below, that the bequest as to the fourth part was void for uncertainty. Ibid.

*(d) Conditions and Contingencies.*

The testatrix, by her will, after giving and bequeathing several legacies, among others some for charitable purposes, proceeded as follows, "I give, demise and bequeath to T M W (the defendant) all my real estates, both freehold and copyhold, in" &c., "and all the residue of my personal estate and effects," to hold to him, the said T M W, his heirs, executors, administrators and assigns for ever; upon this express condition, that if my personal estate should be insufficient for the purpose, that he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies hereinbefore bequeathed, and I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid. And I do hereby charge and make chargeable all my said real and personal estate with the payment of the aforesaid legacies and bequests":—Held (affirming the decision of the Queen's Bench, 31 Law J. Rep. (N.S.) Q.B. 7; 2 Best & S. 232), that these words did not shew that the testator intended to make a gift of an estate to the defendant on a condition, of which the heir might take advantage by way of forfeiture, if the defendant failed to perform it by paying the legacies within the twelve months; and that the true construction was that they created a trust in the defendant, the performance of which was cognizable in a court of equity. *Wright* v. *Wilkin* (Ex. Ch.), 31 Law J Rep. (N.S.) Q.B. 196; 2 Best & S. 259.

Where a testator made a will in case of a contingency, "should anything happen to me on my passage to Wales, as during my stay," and returned to his home safely, the Court held that the will was conditional, and the contingency not having occurred, that it was ineffectual. *Roberts* v. *Roberts*, 31 Law J. Rep. (N.S.) Prob. M. & A. 46; 2 Swab. & T. 337.

The Court will hold a paper to be testamentary which is in due form and duly executed, without looking at its contents, even though they are manifestly nugatory. Ibid.

To constitute an adherence since the Wills Act, it must be accompanied by all the formalities required to the due execution of the will. Ibid.

A testator, in 1858, signed a will, purporting to be conditional upon his non-return from a contemplated journey. After his return from the journey he altered the will in other respects, and it was then formally executed. Upon evidence that when the will was executed, in 1859, the testator was not contemplating any journey, the Court admitted it to probate. *In the goods of Cawthron*, 33 Law J. Rep. (N.S.) Prob. M. & A. 23; 3 Swab. & T. 417.

Testator devised his real estate to his son, when he should have attained the age of twenty-one, subject to the payment of 120*l.* a year for life to testator's widow. He then bequeathed all his personal estate (which he described, and which consisted partly of

ships and partly of stock-in-trade) to his son; and the will went on thus: "but should the hand of death fall on my widow and son, and my having no other children, or my son any issue lawfully begotten, should he leave a widow she shall receive annually 50*l.* out of my real estate, the residue then to be equally divided, share and share alike, after paying such legacies as I may hereafter name, the division of property to be between" persons whom he specially named. The will was made in 1837, when the son was not of age, but he became of age in 1839, and the will was not executed until 1844. The son was the only child. On his father's death he entered into possession of the property, and married, and, in 1856, died without ever having had issue. It was held (varying a judgment of the Court below), that the will having been executed after the Wills Act, the words were to be read in the sense given to them by the legislature; that the contingency as to attaining twenty-one was at an end, but that the other contingency, as to having no issue, did take effect, and so the gift over affected the real estate to which the word "residue" alone applied, but did not affect the personal estate, to which that word was not applicable, the personal estate having been absolutely disposed of by the will. *Semble*—That when a third person has signed his name to a will after those of two others, but there is no proper attesting clause to the will and nothing to shew that the third name so signed was signed at the request of the testator, such person's title as a legatee named in the will is not thereby affected. *Randfield* v. *Randfield* (House of Lords), 30 Law J. Rep. (N.S.) Chanc. 177; 8 H.L. Cas. 225.

Where by will residuary personal estate, or a share thereof, is directed to be laid out in the purchase of land, and the land to be held upon future executory trusts, the intermediate income, until the trust takes effect in possession, must (subject to the restraint on accumulation imposed by law) be treated as part of the principal, and be laid out in like manner; the case being, in effect, that of a contingent gift of residuary personalty which, according to established rule, carries with it the income accruing due previously to the occurrence of the contingency. *The Earl of Bective* v. *Hodgson* (House of Lords), 33 Law J. Rep. (N.S.) Chanc. 601; 10 H.L. Cas. 656.

The decree in *Hopkins* v. *Hopkins*, giving the intermediate income in a similar case to the heir, accounted for and shewn not to be law. Ibid.

*Semble*—Although an appeal be from part only of a decree, all parties served with notice of the appeal, and not themselves appealing, are precluded, whether they appear at the hearing or not, from afterwards raising any objection to the decree; and the proper course, upon the hearing of the partial appeal, is to affirm generally the decree below, except only as to any variations which the appellate Court may think fit to introduce into the portion appealed from. Ibid.

### (*e*) *What Estate passes.*

A testator devised all his manors, &c. "to my son for his natural life, and at his decease" to trustees, "their heirs and assigns, in trust to preserve"—(this devise in trust was repeated whenever necessary)—"for the son or sons, daughter or daughters, the males taking first, of my said son till they attain the age of twenty-one years, or the days of their marriage, and no farther; the elder son to inherit before the younger, but the daughters to take equally and in common as joint heiresses." He empowered his son to give "any part or even the whole of these estates" to any or either of his sons, but not to the daughters, "as my said son may, from their conduct to him, their father, think deserving of preference." But if the eldest grandson should turn out ill, the testator left him an annuity of 200*l.* chargeable on his landed property, "and to the eldest son of such undeserving grandson I leave and bequeath my landed property, estates," &c. "I will therefore that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my son may make." If the son died without issue, the trustees were to preserve the estates for the testator's four daughters during their lives, free from the control, &c., "the estates being equally divided between them or their heirs"; and he gave the "estates and property to them through the said trustees," &c. whom he empowered to raise 10,000*l.* for the daughters, chargeable on all his estate:—Held, that the son took only an estate for life; that the trustees took an estate in fee in remainder expectant on the determination of the life estate of the son, and that on the son's death without issue the estates went over to the daughters as tenants in common in tail. No gift in the will was void for uncertainty or remoteness. *Watkins* v. *Frederick*, 11 H.L. Cas. 358.

*Quære*—Whether an express devise to trustees in fee is cut down if the trust declared is not so extensive as the legal estate. Ibid.

Testator appointed "my universal heir my great-nephew, T J, eldest son of my nephew W." If the great-nephew T J should marry and have a son living at his death, "I will that my estates do descend to his eldest son." If he had more than one son, and the eldest should die before his father, he was to be succeeded by the second son, and so on to the third, &c. If T J should not have any son living at his death, his next brother, the second son of the nephew W, was to succeed, and so on "in case of the failure of male heirs, to the third, fourth, &c." . . . "The eldest great-nephew being always to be considered as my legitimate heir in case of failure of the other brothers, my express will and desire being that my estates do always descend in the male line." . . . "Should all the sons of my nephew W die without leaving a son, my will is that the estates do devolve and be the property of my nephew J; and if he should die without leaving a son, then to my nephew T and his heirs, on the same conditions":—It was held, that on the true construction of all these provisions taken together, the eldest great-nephew T J took an estate in tail male. *Jenkins* v. *Hughes* (House of Lords), 30 Law J. Rep. (N.S.) Chanc. 870; 8 H.L. Cas. 571.

A will contained the following clause: "I give and bequeath to A, B and C all my personal effects, and everything of every kind that I have now, or may have at the time of my decease, in my apartments at 13, Plaistow Grove, or elsewhere":—Held, that the residuary personal estate passed under the words "or elsewhere." *In the goods of Scarborough*, 30 Law J. Rep. (N.S.) Prob. M. & A. 85.

A testator by a will made before the Wills Act, 1 Vict. c. 26, gave all his real and personal estate to trustees, in trust, after the payment of his just debts and funeral and testamentary expenses, to convert the personal estate into money, to be placed at interest, and then, after giving all the profits arising from his real estate and the interest of his personal estate to his wife, to be applied to her maintenance at the discretion of the trustees, if she should need the whole of it, during her life, the testator willed that his trustees should put his kinsman G into possession of a close called "the First Close," and then devised as follows: "I give all that my close or piece of land called 'the Second Close,' with all the appurtenances, unto my kinsman W":—Held, that W took an estate in fee, though the devise to him contained no words of limitation, there being a sufficient intention shewn by the will that the trustees should take the legal fee conferred on them by the word "estate," and hold it after the performance of the other trusts in trust for W. *Smith* v. *Smith*, 31 Law J. Rep. (N.S.) C.P. 25; 11 Com. B. Rep. N.S. 121.

A gift to A of the remainder of money, goods and debts due to the testator after payment of debts, constitutes A residuary legatee. *In the goods of Bloomfield*, 31 Law J. Rep. (N.S.) Prob. M. & A. 119.

By a will, made subsequently to the Wills Act, 1 Vict. c. 26, a testator, after directing his debts and funeral and testamentary expenses to be paid by his executors as soon as conveniently might be after his decease, devised to the persons whom he afterwards appointed executors certain freehold premises, in trust to pay the rents and proceeds thereof unto the testator's son, J S, for his natural life, but without power of anticipation, and from and after the death of J S in trust for the right heirs of him the said J S for ever:—Held, that the executors took the legal estate in fee in the said freehold premises, and therefore, as both the estate to J S for life and also the estate to the heirs of J S were equitable, the rule in *Shelley's case* applied, and J S had an equitable estate in fee. *Spence* v. *Spence*, 31 Law J. Rep. (N.S.) C.P. 189; 12 Com. B. Rep. N.S. 199.

A testator devised certain real estates to his four granddaughters, by name, for their respective lives, in equal shares, with remainders to trustees to preserve contingent remainders, "with remainder in equal shares to the use of the children of my said four granddaughters, and the heirs of their bodies, such children of my said granddaughters taking their mother's share as tenants in common in tail, remainder to the survivors of such children, and in default of issue by my said granddaughters," then over. There was a devise of residuary real estate in similar terms, except that the remainder next following that to the children of the granddaughters as tenants in common in tail was thus expressed: "To the survivors or survivor of such children and the issue of their, his or her body in tail":—Held (reversing the decision of the Lords Justices, and affirming the decision of the Master of the Rolls), that under the words "in default of issue by my said granddaughters," the four granddaughters, and not their children, took by implication, subject to the prior limitations, estates tail in both classes of property, with cross-remainders between them in tail. *Atkinson* v. *Holiby* (House of Lords), 32 Law J. Rep. (N.S.) Chanc. 735; 10 H.L. Cas. 313.

The testator devised freehold property to trustees to the use of his daughter A J for life, and after her decease in trust for such one or more of her children or his, her, or their issue as she should appoint by will, and in default of appointment "in trust for all and every of her children, and the heirs of their body or bodies lawfully begotten, in equal shares and proportions; and in case of the death of my said daughter without leaving any child her surviving, and in the event of such child or children her surviving dying without leaving any issue of his or her body, then in trust for my own right heirs for ever." A J had one son, who died in her lifetime:—Held (*dubitante Williams, J.*), that the son of A J took a vested estate tail under the will, and not an estate tail contingent upon his surviving A J. [*Per Byles, J.*—Though you may not shew by external evidence what was the skill of the person by whom the will was drawn, you may infer this from the evidence afforded by the will itself, and take it into consideration in construing the will.] *Richards* v. *Davies*, 32 Law J. Rep. (N.S.) C.P. 3; 13 Com. B. Rep. N.S. 69—affirmed in Ex. Ch. 32 Law J. Rep. (N.S.) C.P. 112; 13 Com. B. Rep. N.S. 861.

By a will made before the Wills Act, 1 Vict. c. 26, a testator, who was a mortgagee in fee of certain lands, devised unto his wife and two other persons "all moneys in the funds, and securities for moneys, debts on mortgage, and all other his estate and effects of whatever nature or kind soever," subject to the payment of debts, upon trust to receive the rents, interest, &c. for the testator's said wife during her life; and after her decease the testator gave, *inter alia*, various bequests of the different sums due to him on mortgages, in which he described the money so due as "mortgage debts." The will contained a direction to the testator's executors to sell the residue of the testator's estate after the death of his wife, and to divide the money among certain specified persons; and it concluded with an appointment of the testator's wife and the two other trustees to be executors:—Held, that the legal estate in fee in the lands of which the testator was such mortgagee passed under the above devise to the three trustees. *Rippon* v. *Priest*, 32 Law J. Rep. (N.S.) C.P. 65; 13 Com. B. Rep. N.S. 308.

Devise to W for life, and after his decease to the heirs male of his body for their several natural lives in succession, according to their respective seniorities, or in such parts or proportions as the said W, their father, should direct, limit or appoint; and in default of such issue male of the said W, over:—Held, by *Cockburn, C.J.* and *Wightman, J.*, that W took an estate for life only—affirming the judgment below, 29 Law J. Rep. (N.S.) C.P. 180; but by *Martin, B.* and *Channell, B.*, that W took an estate in tail male. *Jordan* v. *Adams* (Ex. Ch.) 30 Law J. Rep. (N.S.) C.P. 161; 9 Com. B. Rep. N.S. 483.

A testatrix by a codicil bequeathed her "wardrobe, trinkets and other things" to her aunt. In the will and codicil she had applied expressions similar to the words "other things" to a portion only of her property undisposed of:—Held, upon the construction of the will and codicil, that the testatrix's aunt was not residuary legatee. *In the goods*

*of Smith*, 34 Law J. Rep. (N.S.) Prob. M. & A. 15; 3 Swab. & T. 561.

A testator by his will devised certain real estates to his daughter Harriet for life, and after her death to her sons successively in tail, and, in default of such issue, to his son John Arthur in fee. By a codicil, the testator, after reciting that "he had by his will devised the reversion in fee in several estates, expectant on the decease of his several daughters (including Harriet), to his son John Arthur," and that "he had devised other estates to trustees to the use of his said son until he should attain the age of twenty-five years, and thereupon to him and his assigns for ever," declared his will to be, that, in case his said son should happen to depart this life without leaving lawful issue of his body living at his decease, and before the said several estates should become vested in him by virtue of the said several limitations aforesaid, the said estates should go to such of his daughters as should then be living, and to the issue of such of them as should then be dead, in the manner therein mentioned. The testator died in 1804; John Arthur attained twenty-five, and died in 1844, without having had issue; and the testator's daughter Harriet died unmarried in 1864:—Held, that "vested," in the codicil, meant vested in interest, and consequently that, on the death of the testator, the estates vested immediately in the son John Arthur, subject to the estates limited to the daughter Harriet and her issue and that the devisees of John Arthur took. *Richardson* v. *Power*, 19 Com. B. Rep. N.S. 780.

(*f*) *Who take.*

A D, after specific bequests to different members of his family, gave the residue to three persons in trust to pay the dividends to his son for life, and after the son's decease to pay to any widow of the son (who was not then married) an annuity of 600*l.* for life, and the residue to his son's children, and, in case there should not be any child of the son "then to stand possessed of the same, in trust for such person or persons of the blood of me, as would by virtue of the Statutes of Distributions of Intestates' Effects have become, and been *then* entitled thereto, in case I had died intestate." At A D's death, he left the son and four daughters him surviving. The son married, enjoyed the dividends of the residue during life, and died without ever having had a child:—Held, that the word *then*, even if treated as an adverb of time, referred only to the time when the persons entitled would come into possession of what had been bequeathed to them; that the persons entitled were to be ascertained at the death of the testator; that the son was one of those persons, and that his right as one of the next-of-kin was not affected by the previous gift of a life interest in the whole of the residue, so that, on the death of the son without issue, the residue became divisible into five shares, of which his personal representatives took one, and his sisters the other four. Held also (*dubitante Lord Wensleydale*), that these shares were not taken in joint tenancy, for where there is a bequest to persons who would have been entitled under the Statute of Distributions, they take as if there had been an intestacy. *Bullock* v. *Downes*, 9 H.L. Cas. 1.

During the life of the son, and till the time of filing the bill, which was twenty-four years after his death, all the members of the family had believed, and had done many acts on the belief (not the result of legal discussion, but a mere family assumption), that the son was not entitled to a share of the residue as one of the next-of-kin, but that his title to the property expired with his life estate:—Held, that this was not such an acquiescence in a family arrangement as prevented the son's personal representatives from enforcing their claim. Held, also, that the length of time was not a bar under the Statute of Limitations, for that the will created a trust. Ibid.

*Semble*—The 40th section of 3 & 4 Will. 4. c. 27. applies to legacies charged on land. Ibid.

A by his will bequeathed the residue of his personal estate to be equally disposed of between five of his children, whom he named. One of those children died in A's lifetime. The Court held that the five children took as the tenants in common, and the share of the deceased child therefore lapsed to the undisposed residue, and granted administration with the will and codicil annexed to B, son of the deceased, not as a legatee, but as entitled as one of his next-of-kin to part of the undisposed residue. *In the goods of Pile*, 2 Swab. & T. 628.

(*g*) *Gifts over.*

[See *post*, (*l*) *Survivorship.*]

A testator devised one-fifth "share" of his freeholds to each of his five children in fee. He then bequeathed personal estate to them, share and share alike, adding, "should either of my children die without issue, I give and bequeath such share and shares amongst my surviving children equally," and should either depart this life leaving children or child, then that child to inherit his parent's share; and if more than one, the share to be equally divided amongst their heirs and assigns for ever:—Held, that the gift over referred to the last antecedent, the personalty, and did not affect the realty. *Adshead* v. *Willetts*, 29 Beav. 358.

A testator gave the income of his residuary real and personal estate to his wife for life, and after her death gave the residues to all his children absolutely; but, in the event of the marriage of any of his daughters, he directed that the interest should be paid to them for life, and after the death of any of them to their husbands for life; and upon the death of the survivor, that the principal should be divided amongst the children of his married daughters, to vest in them at twenty-one, if sons, or at twenty-one, or marriage, if daughters, with benefit of survivorship, and with clauses for maintenance and advancement; and if any of such daughters should have children living at her death, the principal of her share was to be at her own disposal:—Held, that this was an express gift to the children of the daughters, and that the direction applied to all the daughters of the testator, and not to those only who married before the death of the tenant for life. *Witham* v. *Witham*, 30 Law J. Rep. (N.S.) Chanc. 888.

A testator gave his residuary estate, upon trust that the whole should, on his youngest child attaining twenty-one, be valued and specifically divided into three equal parts for his widow and two daughters respectively, and at the death of the widow her share was to be equally divided between the daughters with

a proviso that, if either of the daughters should die before such division of the property should have been made, leaving no surviving issue, then the part of the deceased should be given to her surviving sister, but if either should die and leave surviving issue, the part of her so dying should be equally divided amongst her surviving children. The income to go to the support of the widow and children. Both daughters having died before the widow,—Held, that the real and personal residuary estate of the testator had devolved on the two daughters in equal moieties, subject to the widow's life interest in one-third thereof. *Maddison* v. *Chapman,* 1 Jo. & H. 470.

The rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification of survivors at the period spoken of by the testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will. *In re Keep's Will,* 32 Beav. 122.

The word "survivors" of nieces construed "others," in consequence of the gift over, and of the subsequent part of the will referring to the issue of a deceased niece participating in an accrued share. Ibid.

The case of *Wilmot* v. *Wilmot* (8 Ves. 10) is not overruled by *Winterton* v. *Crawford* (1 Russ. & M. 407). Ibid.

The word "survivor" cannot be construed as "others" where the gift over is partly to persons whose interests are not given over. *De Garagnol* v. *Liardet,* 32 Beav. 608.

A testator gave legacies to each of his four daughters for life, with remainder to their children; and he provided, that if either of the daughters should die without children, her share should go over to the survivors of his sons and daughters:—Held, that "survivors" could not be read "others," in consequence of the gift over being to a different class from those whose shares were to go over. Ibid.

A testator, who had seven sons, gave certain chattels to his wife for life, and after her decease to such of his sons as should be then living and should first attain twenty-one. He then gave three specific parts of his real estate to six of his sons, naming them, each part to two, with benefit of survivorship, and another specific part to the remaining son, with a money legacy. He then gave all his residuary real estate and personal estate to trustees, upon trust, to sell and convert at their discretion, and out of the income to pay his wife an annuity, any deficiency to be made up out of the estates given to his sons, and subject thereto and after the decease of his wife to convey and transfer the residue of his real and personal estate to his seven sons before named or such of them as should be then living, share and share alike as tenants in common, and not as joint tenants, to be vested in him or them when and as he or they should respectively attain twenty-one, or die under that age leaving issue at his or their decease. And in case any one or more of the said children should die under twenty-one without leaving issue, then to transfer and convey the share of such child so dying to the others or other of them as tenants in common, to be paid at the time appointed for payment of the original shares:—Held, that a son who died leaving a widow and children, but who predeceased the testator's widow, took no share in the residuary estate. *In re Crosse's Will,* 32 Law J. Rep. (N.S.) Chanc. 344.

A testator gave real and personal estate to his wife for her life, and after her death directed it "to be equally divided between his four children, A, B, C and D, or their child or children, share and share alike," with a gift over in case of the death of any of his children without leaving children, "to the survivor or survivors of him, her or them, or his, her or their child or children, share and share alike, for ever." One of his children died in the lifetime of the widow, having never been married:—Held, that the surviving children took, in exclusion of grandchildren, the whole real and personal estate, as tenants in common. *Blundell* v. *Chapman,* 33 Law J. Rep. (N.S.) Chanc. 660; 33 Beav. 648.

A testator gave real and personal estate to trustees upon trust to receive the rents of certain leasehold premises, and pay the same to his daughter E upon her sole receipt, for her separate use, but in case of the death of E before the expiration of the lease, then upon trust to invest and accumulate the rents and profits for the benefit of the children of E living at her decease. E died before the expiration of the lease, without children:—Held, affirming a decree of the Master of the Rolls, that E was absolutely entitled to the leasehold premises. *Watkins* v. *Weston,* 32 Law J. Rep. (N.S.) Chanc. 609; 32 Beav. 238.

A testator gave real estate to trustees upon trust to pay a moiety of the rents to his wife for life, and the other moiety for the maintenance of his daughter, and after the wife's death he gave all the estate to his daughter in fee, provided that if the daughters should die without lawful issue, the wife her surviving, then he gave the estate to his wife for life and after her death "to my relations, share and share alike." He died almost immediately after making his will, and his daughter was his only child, she died without issue in the lifetime of the wife:—Held, that "relations" meant next-of-kin, and that the period of ascertaining them was not to be postponed till the death of the widow; but whether they were to be ascertained at the death of the testator or of the daughter—*quære.* *Lees* v. *Massey,* 3 De Gex, F. & J. 113.

The death of the daughter was the period for ascertaining them (per *Lord Campbell*). Ibid.

Bequest of residue upon trust to apply such part as the trustees should think fit for maintenance of A until twenty-one, then to pay her out of income 500*l.* until twenty-five, and then for A for life and after her death for all her children until they should respectively attain twenty-five, with a gift over. Similar bequest of leaseholds, except that it concluded with an absolute life interest in A:—Held, that the children of A took vested interests at birth, and that the gift over was void for remoteness. *Hardcastle v. Hardcastle,* 1 Hem. & M. 405.

A testator gave to each of four persons, when and as they respectively attained twenty-one, one-fourth of his residue for life, and in case either of them should happen to die under the age of twenty-one years, and without leaving lawful issue, then he gave his share to the survivors for life. And from and after the decease of either of the legatees leaving lawful issue surviving, he bequeathed his share to such issue. And if all four legatees should die without

leaving issue, there was a gift over. One of the legatees attained twenty-one, and died without issue:—Held, that her share was undisposed of, the Court being of opinion that "and" could not be read "or." *Coates* v. *Hart*, 32 Beav. 349.

A testator devised his real estate to his three daughters equally in remainder, and he provided that if "any of them should die and leave issue, then such issue should succeed to the mother's share in that his will." He afterwards gave the residue of his estate and effects to the same daughters and to his two sons in possession:—Held, that the issue of the daughters took no interest in the daughters' share of the residue. *Tibbs* v. *Elliott*, 34 Beav. 424.

*(h) Gift of Residue to Executors.*

By her will a testatrix after directing certain legacies, in certain events, to fall into the residue, bequeathed specified articles and "other personal effects" to A and B, in confidence that they would distribute and dispose of them as she by memorandum or otherwise might direct, and appointed A and B her executors. By a codicil the testatrix directed her "executors and residuary legatees" to vary certain bequests, and empowered them to postpone legacies, the interest in the mean time "to form part of my residuary estate," and gave a legacy to "A, one of my executors and residuary legatees." By a second codicil the testatrix gave a life interest to a legatee in a sum which, under the former dispositions, would have fallen into the residue, and stated that the alteration would make little difference, as the sum would ultimately fall into the residue. After authorizing the executors to postpone the payment of legacies and giving other directions, the codicil concluded thus: "These wishes, written by myself, and only concern the interest of my executors, will, I feel sure, be quite sufficient to fulfil all herein mentioned, but will perhaps be more correct if I sign my name in the presence of two witnesses, who are also in the presence of each other":—Held, that on the will alone the executors would have taken the residue subject to a trust for the next-of-kin, but that the word "confidence" in the will admitted of explanation, and was explained by the codicils not to amount to a binding trust. *Shepherd* v. *Nottidge*, 2 Jo. & H. 766.

Held also, that on the will as explained by the codicils the bequest to the executors was not limited to things *ejusdem generis* with those described, but included the whole residue. Ibid.

Held, consequently, that the executors took the whole residue beneficially. Ibid.

A testator gave residuary real and personal estate to an executor "to enable him to carry into effect the purposes of the will":—Held, on demurrer to a bill filed by the heir-at-law, that the executor did not take beneficially, and that, as to the realty not exhausted by the will, there was a resulting trust for the heir-at-law. *Barrs* v. *Fewkes*, 33 Law J. Rep. (N.S.) Chanc. 485; 2 Hem. & M. 60.

A testator gave several legacies of considerable amount to his children, to be paid out of his real and personal estate; and he gave 10*l.* each to his two executors, in case they accepted and acted in the executorship of his will. He then made various specific bequests; "and as to the rest, residue and remainder of his real and personal estate, not hereinbefore otherwise disposed of," he gave, devised and bequeathed the same to A B and C D, and made them sole executors of his will. By a codicil, the testator devised to his executors a particular house, not before mentioned, in trust for sale, and the proceeds to be divided between all his children:—Held, that the facts of the executors having equal legacies given them, and taking the residue in joint-tenancy, though sufficient to have prevented them from taking the residuary personal estate beneficially by virtue of their office, were insufficient to prevent the operation of the clear gift to them as individuals, and that they took the residue under the will beneficially. *In re Henshaw*, 34 Law J. Rep. (N.S.) Chanc. 98.

*(i) Secret Trust.*

A testator, desiring to apply his residuary real and personal estate to charity, was advised that he must give it absolutely to the legatees; and his will was accordingly drawn with an absolute gift of the residue to G, S and O. The instructions for the will were in the handwriting of G, who also prepared a statement containing a list of the legacies given by the will, followed by a memorandum that the testator had suggested that after the residuary legatees had retained 25*l.* each for their own use, the residue might be divided in a particular way for the benefit of certain charities. The statement also contained a detailed account of the testator's property, consisting chiefly of land. This statement and a copy of a will were communicated by G to S and O, and received by them without any express acceptance or refusal of the trust. S afterwards told the testator that he would endeavour to carry out his wishes. O preserved silence on the subject to the last. G having died before testator,—Held, there was *prima facie* evidence that G was authorized by the testator to make the communication, and was known or believed by both S and O to be so authorized, and therefore that the legatees could not take for their own benefit. *Moss* v. *Cooper*, 1 Jo. & H. 352.

In order to fix a legatee with a secret trust, it is not necessary that there should be a bargain before the execution of the will. The only distinction between a will made on the faith of a previous promise and a will followed by a promise is, that on a gift to A and B on the faith of a promise by A, the trust is fastened on the gift to both; but, if the will is first made and communicated only to A, his acceptance of a secret trust will affect his own gift only, and not the gift to B. Ibid.

Where a testator intends to fix a secret trust on an absolute gift, and that intention is communicated without the testator's authority to the legatees, *quære*, whether their subsequent silence would not be sufficient acceptance of the trust to exclude them from the beneficial enjoyment of the gift. Ibid.

*(k) Shifting Clause.*

By his will a testator devised the C estate to the use of his eldest son J for life, with remainder to his first and other sons in tail male, with remainder to his (testator's) second and third sons R and J and their issue male, with remainder to every other son of the testator in tail male, with remainder to the first and other sons of his eldest son J in tail general, with similar limitations in favour of the sons of testator's second and third and other sons,

with remainder to the use of the first and other daughters of his eldest son J in tail male, with similar limitations in favour of the daughters of testator's second and third sons, with remainder to the use of the first and other daughters of his eldest son J in tail general, with similar limitations in favour of the daughters of testator's second and third sons, with remainder to the use of all and every testator's sons to be thereafter born successively in tail general, with remainder to the use of his eldest daughter E for life, with remainders over. The will further directed that so often as the G estates should come to any of the testator's sons or daughters or their issue being in possession of the C estate, then that the persons next in remainder, according to the limitations in the will, should be entitled to and come into possession of the C estate for the estate and interest thereby limited to him or her respectively, and so from time to time as often as the event might happen, in such manner and as if the person so becoming possessed of the G estates had died or was then dead without issue. The testator's eldest son J came into possession of the G estates; and by a decree of the Court of Chancery it was declared that the testator's second son R became entitled to the C estate for life with remainder to his first and other sons in tail male, with such remainders over as in the will mentioned. R, dying without issue, was succeeded in the C estate by the testator's third son, who also died without issue. There being no other sons, the testator's eldest daughter E then claimed the C estate in preference to the eldest son of J, and contended that the will was to be construed as if J had died without issue:—Held, affirming the judgment of the Court of Exchequer Chamber (*Gardiner* v. *Jellicoe*, 33 Law J. Rep. (N.S.) C.P. 128; 15 Com. B. Rep. N.S. 170—overruling the judgment of the Common Pleas, 32 Law J. Rep. (N.S.) C.P. 17; 12 Com. B. Rep. N.S. 568), that the shifting clause did not operate to prevent the eldest son of J from taking the C estate under the limitation in remainder to his first and other sons in tail general in priority to the testator's daughter E. *Jellicoe* v. *Gardiner* (House of Lords), 34 Law J. Rep. (N.S.) C.P. 282.

*Quære*—As to the correctness of the decree in Chancery. Ibid.

### (*l*) *Survivorship.*

[See *ante*, (*g*) *Gifts over.*]

The benefit of survivorship may be given to those who have life interests as tenants in common. The word "survivor" in gifts of personal estate may be taken as referring to the period of distribution. It is not equally settled that with regard to real estate it applies to the determination of the prior limitation. When the word "survivor" is applied to a class of persons, and individuals of that class are named, its natural meaning is "the longest liver" of those who are named. *Taaffe* v. *Conmee*, 10 H.L. Cas. 64.

A devised his estates in trust to the use of his nephew, D F, and his issue male in strict settlement, "and for default of such issue male in D F, to the use of my nieces J, R and B, and the survivor of them for the term of their natural lives, as tenants in common and not as joint tenants, without impeachment of waste, and from and after their decease to the use of their first and every other son and sons, and the heirs male of their respective bodies, successively in equal proportions, the elder of such sons of each of my said nieces and the heirs male of their bodies being always preferred, &c., and for default of such issue male, then to the daughters of the said J, R and B, and for default of such issue male or female to my own right heirs." He directed that no son of a niece should take any benefit under the will, unless on assuming his name. D F died without issue. J had a daughter; R and B had each a son; J and R died:—Held, that the nieces took as tenants in common for life with cross-remainders between them for life; that on the deaths of J and R, the "survivor," B, took the whole for life; that the sons took a remainder, expectant on her death, as tenants in common in tail male, and that there was no estate in any daughter of a niece, until a total failure of issue male. Ibid.

There is not in the English law any presumption from age, sex, or other circumstances, as to the survivorship of one out of several persons who are destroyed by the same calamity. Where, therefore, the husband, wife and two children were swept off the deck of the vessel by one wave, and there was no distinct evidence that any one was seen later than another, although evidence was given that the husband was a strong man and a good swimmer, and the wife was a weak and delicate woman, and could not swim at all,—the House would not assume that one survived the other. A made a will, by which, under a power of appointment, reserved to her on her father's will, she bequeathed her property to her husband, "and in case my said husband shall die in my lifetime," to W W. The husband made a will in the same terms. The husband and wife were by the same wave swept off the deck of a vessel in a storm at sea, and were drowned. No evidence was given to prove that one survived the other; and it was held, that W W could not claim under either will, and that the property went over to those who, by the father's will, were to take in default of appointment by the daughter. The union of the two titles in W W did not affect the case, for he could not succeed in one because he did not succeed under the other, but was bound to establish his claim clearly under one or the other. No costs were given. *Wing* v. *Angrave* (House of Lords), 30 Law J. Rep. (N.S.) Chanc. 65; 8 H.L. Cas. 183.

## (B) When Valid or Void.

### (*a*) *Will of the Sovereign.*

The Court of Probate has no jurisdiction to decide on the validity of the will of a deceased sovereign of this realm. Where, therefore, application was made on behalf of the personal representative of a legatee under an alleged will of His late Majesty King George the Third for leave to cite the Attorney General, as representative of the reigning sovereign, the heir general of His late Majesty King George the Fourth, the heir-at-law of the alleged testator, to see the alleged will propounded, the Court rejected the application. *In the goods of King George the Third*, 32 Law J. Rep. (N.S.) Prob. M. & A. 15; 3 Swab. & T. 199.

### (*b*) *In general.*

Where a will is written on several sheets of paper, and the last sheet only is duly executed, although the

attesting witnesses did not observe the others, the *prima facie* presumption is that they all formed part of the will at the time of its execution; but where there is evidence from the provisions and structure of the will and other sources tending to rebut and confirm this presumption, the question must be decided upon that evidence. *Marsh* v. *Marsh*, 30 Law J. Rep. (N.S.) Prob. M. & A. 77.

The Court refused to grant probate on motion, without the consent of the person entitled in case of intestacy, of the will of a deaf and dumb man who could neither read nor write, alleged to have been prepared in accordance with the instructions of the testator conveyed partly by the use of the deaf and dumb alphabet, and partly by signs and motions, the evidence as to the signs and motions not being deemed satisfactory. *In the goods of Owston*, 31 Law J. Rep. (N.S.) Prob. M. & A. 177; 2 Swab. & T. 461.

The proviso in section 21. of 20 & 21 Vict. c. 85, that an order of protection "if made by a police magistrate or Justices at petty sessions, shall within ten days after the making thereof be entered with the Registrar of the county court within whose jurisdiction the wife is resident," is directory and not imperative; and the will of a married woman who has obtained such an order is valid, although the order may not have been registered within the time specified in the act. *In the goods of Farraday*, 31 Law J. Rep. (N.S.) Prob. M. & A. 7; 2 Swab. & T. 369.

In the absence of incapacity, undue influence or fraud, the omission to insert in a will certain legacies for which a testator had given instructions, does not invalidate the will if at the time of its execution its contents are known to the testator. *Mitchell* v. *Gard*, 32 Law J. Rep. (N.S.) Prob. M. & A. 129; 3 Swab. & T. 75.

The wife of a convicted felon is a feme sole as to her testamentary capacity; and a will made by her whilst her husband is undergoing his sentence is therefore entitled to probate. *In the goods of Coward*, 34 Law J. Rep. (N.S.) Prob. M. & A. 120; 4 Swab. & T. 46.

(*c*) *Incompetency.*

To a declaration propounding a will the defendant pleaded—1. That at the time of the pretended execution of the will the deceased was incapable of executing it. 2. That the will was prepared and made by A, and that deceased had not given A directions to prepare or make it:—Held, on demurrer, that both pleas were bad. *Middlehurst* v. *Johnson*, 30 Law J. Rep. (N.S.) Prob. M. & A. 14.

(*d*) *Sham Will.*

A duly executed codicil was pronounced against upon parol evidence that the testator did not intend that it should be operative. *Lister* v. *Smith*, 33 Law J. Rep. (N.S.) Prob. M. & A. 29; 3 Swab. & T. 282.

*Semble*—That the Court is not bound to act upon the verdict of a jury that a testator did not intend a will or codicil to be operative, but must itself be satisfied of that fact before pronouncing against it. Ibid.

(*e*) *Execution and Attestation.*

Where the signature of the testator and the attestation were written on a piece of paper, bearing a bill stamp, pasted at the foot of the parchment upon which the bill was written,—Held, a good execution, since it was apparent on the face of the instrument that the testator intended to give effect to it by his signature. *In the goods of Gausden*, 31 Law J. Rep. (N.S.) Prob. M. & A. 53; 2 Swab. & T. 362.

Where J G appointed as executrix of his will "my wife M G,"—Held, that this was no *falsa demonstratio*, though it appeared that M G was not the wife of the testator, as the pretended marriage was void on the ground of affinity. Ibid.

Where the attestation clause was written by the testator and read over and acknowledged by him in the presence of the two attesting witnesses, before they subscribed their names, and his name in the body of the attestation clause was the only signature to the will, the Court held that the will was duly executed. *In the goods of Walker*, 31 Law J. Rep. (N.S.) Prob. M. & A. 62; 2 Swab. & T. 354.

The Court refused to grant probate on motion, where the attestation clause and signatures of the deceased and the attesting witnesses were written on a separate piece of paper, which had previously been attached by wafers to the bottom of the will. *In the goods of Lambert*, 31 Law J. Rep. (N.S.) Prob. M. & A. 118.

The signatures of the testator and the attesting witnesses were written on a separate piece of paper which had been previously wafered to the foot of the will: — Held, that the will was duly executed. *Cook* v. *Lambert*, 32 Law J. Rep. (N.S.) Prob. M. & A. 93; 3 Swab. & T. 46.

A testator, who through infirmity had become unable to write without difficulty, caused his usual signature to be engraved upon a stamp, by means of which his signature was for some months previous to his death impressed on letters and other documents. By the direction of the testator, and in his presence and in that of the other witness, one of the subscribing witnesses with his stamp impressed the testator's signature at the foot of a codicil. The testator, in the presence of the witnesses, then acknowledged the signature to be his and the codicil to be a codicil to his will, and the witnesses then duly subscribed their names. The Court refused to grant probate of the codicil upon motion. *In the goods of Jenkyns*, 32 Law J. Rep. (N.S.) Prob. M. & A. 71; 3 Swab. & T. 93.

*Quære*—Whether a person directed by the testator to sign for him can sign by mark. Ibid.

A, in the presence of a testator, and by his direction, impressed the testator's usual signature at the foot of a codicil by means of a stamp upon which such signature had been engraved:—Held, that the will was duly signed. *Jenkyns* v. *Gaisford*, 32 Law J. Rep. (N.S.) Prob. M. & A. 122; 3 Swab. & T. 93.

A testatrix signed her will below the signatures of the attesting witnesses, but before they signed. She afterwards executed a codicil, but signed it *after* the witnesses who attested it, though on the same occasion:—Held, the will was entitled to probate, but the codicil was not. *In the goods of Hoskins*, 32 Law J. Rep. (N.S.) Prob. M. & A. 158.

After the death of A there was found a will in her handwriting, which filled the four sides of a sheet of paper. To the bottom of the second side was attached by wafers a piece of paper, upon which was written

a formal clause of attestation, and the signatures of the deceased and of two witnesses. One of the witnesses was dead, and the other proved that the paper was duly signed and attested; but was unable to say whether before execution it was attached to the will. The Court refused to grant probate on motion. *In the goods of West*, 32 Law J. Rep. (N.S.) Prob. M. & A. 182.

After the death of A, a codicil was found written by him on the first side of a sheet of paper, and beneath it was: "For my signature and witnesses see next side." On the fourth side, and level with the bottom of the codicil when the sheet was open, were the signatures of A and of two attesting witnesses. When the witnesses signed it the paper was folded, and they were unable to see whether there was any writing on the first side:—Held, that, in the absence of evidence that the codicil was written before the execution, it was entitled to probate. *Semble*—That if there had been such evidence the codicil was duly executed under 15 & 16 Vict. c. 24. *In the goods of Hammond*, 32 Law J. Rep. (N.S.) Prob. M. & A. 201; 3 Swab. & T. 90.

A testator duly executed his will, which was written on the first and on part of the second page of a sheet of paper. Beneath the subscriptions of the witnesses there was a clause appointing an executor, and beneath this and also on the third page were several alterations in the disposition of the testator's property, apparently written from time to time. At the end of the whole, and on the third page, the testator signed his name in the presence of witnesses who duly subscribed:—Held, that the presumption was that the testator intended his signature at the end to apply to all that preceded it, and that as there was nothing to rebut such presumption, the whole was entitled to probate. *In the goods of Cattrall*, 33 Law J. Rep. (N.S.) Prob. M. & A. 106; 3 Swab. & T. 419.

A testamentary paper which, upon the face of it, appeared to have been duly executed, was not signed in the presence of the attesting witnesses, nor did they when they signed see any writing:—Held, that it was not duly executed. *In the goods of Pearsons*, 33 Law J. Rep. (N.S.) Prob. M. & A. 177.

A will and one codicil were written upon the first three pages and the top of the fourth page of a sheet of paper. The beginning of a second codicil was written at the bottom of the fourth page, and the end of the codicil with the attestation clause and the signatures of the testatrix and the attesting witnesses on the upper part of the same page beneath the end of the first codicil. The Court granted probate of the second codicil, including the portion which appeared on the lower part of the page, being satisfied that it had been written before the concluding portion and the attestation clause and signatures, which appeared on the upper part. *In the goods of Kimpton*, 33 Law J. Rep. (N.S.) Prob. M. & A. 153; 3 Swab. & T. 427.

The testator's signature to his will was written partly across the last line but one of the will, and entirely above the last line, with the exception of one letter which touched the last line:—Held, that the will was signed at the foot or end thereof. *In the goods of Woodley*, 33 Law J. Rep. (N.S.) Prob. M. & A. 154; 3 Swab. & T. 429.

When the attestation clause to a will is insufficient, the Court will not dispense with the affidavit of the attesting witnesses as to due execution, which the Registrars are directed by the Rules in such case to require. *In the goods of Latham*, 33 Law J. Rep. (N.S.) Prob. M. & A. 186.

The attestation clause to a will executed abroad being insufficient, the Court refused to grant probate without an affidavit by the attesting witnesses as to due execution, although it appeared from a certificate of the British Consul, indorsed on the will, that the attesting witnesses had on oath proved due execution. Ibid.

In questions as to due execution, the presumption "*omnia rite esse acta*" applies with more or less force according to the circumstances of each case. *Vinnicombe* v. *Butler*, 34 Law J. Rep. (N.S.) Prob. M. & A. 18; 3 Swab. & T. 580.

When there is a regular attestation clause, and the will upon the face of it appears to have been duly executed, the Court will presume that the requirements of the Wills Act have been complied with, although the memory of the witnesses may have failed. Ibid.

When the attestation clause is informal, the presumption is less strong, but the leaning of the Court in such a case is not to allow the testator's intention to be frustrated by lapse of time and failure of the memory of the witnesses, especially when it appears that the testator signed the paper and the witnesses were summoned for the express purpose of witnessing a will. Ibid.

Where the attestation clause to a will is informal, and the attesting witnesses identify their signatures and that of the testator, but have no recollection of the circumstances under which the will was executed, the presumption, in the absence of evidence to the contrary, is that the will was duly executed. *In the goods of Rees*, 34 Law J. Rep. (N.S.) Prob. M. & A. 56.

A codicil, written on half a sheet of note-paper, occupied so much space as not to leave room for the signatures of the testator and of the witnesses in the ordinary form. Beneath it were the signatures of the two witnesses, and on the right side of the paper, in a blank space between its edge and the codicil, the signature of the testator was written at right angles to the codicil. The testator signed in the presence of the witnesses, who duly subscribed:—Held, that the codicil was duly executed within the meaning of 15 & 16 Vict. c. 24. s. 1, the signature of the testator being "so placed beside or opposite to the end of the codicil that it was apparent on the face of it that the testator intended to give effect by such signature to the writing as his codicil." *In the goods of Jones*, 34 Law J. Rep. (N.S.) Prob. M. & A. 41; 4 Swab. & T. 1.

The signature to a will, required by the Wills Act, must be at the foot or end of the whole of that which the deceased intended to execute as his will. If it is at the foot or end of a portion only of that which he intended to execute, such portion is not entitled to probate. *Sweetland* v. *Sweetland*, 34 Law J. Rep. (N.S.) Prob. M. & A. 42; 4 Swab. & T. 6.

The attesting witnesses to a will, which upon its face appeared to have been duly executed, swore positively that the testator had neither signed nor acknowledged his signature in their presence, and that when each of them signed the other was not present:—Held, that, in the teeth of this evidence,

the Court could not presume due execution from the facts that there was a formal attestation clause to the will, and that prior to its execution the testator had received instructions as to the proper mode of executing it. *Croft* v. *Croft*, 34 Law J. Rep. (N.S.) Prob. M. & A. 44; 4 Swab. & T. 10.

Where one of the attesting witnesses to a will was dead, and it appeared that it would be difficult, if not impossible, to discover the other, and the only parties interested in the estate consented, the Court granted probate of the will, though in the attestation clause it did not appear under what circumstances the attestation had been made. *In the goods of Nicks*, 34 Law J. Rep. (N.S.) Prob. M. & A. 30.

A will filled two pages of a sheet of paper, leaving no room on the second page for the signatures of the testator and of the attesting witnesses, which were written along the side of the will upon the third page:—Held, that the will was duly executed. *In the goods of Wright*, 34 Law J. Rep. (N.S.) Prob. M. & A. 104; 4 Swab. & T. 35.

Part of a will was written on the first two sides of a sheet of paper, the final clause being at the top of the third side. At the bottom of the second side were the signature of the testator, an attestation clause and the signatures of two witnesses, the last two letters of the testator's name extending on to the third side and beneath the final clause:—Held, that the whole paper writing was entitled to probate. *In the goods of Powell*, 34 Law J. Rep. (N.S.) Prob. M. & A. 107; 4 Swab. & T. 34.

To make a valid subscription and attestation to a will there must be either the name of the witness or some mark intended to represent it. A correction of an error in a previous writing of his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose. *Hindmarsh* v. *Charlton*, 8 H.L. Cas. 160.

The signature, or acknowledgment, of the testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed, or so acknowledged his signature, subscribe the will in his presence. Ibid.

A testator produced his will to A, and signed it in A's presence. A, whose name consisted of four words, the first of which began with "F," then, in the testator's presence, signed his own name, but by accident left his first initial letter uncrossed, so that it stood as if it was "T." He afterwards advised the testator that there ought to be two witnesses to the will, and in the afternoon of the same day, B being present, the testator produced his will, and shewed and acknowledged his signature in the presence of both A and B. B then wrote his name, and at his desire A added the date, and then observed and corrected the first initial of his own name by crossing the T, and so making it F:—Held, affirming the judgment of the Probate Court, that the will was not duly attested within the 1 Vict. c. 26. s. 9. Ibid.

No misconduct was imputed: no costs were given. Ibid.

A codicil which had previously been signed by the testatrix was signed by the attesting witnesses in a sitting-room, the door of which was opposite to the door of a room where the testatrix was lying in bed. At the time both doors were open and the testatrix might by raising herself in bed have seen the witnesses sign. It did not appear that she had done so, and the witnesses neither saw her nor heard her voice:—Held, that the codicil was not duly attested. *In the goods of Kellick*, 34 Law J. Rep. (N.S.) Prob. M. & A. 2; *nom. Killick*, 3 Swab. & T. 578.

One of the attesting witnesses to a will instead of writing his name, wrote "servant to Mr. S," believing that to be the proper mode of subscribing the will:—Held, that this was a sufficient subscription. *In the goods of Sperling*, 33 Law J. Rep. (N.S.) Prob. M. & A. 25; 3 Swab. & T. 272.

The names of two attesting witnesses to a will, who were unable to write, were written by another person whilst they held the top of the pen:—Held, that the will was duly attested. *In the goods of Lewis*, 31 Law J. Rep. (N.S.) Prob. M. & A. 153; 2 Swab. & T. 153.

Where the party propounding a will in a contested suit called one of the attesting witnesses, who gave evidence against the due execution, the Court held that he was bound to call the other attesting witness. *Owen* v. *Williams*, 32 Law J. Rep. (N.S.) Prob. M. & A. 159.

Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed and attested, and that subsequently the attesting witness's name had been erased by the testator, and had, at his request, been re-written by the attesting witness, the Court, on motion, granted probate to the widow, on affidavits that she and two infant children were the only persons entitled in distribution, and that notice had been given to the children. *In the goods of Colman*, 30 Law J. Rep. (N.S.) Prob. M. & A. 170; 2 Swab. & T. 314.

Thomas Douse executed by mark a will in which the testator was described as John Douse, and against his mark was written "The mark of John Douse." The Court being satisfied that Thomas Douse was the person who made the mark, and that he did so *animo testandi*, probate was granted. *In the goods of Douse*, 31 Law J. Rep. (N.S.) Prob. M. & A. 172; 2 Swab. & T. 593.

A testator made a will and codicil; the former was attested so as to pass real estate, but the latter was not. By his will he bequeathed a legacy of 3,000*l.*, and charged it on his real estate. But he devised his real and personal estate to trustees, charged with his legacies, upon trust thereout by mortgage, sale or other disposition to pay the legacy of 3,000*l.* By the codicil he reduced the legacy from 3,000*l.* to 2,000*l.*:—Held, that the codicil, though not properly attested, effected the reduction. *Coverdale* v. *Lewis*, 30 Beav. 409.

After a will had been executed and sufficiently attested by two witnesses, a devisee under the will, at the request of the testator's wife, the testator intimating that it was unnecessary to do so, but not objecting otherwise, added her name as an attesting witness:—Held, that the act of attestation could not be disregarded as useless and ineffectual, and that by the express enactment of the Wills Act (section 15.) the devisee was excluded from taking any interest under the will. *Randfield* v. *Randfield*, 32 Law J. Rep. (N.S.) Chanc. 668.

### (*f*) *Alteration and Interlineation.*

Upon the death of A a will was found, in which a legacy to B was erased, but so as to be legible.

One of the attesting witnesses stated that the erasure was made before the execution of the will; the other witness had no recollection on the subject; and evidence was given tending to shew that the erasure was made after execution. The Court, upon the balance of the evidence, being of opinion that the erasure was made after execution, granted probate without the erasure. *In the goods of Elizabeth Hardy,* 30 Law J. Rep. (N.S.) Prob. M. & A. 142.

*Quære*—Whether declarations of a testator made after the execution of a will are admissible in evidence to shew that an erasure was made after execution. Ibid.

A, on the 28th of April, 1847, executed a draft will, in which, after his death, were found interlineations and cancellations, some in ink and some in pencil. In May, 1847, he executed an engrossed will, and in 1854 he executed a codicil, which purported to be a codicil of the will of April, 1847. It appearing that the engrossed will was copied from the will of April, 1847, and that it corresponded with it as altered in ink, and consequently that the latter will was so altered before the date of the codicil, the Court granted probate of the will of 1847, as altered in ink, and of the codicil of 1854. *In the goods of Wyatt,* 31 Law J. Rep. (N.S.) Prob. M. & A. 197; 2 Swab. & T. 494.

A, after the 1 Vict. c. 26, made a will, which was written on the first and third pages of several sheets of note-paper. At the bottom of one of these pages were the words and mark—"I leave the whole of my property to the following religious societies, viz., ×, to be divided in equal shares among them." On the top of the opposite page was a similar mark to that following the "viz.," and the names of four religious societies. There being no evidence that the names of the societies were written before the execution of the will, the Court, considering them to be interlineations, excluded them from probate. *In the goods of Ebenezer White,* 30 Law J. Rep. (N.S.) Prob. M. & A. 55.

In order that an unattested paper may be adopted as part of a duly attested will, it must be referred to by the will in such a manner as shall, with the assistance of parol evidence when necessary and properly admissible, leave no doubt of its identity. *Dickinson* v. *Stidolph,* 11 Com. B. Rep. N.S. 341.

Where a codicil refers to two memoranda, and only one is found, effect must be given to that which is found; for, either the ordinary presumption must prevail, that the missing paper was destroyed *animo revocandi,* or the principle must be applied that the apparent testamentary intention of a testator are not to be disappointed, merely because he made other dispositions which are unknown by reason of the testamentary paper which contained them not being forthcoming. Ibid.

Effect of a duly attested codicil, though it relate only to personal estate, as a republication of the will, so as to pass lands purchased in the interval between the will and the codicil. Ibid.

### (C) Revocation and Cancellation.

A will executing a power is not revoked by deeds altering the estate or interest of the party appointing the property. *De Pontès* v. *Kendall; Ford* v. *De Pontès,* 31 Law J. Rep. (N.S.) Chanc. 185; 30 Beav. 572.

A disposition by will since the Will. 4. & 1 Vict. c. 26. can only be revoked by ademption of the property devised, or by a declaration of an intention to revoke, or by words equivalent thereto. Ibid.

If deeds which execute a power by making an absolute appointment do not revoke an existing will, and the will is valid, the Court will not decide whether, if there were no will, the deeds could have been carried into effect. Ibid.

A testator, by a codicil to his will, devised lands to trustees during the life of his daughter without impeachment of waste, in trust for her separate use, with restraint on anticipation. He subsequently conveyed the same and also other lands by a deed, which did not notice the codicil, to a different trustee, for the life of the same daughter, but not making the trustee unimpeachable for waste, also for the separate use of the daughter, and with restraint on anticipation:—Held, reversing the decision of *Stuart, V.C.,* that the daughter's life estate given by the codicil was revoked, with all its incidents, by the deed, and that she was impeachable of waste. *Lowndes* v. *Norton,* 33 Law J. Rep. (N.S.) Chanc. 583.

A will was partially revoked by erasures, and was afterwards republished:—Held, that the revocation was final, and not deliberative. *Ibbott* v. *Bell,* 34 Beav. 395.

If a will be revoked by cancellation, for the purpose of giving effect to different dispositions, such revocation is ineffectual if the substituted dispositions be not effective. Ibid.

The rule of English law following that of the civil law is this, "*Tunc prius testamentum rumpitur cum posterius perfectum est.*" Ibid.

The testatrix by her will, made in 1819, but not properly attested, purported to give real estate to seven persons as tenants in common. In August following she executed a codicil, properly attested, which, by referring to the prior instrument, made it effective as regarded real estate. In November she cancelled the names of two of the seven devisees and re-executed the will, but it was not properly attested. In February, 1821, she republished her will by an instrument properly attested, and died in 1823:—Held, that the erasure of the names of the two devisees was final and not deliberative, and that they took no interest in the real estate. Ibid.

A codicil commenced—"This is a codicil to my last will made on the 30th of June, 1858." The only will then in existence was a will made on the 15th of April, 1859, but the testator had previously executed a will of the 30th of June, 1858, which had been destroyed when the later will was executed. There was nothing in the provisions of the codicil to shew that the testator had intended it to be a codicil to the later will. There was evidence of declarations of the testator before and after the codicil was executed, tending to shew that he had meant it to be a codicil to the later will:—Held, first, that these declarations were not admissible for the purpose of shewing the testator meant to refer to the will of 1859; secondly, that as the codicil in no way referred to the will of 1859, it could not be presumed that the reference to the other will was by mistake, and that the will of 1859 was conse-

quently revoked. *In the goods of Goodenough*, 30 Law J. Rep. (N.S.) Prob. M. & A. 166; 2 Swab. & T. 141.

A, a married woman, made a will in 1848 in execution of a power of appointment, and in 1857 made another in execution of another power of appointment. The later will contained a general revocatory clause, but it did not refer to the will of 1848, or to the power in execution of which it was made, or to the property thereby appointed:—Held, that the will of 1848 was not revoked. *In the goods of Joys*, 30 Law J. Rep. (N.S.) Prob. M. & A. 169.

Declarations by a testator that he had destroyed a will, the revocation of which is in issue, are inadmissible in evidence. *Staines* v. *Stewart*, 31 Law J. Rep. (N.S.) Prob. M. & A. 10; 2 Swab. & T. 320.

When the plaintiff in a testamentary suit dies after the hearing and before judgment, the Court will not, on the application of his personal representative, give judgment, unless such personal representative has been made a party to the record. Ibid.

The signatures of the attesting witnesses to a will being an essential part of the will, the tearing them off by the testator *animo revocandi* revokes the will. *Evans* v. *Dallow; In the goods of Dallow*, 31 Law J. Rep. (N.S.) Prob. M. & A. 128.

Where a will of which the testator has the custody is found so mutilated after his death, the presumption is, that the mutilation was the act of the testator, done *animo revocandi*. Ibid.

A testator destroyed his will, believing that it had already been revoked by a later will, which was, in fact, invalid, and the only evidence of his object in destroying it was a declaration made at the time that it was no use to keep it, as he had another:—Held, that the will was not revoked. *Clarkson* v. *Clarkson, Clarkson intervening as heir-at-law of the deceased*, 31 Law J. Rep. (N.S.) Prob. M. & A. 143; 2 Swab. & T. 497.

A codicil is *prima facie* dependent on the will. Where a will and codicil to it have been in existence, and the will has been subsequently destroyed by the testator, the burden of proof is on the party setting up the codicil, to shew that it was the intention of the testator that it should operate separately from the will; otherwise the presumption is that by the destruction of the will the codicil was revoked. *Grimwood* v. *Cozens*, 2 Swab. & T. 364.

Where a will in the custody of the testator is found after his death mutilated, the presumption, in the absence of evidence, is that it was mutilated by him after its execution, and if there be a codicil after the execution of the codicil. *Christmas* v. *Whinyates*, 32 Law J. Rep. (N.S.) Prob. M. & A. 73; 3 Swab. & T. 81.

A testatrix wrote her will upon the four pages of a sheet of paper, and upon the first page of another sheet, and in the presence of the attesting witnesses signed it at the bottom of that page, and also at the top of the next page, and underneath the latter signature the attesting witnesses signed their names. She afterwards wrote and duly executed a codicil on the second page referring to the will. After her death both sheets of paper were found in a box, inclosed in separate envelopes; but the top of the second sheet, and with it the signature of the deceased, was cut off, the signatures of the attesting witnesses remaining. There was no proof that any writing besides the testatrix's signature had been cut off, though this appeared probable from the fact that the conclusion of the first sheet referred to a certain disposition of property as following, which was wanting in the second sheet:—Held, 1. That in the absence of evidence it must be presumed that the deceased mutilated the will after the execution of the codicil. 2. That when the codicil was executed, the will and codicil formed but one testament. 3. That the manner in which the will was cut, the preservation of both sheets, and other circumstances shewed that the testatrix intended not to revoke the will altogether, but only such part as was cut off; and, therefore, that the remaining part of the will and the codicil were entitled to probate. Ibid.

A testator cut out of his will the names of the attesting witnesses, giving as his reason, that he had some idea of altering it, and having a new will made; and afterwards, on the same day, replaced the piece so cut out, saying that the will would do for the present. The Court, upon motion, with the consent of the persons interested in case of intestacy, granted probate. *In the goods of Eeles*, 32 Law J. Rep. (N.S.) Prob. M. & A. 4; 2 Swab. & T. 600.

A, by his will, made in 1853, gave all his real and personal estate to B and appointed B sole executor, and by a subsequent will which contained no clause of revocation, he gave two houses to C and appointed C sole executor:—Held, that the latter will was not inconsistent with the earlier, and therefore did not revoke it, and that B and C were entitled to probate of both instruments. *Geaves* v. *Price*, 32 Law J. Rep. (N.S.) Prob. M. & A. 113; 3 Swab. & T. 71.

A, by her will, gave certain property over which she had a power of appointment to her four sons, and appointed B executor. By a subsequent will, which contained no clause of revocation, she gave all the property of which she might die possessed to three of her sons, and appointed C executor:—Held, that the second will did not revoke the first, but that both were entitled to probate. *In the goods of Graham*, 32 Law J. Rep. (N.S.) Prob. M. & A. 113; 3 Swab. & T. 69.

A executed a will containing certain bequests, and subsequently a codicil purporting to be a codicil to that will, the provisions of which were in no way dependent upon those of the will, and in all other respects he confirmed the will. Afterwards, being offended with persons benefited by the will, he cancelled it *animo revocandi*. The Court refused to grant administration with the codicil annexed upon motion where the parties interested in case of intestacy had not been cited. *In the goods of Dutton*, 32 Law J. Rep. (N.S.) Prob. M. & A. 137.

*Semble*—That the codicil was revoked. Ibid.

A, in 1856, duly executed a will, of which he kept possession. In 1861, a fresh will was drawn up for him, but was never finally settled. He subsequently referred to the executed will as being then in existence, and afterwards expressed his intention to destroy it and to settle the new one, but died without having done so. After his death, the draft prepared in 1861 was found, but not the executed will:—Held, that the executed will was revoked. *In the goods of Mitcheson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 202.

A testator, at the date of his will, 1802, had two legitimate sons, G the elder and B the younger, and two illegitimate children, a son W, the plaintiff, and a daughter J. By the will he devised an estate, subject to certain annuities, to trustees, to the use of his second son B for life, remainder to the sons and daughters of B successively in tail, remainder to his eldest son G for life, remainder to the sons and daughters of G successively in tail, remainder to his natural son W, the plaintiff, remainder in fee to his friend T. Amongst the annuities was one of 21*l.* to W, the plaintiff, and one of 5*l.* to his natural daughter J. G died in 1806 without issue. T, the remainderman in fee, died in 1818. The testator, in 1819, by a testamentary instrument, which he therein declares to be *a codicil to be added to and taken as part of his will*, gave to the plaintiff, W, a further sum of 21*l.* annually, *in addition to the* 21*l. left to him by his said will;* and he gave to his natural daughter J a sum of 10*l.* per annum; and after other bequests he then gave to his second son B "*all his estate and property of every description whatever, after discharging the above legacies.*" The testator died in 1820. B died, seised, in 1861, without issue. The plaintiff, W, then claimed the property under the life estate devised to him by the will of 1802. In ejectment by W against the trustees under B's will,—Held, that as the codicil did not shew *clearly* that the testator intended to revoke the life estate given to the plaintiff by the will, the plaintiff was entitled to recover possession, in accordance with the principle of the decisions in *Hearle* v. *Hicks* and *Evans* v. *Evans*, namely, that the intention to revoke must be equally clear and free from doubt with the original intention to devise. *Robertson* v. *Powell*, 33 Law J. Rep. (N.S.) Exch. 34; 2 Hurls. & C. 762.

A testamentary paper purporting to be a codicil to a will, but being substantially independent of it, is not necessarily revoked by the revocation of the will. *In the goods of Ellice*, 33 Law J. Rep. (N.S.) Prob. M. & A. 27.

A testator made a will in 1851, and a codicil thereto in 1854. He burned the will in 1851 with the intention of revoking it, but not with the intention of revoking the codicil. The codicil was substantially independent of the will:—Held, that the revocation of the will did not revoke the codicil. Ibid.

A testatrix duly executed a will contained in six sheets of paper, and signed her name at the bottom of each of the first five sheets. She afterwards cut off these signatures, and struck through the signature at the end of the will with a pen, and wrote after it the word "cancelled" with her initials and the date. The Court, being satisfied that the will had been thus mutilated *animo cancellandi*, held that it had been revoked. *In the goods of Harris*, 33 Law J. Rep. (N.S.) Prob. M. & A. 181; 3 Swab. & T. 485.

A codicil executed before the revocation of the will and independent of the will admitted to probate. Ibid.

A duly executed a will, and afterwards had it re-copied, with the exception of one bequest; she signed the second will in the presence of two witnesses, but it was not duly attested in consequence of the name of one of the witnesses, who was unable to write, being subscribed by the other witness. Two years afterwards she cut out of the first will the names of the attesting witnesses without stating her reason for doing so. Both wills remained in her possession until her death:—Held, that notwithstanding the time which had elapsed since she signed the second will, the reasonable presumption was that the testatrix mutilated the first will under the erroneous impression that the second will was valid, and therefore that on the principle of dependent relative revocation, the first will was not revoked. *In the goods of Middleton*, 34 Law J. Rep. (N.S.) Prob. M. & A. 16; 3 Swab. & T. 583.

A testator gave directions that his will, from which he had erased one clause, should be copied with the omission of that clause. In making the copy other portions of the will were by mistake omitted, and the imperfect copy was duly executed. Both instruments remained in the testator's possession until his death, when the mistake was discovered. The Court, being satisfied, by parol evidence of the circumstances under which the second instrument was executed, that the testator had executed it in the belief that it was an exact copy of the first, with the omission of the erased clause, held, that it did not revoke the first, and admitted both to probate as together containing the last will of the testator. *Birks* v. *Birks*, 34 Law J. Rep. (N.S.) Prob. M. & A. 90; 4 Swab. & T. 23.

### (D) REPUBLICATION AND REVIVAL.

A made a will in 1826 and another in 1851 inconsistent with the former. Before his death he burned the second will *animo cancellandi*, accompanying the act with declarations which shewed that he supposed that the will of 1826 had thereby been revived:—Held, first, that the earlier will was not revived, as though made before the Wills Act, it could only be revived in the way pointed out by that act, and not by declarations of the testator. Secondly, that the doctrine of dependent relative revocation did not apply to the burning of the later will, but that it was absolutely revoked. *Dickinson* v. *Swatman*, 30 Law J. Rep. (N.S.) Prob. M. & A. 84.

*Semble*—The doctrine of dependent relative revocation only applies where the revocation is to be dependent on a future event. Ibid.

In order that a revoked will may be revived by a codicil since the Wills Act, an intention to revive it must appear from the contents of the codicil, and cannot be established by any act *dehors* the codicil. Mere physical annexation, *e. g.* the tying the will and codicil together, is not sufficient. *Marsh* v. *Marsh*, 30 Law J. Rep. (N.S.) Prob. M. & A. 77.

A codicil conditioned to take effect only upon an event which does not happen republishes a will, and is on that ground entitled to probate. *In the goods of Da Silva*, 30 Law J. Rep. (N.S.) Prob. M. & A. 171; 2 Swab. & T. 315.

Where a testator made a will, dated the 30th of June, 1858, and destroyed it upon executing a second will in 1859, and afterwards made a codicil intending it to be supplementary to the will of 1859, but expressing it to be "a codicil to my last will, made on the 30th of June, 1858," the Court granted probate of the will of 1859 and the codicil. *Rogers* v. *Goodenough*, 31 Law J. Rep. (N.S.) Prob. M. & A. 49; 2 Swab. & T. 342.

There can be no revival of a will which has ceased to have both a physical and legal existence. Ibid.

*Quære*—First, whether a will can be revived which is no longer *in esse*. Ibid.

Secondly, whether evidence is admissible to explain the mistake, or supposed mistake, of a testator. Ibid.

A testator, by will, made on the 30th of April, 1857, devised a freehold house to A for life, and by a codicil thereto, made in September, 1857, he bequeathed her, in addition, a legacy of 200*l.*; and by another codicil, made on the 30th of April, 1857, he bequeathed her a leasehold house and the furniture and effects therein. On the 3rd of June, 1858, he executed a will, which differed only from that of 1857 by the substitution of another person as one of the executors and residuary devisees and legatees, and which revoked all former wills. On the same day he re-executed the codicil of September, 1857, as a codicil to the will of the 3rd of June, 1858. There was evidence that the will of 1858, which was not found after the testator's decease, had been destroyed by him in 1859, *animo revocandi*. On the 1st of June, 1860, the testator wrote to A a letter, which was duly executed as a will, stating that he had made a will and had left A a freehold house and furniture for life, and that he wrote the letter in confirmation of what he had already done. After his death the will of 1857 and the two codicils were found sealed up in an envelope, indorsed in the handwriting of the testator, "Sealed, June 13th, 1860": —Held, that by the letter the deceased intended to confirm the testamentary papers found in the envelope, and that they and the letter were entitled to probate. *In the goods of M'Cabe*, 31 Law J. Rep. (N.S.) Prob. M. & A. 190; 2 Swab. & T. 474.

By ante-nuptial settlement personalty was settled in trust for A, the intended wife, if she should survive her husband, and in case she should die in his lifetime in trust for such person or persons and for such intents and purposes as she, notwithstanding her coverture, should, by will, appoint. A, in the lifetime of her husband, duly executed her will, purporting to be in exercise of the power given by the settlement, and of every other power enabling her in that behalf. She survived her husband and died without having republished her will. The Court refused, upon motion, to grant general probate. *In the goods of Wollaston*, 32 Law J. Rep. (N.S.) Prob. M. & A. 171.

In a suit for revocation of probate of a will, issue having been joined on the plea of undue execution, and a commission having issued for the examination of one of the attesting witnesses who was resident in New Zealand,—the Court ordered that the will should be sent to New Zealand, annexed to the commission, upon an authentic copy being left in the registry. *Forster* v. *Forster*, 33 Law J. Rep. (N.S.) Prob. M. & A. 113.

In contentious proceedings, the party propounding a will is not bound to call both the attesting witnesses. Ibid.

A executed a will and codicil, which had been prepared by her solicitor, bearing date the 14th of February, 1856. On the 10th of November, 1858, she copied the will, omitting several legacies, and executed the copy and a codicil of the same tenor as the previous one. In 1861 she instructed her solicitor to prepare a further codicil, and he, not knowing that the will and codicil of 1858 had been made, drew up a codicil, which purported to be a codicil to the deceased's "last will and testament, bearing date the 14th of February, 1856," and the deceased duly executed it. After her death, the will and codicil of November, 1858, and the codicil of 1861 were found together, and in another place the will and codicil of February, 1856, from which the deceased's signature had been torn off. The Court being satisfied that the deceased intended the last codicil to be a codicil to the will of 1858, held that the words "bearing date the 14th of February, 1856," as they were merely words of description, might be disregarded, upon the principle "*falsa demonstratio non nocet si de corpore constat*," and granted probate of the will and codicil of the 10th of November, 1858, and of the codicil of 1861. *In the goods of Whatman*, 34 Law J. Rep. (N.S.) Prob. M. & A. 17.

### (E) ESTABLISHMENT OF WILL.

Two suits were instituted in this court, the one by a residuary legatee, and the other by the heir-at-law of the testator. In each suit the plaintiff insisted that the devisee was a trustee of the real estate:—Held, that the heir-at-law was entitled to have the will established against him, and that no administration of the estate could be made until the validity of the devise was ascertained, and on the heir-at-law asking for an issue, it was directed in both suits to ascertain whether the devise formed part of the will; but upon appeal the order for an issue was discharged, liberty being given to the heir-at-law to bring an ejectment. *Taylor* v. *Brown; Arnold* v. *Brown*, 31 Law J. Rep. (N.S.) Chanc. 453.

An heir is entitled to have the validity of a contested will tried upon an issue, or, possibly, under the 25 & 26 Vict. c. 42, by a jury before the Court of Chancery. But when the heir has caused the difficulty, as when he has destroyed the will, or where it is traced into his possession and he does not produce it, he has no such right. *Williams* v. *Williams*, 33 Beav. 306.

In a suit by the heir-at-law, contesting the validity of his ancestor's will, he is not entitled as of right to an issue *devisavit vel non*. *Cowgill* v. *Rhodes*, 33 Beav. 310.

Upon a bill by the heir, impeaching a will, the plaintiff did not cross-examine the defendant's witnesses, nor apply for a trial by jury. The Court refused an issue, and determined the validity of the will upon the evidence before it. Ibid.

### (F) EXECUTION OF POWER.

A testator, by his will, made since the 7 Will. 4. & 1 Vict. c. 26, gave real estates to trustees, upon trust for E M, a married woman, her heirs and assigns, and to be conveyed by her to such person as she, notwithstanding her coverture, should direct or appoint by any instrument in writing to be by her signed, sealed and delivered in the presence of, and attested by, two or more credible witnesses, and in default for E M, her heirs and assigns, for her separate use. E M devised the estate to her husband by a will, duly executed in conformity with the Wills Act, but not sealed:—Held, by the Lord Chancellor, reversing the ruling of the Master of the Rolls on this point, that the power was not well executed. *Taylor* v. *Meads*, 34 Law J. Rep. (N.S.) Chanc. 203.

But held also, that the equitable fee to which, in default of appointment, she was entitled to her separate use, was well devised by her will. Ibid.

### (G) ELECTION.

The wife of a testator was entitled to a share of the produce of the R estate, which had been directed to be sold. By his will the testator gave all his share, estate and interest in the R property to his daughter, and benefits out of his own estate to his widow:—Held, that the will raised a case for election as against the widow. *Whitley* v. *Whitley*, 31 Beav. 173.

A testator was entitled to a moiety only of each of two farms, called T and P, the remaining moiety of each belonging in equal shares to W and L. The testator by his will gave "my farm called T" to W and E, their heirs and assigns, as tenants in common. And he gave them 200*l.* towards rebuilding and repairing the house, &c. "on my said farm T." He then devised "my farm called P" to the plaintiffs in like manner, but without any similar gift for repairs. After his death L conveyed all his interest in the two farms to the plaintiffs:—Held (affirming the decision of one of the Vice Chancellors), that W must elect whether he would take under or against the will. *Howells* v. *Jenkins*, 32 Law J. Rep. (N.S.) Chanc. 788; 1 De Gex, J. & S. 617.

Held also, upon his electing to take against the will, that the benefits he would have taken under the will must be apportioned in compensation of the disappointed devisees, in proportion to the value of the gifts which they lost by his election; and the consequential inquiries as to those values were directed in chambers. Ibid.

### (H) PROBATE.

#### (*a*) *General Points.*

When the title to probate of an instrument depends upon the construction of its terms, and that is doubtful, the Court will grant probate, in order that recourse may be had to a Court of construction. *In the goods of Mundy*, 30 Law J. Rep. (N.S.) Prob. M. & A. 85; 2 Swab. & T. 119.

As personal property, wherever situate, follows the person, the Court will grant probate of a document though it purports to deal only with property out of its jurisdiction. *In the goods of Winter*, 30 Law J. Rep. (N.S.) Prob. M. & A. 56.

A will contained the following clause: "I appoint J J my executor, but should he decline or consider himself incapable of acting, then I appoint E J to be executor." J J died in the lifetime of the testatrix:—Held, that the intention of the testator was that E J should be executor if J J could not or would not act, and that E J, as substituted executor, was therefore entitled to probate. *In the goods of Betts*, 30 Law J. Rep. (N.S.) Prob. M. & A. 167.

A will contained the following clause: "I must beg A to appoint some one to see this my will executed." A filed in the registry an appointment of himself as executor:—Held, that A was entitled to probate. *In the goods of Ryder*, 31 Law J. Rep. (N.S.) Prob. M. & A. 215; 2 Swab. & T. 127.

If a testator when he executes a testamentary paper is ignorant that it contains a clause which has been inserted without his knowledge and by mistake, such clause will be excluded from the probate. *In the goods of Duane*, 31 Law J. Rep. (N.S.) Prob. M. & A. 173; 2 Swab. & T. 590.

The executor of a *felo de se* is entitled to probate. *In the goods of Bailey*, 31 Law J. Rep. (N.S.) Prob. M. & A. 178; 2 Swab. & T. 156.

A and B, sisters living together, by a testamentary paper duly executed by both, directed that upon the death of either whatever remained of their joint savings should go to the survivor, and that at the death of the survivor whatever remained, as also their furniture, plate, &c., should be divided amongst certain specified persons. Upon the death of B, who survived A, the Court granted administration with this paper annexed as the will of B. *In the goods of Lovegrove*, 31 Law J. Rep. (N.S.) Prob. M. & A. 87; 2 Swab. & T. 453.

A testamentary paper not disposing of personalty or appointing an executor, but simply appointing a guardian of the testator's children, is not entitled to probate. *In the goods of Morton*, 33 Law J. Rep. (N.S.) Prob. M. & A. 87; 3 Swab. & T. 422.

A married woman, who by her marriage settlement had a power of appointment over certain personal property, executed on the same day two instruments on separate papers. By the first she gave all her property to her sister for her sole use from the date thereof. By the second, after referring to the first as a deed of gift and reciting its contents, she expressed her confidence that her sister would fulfil her wishes as to certain specified bequests. Immediately after execution she gave both instruments to her sister, who kept them until after deceased's death. Upon pronf that the deceased had always treated these instruments as her will, and that she retained the control over her property until her death, the Court admitted them to probate. *In the goods of Webb*, 33 Law J. Rep. (N.S.) Prob. M. & A. 182; 3 Swab. & T. 482.

A testator left a will and five codicils, all duly executed. The earliest of these codicils, dated March 25th, 1848, purported to be a second codicil to the will, and referred to and confirmed a "first codicil." There was no evidence that any codicil had been executed before that of March 25th, 1848, but it appeared that in that month the solicitor of the testator had prepared a draft codicil, and forwarded it to the deceased for execution, and that when he prepared the codicil of March 25th, 1848, he was under the erroneous impression that the draft codicil had been executed. After the testator's death the draft codicil was found tied up with the other testamentary papers. The Court refused to grant probate of the draft codicil, on the ground that it was not sufficiently identified as the paper referred to by the testator. *In the goods of Allnutt*, 33 Law J. Rep. (N.S.) Prob. M. & A. 86; 3 Swab. & T. 167.

Probate will not be granted upon motion of the will of a deaf and dumb testator, who can neither read nor write, and who converses by signs, and not by means of the deaf and dumb alphabet, unless the nature of the signs by which he signifies his knowledge and approval of the contents of the will be stated upon affidavit. *In the goods of Geale*, 33 Law J. Rep. (N.S.) Prob. M. & A. 125; 3 Swab. & T. 431.

Testator made a will in England, appointing A and B his executors. He afterwards made a

codicil in India, in which he desired that his affairs might not be placed in the hands of the Administrator General, but might be managed entirely by C and D, whom he appointed his executors in that country. It was held, that C and D were not entitled to probate in England. *In the goods of Wallich*, 33 Law J. Rep. (N.S.) Prob. M. & A. 87 ; 3 Swab. & T. 423.

A domiciled Portuguese by his will appointed A and B his executors in Portugal, and C and D his executors in England :—Held, that as one of the latter executors was resident in Portugal, the words "in England" and "in Portugal" were equivalent to "for England" and "for Portugal" respectively. *Velho (by his Attorney)* v. *Leite*, 33 Law J. Rep. (N.S.) Prob. M. & A. 107 ; 3 Swab. & T. 456.

*(b) Citation.*

The Court of Probate has no power to dispense with service of citations. Leave to proceed to prove a will in solemn form will not be granted unless citations have been personally served on the persons entitled to see proceedings, or, if personal service is impracticable, have been duly advertised. *Potts* v. *Potts*, 30 Law J. Rep. (N.S.) Prob. M. & A. 112.

*Semble*—That a solicitor cannot accept service of citations for infants. *Ryves* v. *Ryves*, 30 Law J. Rep. (N.S.) Prob. M. & A. 144.

An affidavit that a minor was served with a citation "in the presence of A his guardian" is not sufficient ; but it should be shewn how A became his guardian. *Johnson* v. *Weldy*, 30 Law J. Rep. (N.S.) Prob. M. & A. 170 ; 2 Swab. & T. 313.

The proper form of affidavit that a person resident abroad and cited by advertisement has no agent in England, is, that he has "no attorney, agent, or correspondent in England." An affidavit that he has no "lawfully appointed attorney or agent in England" is insufficient. *Kenworthy* v. *Kenworthy*, 32 Law J. Rep. (N.S.) Prob. M. & A. 107 ; 3 Swab. & T. 64.

Plaintiff in a suit for revocation of probate in the citation described himself as "one of the lawful cousins and next-of-kin" of the deceased, and upon an order obtained by defendants that he should propound his interest, filed an action on petition, in which he alleged that he was "one of the executors and residuary legatee of A, deceased, who was the lawful cousin-german of the deceased, and one of his next-of-kin, and living at his death." Upon motion, the Court gave plaintiff leave to amend the citation by inserting it in his correct description upon payment of defendant's costs up to the time of the amendment, exclusive of the costs of entering an appearance. *Ridgway* v. *Abingdon*, 32 Law J. Rep. (N.S.) Prob. M. & A. 4 ; 3 Swab. & T. 3.

An affidavit of service of a citation should identify the citation served. An affidavit of search and non-appearance should state when the search was made, and if two persons have been cited and neither has appeared, it should state that no appearance has been entered by or on behalf of "either of them." *Harenc* v. *Dawson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 94 ; 3 Swab. & T. 50.

Executors propounding a will disposing of real estate may issue citations to see proceedings against the heir-at-law, although he may be already before the Court as a party to the suit, and also against the devisees under a prior will which is not propounded. *Lister* v. *Smith*, 32 Law J. Rep. (N.S.) Prob. M. & A. 13.

A testamentary suit was commenced by caveat, and after warning of the caveat and entry of appearance by the next-of-kin, the executrix under an alleged will filed a declaration propounding the will : —Held, that leave to cite the heir-at-law of the testator under 20 & 21 Vict. c. 77. s. 61. could not be granted until a plea had been filed denying the validity of the will. *Coplestone* v. *Nicholes*, 33 Law J. Rep. (N.S.) Prob. M. & A. 57.

A citation, issued by a creditor of a deceased, calling upon minors to accept or refuse letters of administration, was personally served upon them, but the person under whose care they were, though he had notice of the citation, declined to be present at the service. The next-of-kin of the minors had also notice of the citation, and ineffectual attempts to serve him were made :—Held, that the service was sufficient. *Lean* v. *Viner*, 33 Law J. Rep. (N.S.) Prob. M. & A. 88 ; 3 Swab. & T. 469.

Executors propounding a will in solemn form, may obtain the leave of the Court to cite the heir-at-law to see proceedings, under section 61. of 20 & 21 Vict. c. 77, although no plea is filed and the validity of the will is not in dispute. *Domville* v. *Domville*, 34 Law J. Rep. (N.S.) Prob. M. & A. 79 ; 4 Swab. & T. 17.

*(c) To whom granted, generally.*

An executor who after the testator's death is convicted of felony is, nevertheless, entitled to probate. *Smethurst* v. *Tomlin*, 30 Law J. Rep. (N.S.) Prob. M. & A. 269 ; 2 Swab. & T. 143.

A will contained the following appointment of executors : "I appoint A as my executor with any two of my sons." The testator died, leaving three sons. The Court declined to grant probate to A and two of the sons. *In the goods of Baylis*, 31 Law J. Rep. (N.S.) Prob. M. & A. 119 ; 2 Swab. & T. 613.

Testator appointed his son sole executor, but in the event of his going abroad, or being and remaining abroad for upwards of two calendar months, then he appointed B his executor. The son, after the death of testator, went abroad, without taking probate, and there remained. The Court granted probate to B ; but reserved power to the son to prove the will. *In the goods of Lane*, 33 Law J. Rep. (N.S.) Prob. M. & A. 185.

*(d) Executor according to the Tenor.*

In order that A may be executor according to the tenor, a general power to receive and pay what is due to and from the estate of the testator must be vested in him by the will. A bequest to A of all the testator's effects, in trust to be equally divided between himself and others, does not make A executor according to the tenor. *In the goods of Jones*, 31 Law J. Rep. (N.S.) Prob. M. & A. 199 ; 2 Swab. & T. 155.

A testatrix inclosed in an envelope addressed by her "Miss Eliza Adams" a duly executed testamentary paper in the form of a letter, which, after stating the nature of her property and giving directions as to its disposition after her death, concluded thus : "I know of nothing else, my dear Eliza, to

trouble you with, and trust that this will not involve you in much." The real name of the person for whom the paper was intended by the testatrix was Eliza Mary Adams:—Held, that she was entitled to probate as testatrix according to the tenor. *In the goods of Manly*, 31 Law J. Rep. (N.S.) Prob. M. & A. 198.

A direction in a will that out of a particular fund A shall pay the debts and funeral expenses of the testator does not constitute A executor according to the tenor, even though the testator states that such fund is all the property of which he is possessed. *In the goods of Toomy*, 34 Law J. Rep. (N.S.) Prob. M. & A. 3; 3 Swab. & T. 562.

(*e*) *Joint Grant of.*

An illiterate testator appointed his widow and his son residuary legatees, and named them "whole and sole executrix." The Court inferred that his intention was to include them both, and made a joint grant of probate to them. *In the goods of Court*, 31 Law J. Rep. (N.S.) Prob. M. & A. 61; 2 Swab. & T. 485.

(*f*) *Double Probate.*

Where an executor who has obtained probate, power being reserved to a co-executor to come in and prove, refuses to produce the probate and furnish an account of the effects of the deceased, in order that the co-executor may obtain probate without paying probate duty, the Court will allow a citation to issue calling upon him to produce such probate and furnish such account. *In the goods of Turrell*, 31 Law J. Rep. (N.S.) Prob. M. & A. 170; 2 Swab. & T. 456.

(*g*) *Where Executor renounces.*

A, one of the executors of B, after intermeddling with the deceased's estate, renounced probate, and probate was granted to another executor. A being afterwards desirous of taking probate, the Court declared his renunciation invalid, and ordered the copy of it on the probate to be cancelled. *In the goods of Badenach*, 33 Law J. Rep. (N.S.) Prob. M. & A. 179; 3 Swab. & T. 465.

(*h*) *Confirmation and Probate Act.*

The Court will not allow its seal to be affixed to an "eik" or additional confirmation. If the original confirmation does not include the whole of the deceased's personal estate in England, the proper course is to obtain a new confirmation. *In the goods of Hutcheson*, 32 Law J. Rep. (N.S.) Prob. M. & A. 167; 3 Swab. & T. 165.

The form of a testament *testamentar*, or confirmation of an executor nominate, contained in Schedule E. of the Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56), recites that the executor nominate has given up on oath an inventory of the personal estate and effects of the deceased "at the time of his death" situated in Scotland, or England, or Ireland. A confirmation was tendered for sealing, from which the words "at the time of his death" were omitted:—Held, that those words had been properly omitted since the passing of the 23 Vict. c. 15. and the 23 & 24 Vict. c. 80, and the confirmation was ordered to be sealed. *In the goods of Hay*, 33 Law J. Rep. (N.S.) Prob. M. & A. 25; 3 Swab. & T. 273.

A note or memorandum on a probate that the deceased died domiciled in England may, under section 14. of 21 & 22 Vict. c. 56, be written after the probate has issued. *In the goods of Muir* overruled. *In the goods of Allison*, 34 Law J. Rep. (N.S.) Prob. M. & A. 20; 3 Swab. & T. 574.

An additional confirmation, granted under sect. 12. of the Confirmation and Probate Act, 1858, does not apply to an original confirmation granted before that act came into operation. *In the goods of Gordon*, 2 Swab. & T. 622.

*Semble*—An additional confirmation, which does not include personal estate in Scotland, besides personal estate in England, is not entitled to be sealed with the seal of the Probate Court under the above section. Ibid.

Where an inventory has been recorded in a Commissary Court of Scotland of the personal estate of a person who died domiciled in Scotland, and confirmation has been granted in respect of the same, and afterwards an additional inventory has been recorded of personal estate belonging to the deceased in England, and an "eik," or additional confirmation, has been granted in respect of the same, the Court of Probate will not seal such "eik," or additional confirmation. *In the goods of Wingate*, 2 Swab. & T. 625.

(*i*) *Probate in Fac-simile.*

A duly executed her will, and subsequently re-executed it in the presence of two other witnesses. When the will was found, after the death of the testatrix, it appeared that the first attestation clause and the names of the first two witnesses had been struck through with a pen, but there was no evidence when or by whom this had been done:—Held, that it could not be presumed that they were struck through before the will was re-executed, and therefore that probate should be granted in fac-simile. *In the goods of Smith*, 34 Law J. Rep. (N.S.) Prob. M. & A. 19; 3 Swab. & T. 589.

Three persons were present and saw the deceased sign a will and codicil, and two of them signed as attesting witnesses. Immediately after they had signed, the signature of one of them was struck through, and the deceased acknowledged his previous signature, and the third person signed as an attesting witness:—Held, that the name which had been struck through could not be omitted from the probate, and probate was ordered to issue in fac-simile. *In the goods of Raine*, 34 Law J. Rep. (N.S.) Prob. M. & A. 125.

(*k*) *Incorporation of Documents.*

A, by his will, bequeathed certain leaseholds to trustees upon the same trusts as were declared by a settlement. With a slight exception, the whole of these leaseholds were included in the settlement, which was of great length. The Court granted probate without requiring the settlement to be embodied in it, upon an affidavit being filed in the registry, stating the existence of, and describing, the settlement. *In the goods of the Marquis of Lansdowne*, 32 Law J. Rep. (N.S.) Prob. M. & A. 121; 3 Swab. & T. 194.

Testatrix, by her will, directed her executors to distribute certain articles "according to any list or lists signed by me," and subsequently executed two codicils. After the execution of the will and

before that of the second codicil, testatrix signed such a list, but it was unattested, and was not referred to in either of the codicils. It was held, the list was entitled to probate. *In the goods of Stewart*, 32 Law J. Rep. (N.S.) Prob. M. & A. 94; 3 Swab. & T. 192.

A will contained the following clause: "I request my trinkets shall be divided as I shall direct in a small memorandum." After the death of the deceased, an unexecuted memorandum in her handwriting disposing of certain trinkets was found, and it appeared that this was in existence before the execution of a codicil, but it was not referred to by it:—Held, that the memorandum was not entitled to probate. *In the goods of Mathias*, 32 Law J. Rep. (N.S.) Prob. M. & A. 115; 3 Swab. & T. 100.

A testator devised his real estate to A and B to such uses, &c. as were declared by a certain deed of settlement, and directed that they should stand possessed of his leasehold estate for such trusts, &c. as should as nearly correspond with the uses declared as to his real estate as the different tenure and quality of the premises and the rules of law would permit. The deceased left no leasehold estate, and the trustees of the settlement refused to produce it:—Held, that probate of the will might be granted without including in it any portion of the settlement. *In the goods of Dundas*, 32 Law J. Rep. (N.S.) Prob. M. & A. 165.

In order that a testamentary paper duly executed may incorporate another, it must refer to it as a written document then existing, in such terms that it may be ascertained. The identity may be ascertained by aid of evidence of the surrounding facts. A duly executed the following document: "It is my wish for my dear husband to administer the moneys. The smaller bequests L will be so kind as to attend to." She then, in the presence of the attesting witnesses, inclosed in it two papers with writing thereon, folded it up and sealed it. After her death the envelope was found to contain two sheets of paper containing bequests of money and other bequests, in the handwriting of the deceased, but unexecuted. When found, it appeared that the envelope had been opened and re-sealed, and there was no evidence that the papers found in it were those originally inclosed, or that they were in existence when the envelope was executed. No other testamentary papers were found:—Held, that the duly-executed paper did not refer to any written document as then existing; and assuming that it did so, that the document was not pointed out in such manner as to enable the Court to ascertain its identity, and therefore, that the three papers were not together entitled to probate. *Van Straubenzee* v. *Monck*, 32 Law J. Rep. (N.S.) Prob. M. & A. 21; 3 Swab. & T. 21.

Held also, that as the duly-executed paper taken by itself had no testamentary character, it was not entitled to probate. Ibid.

A will made in November, 1861, contained a clause: "I make no specific bequest to my brothers' children, &c. Upon this subject I refer my wife to my annulled will, dated the 11th of February, 1861." The annulled will contained no bequest to these children, but in it the testator stated that in the present aspect of affairs there was every prospect that they would be left well provided for; but that if any reverse should overtake them, he trusted and felt sure that his wife would share her all with them. Upon motion for probate of the will of November, 1861,—Held, that the annulled will did not raise any implied trust in favour of the said children, and that, therefore, it need not be embodied in the probate. *In the goods of Ouchterlony*, 32 Law J. Rep. (N.S.) Prob. M. & A. 140; 3 Swab. & T. 175.

In order that an unexecuted paper writing may be incorporated in a will, it must be so described in the will as to leave no doubt in the mind of the Court that it is the paper writing referred to. *In the goods of Brewis*, 33 Law J. Rep. (N.S.) Prob. M. & A. 124; 3 Swab. & T. 473.

A will contained a clause: "I give to my wife the whole of my property, both real and personal, unto her during her natural life, and to be divided at her decease in the manner hereinafter named among my nine children." In the will, which was written on the first page of a sheet of paper, there was no direction as to the division of the testator's property after his wife's death, but on the second and third pages there was an unexecuted list of bequests and devises to the children, written before the will was executed, which did not state that the bequests and devises were to take effect at the death of the testator's wife:—Held, that probate of the list ought not to be granted on motion, upon the ground that the bequests and devises contained in it were apparently intended to take effect immediately after the testator's death, and it was not, therefore, identified as the writing referred to in the will. Ibid.

The testamentary character of a paper writing may be proved by parol evidence. *In the goods of English*, 34 Law J. Rep. (N.S.) Prob. M. & A. 5; 3 Swab. & T. 586.

A testator duly executed, on the same day, three testamentary papers. By the first, he disposed of certain property in Canada, and appointed A and B executors. By the second, he disposed of certain property in England, and appointed C and D executors. The third, which was substantially the same as the second, appointed no executors. The second and third papers purported to dispose of the residue, and did not expressly state that they were intended to dispose of the residue in England only. It was proved by parol evidence that the testator intended then to dispose of the residue in England only. Probate was granted of the three papers, as together containing the last will of the deceased, to the executors named in the first and second papers. *In the goods of Nickalls*, 34 Law J. Rep. (N.S.) Prob. M. & A. 103; 4 Swab. & T. 40.

Parol evidence as to a testator's intention to incorporate an unexecuted testamentary paper with a testamentary paper which is duly executed, is not admissible unless the duly executed paper contains a distinct reference to some other paper. A duly executed testamentary paper in these words—"I name J C as my executor, empowering him to draw any money out of the North Bank, Plymouth, to employ it for me after my decease in all things necessary"—Held, not to contain such a reference to any other paper as to render parol evidence admissible of the testator's intention to incorporate an unexecuted testamentary paper with it. *In the goods of Luke*, 34 Law J. Rep. (N.S.) Prob. M. & A. 105.

### (*l*) *Domicil.*

An application for probate of a testamentary instrument executed by a person when domiciled

abroad should be supported by evidence that, according to the law of the domicil, such instrument is a good will. *In the goods of Stoddart*, 31 Law J. Rep. (N.S.) Prob. M. & A. 195 ; 2 Swab. & T. 356.

When a British subject dies abroad after the passing of 24 & 25 Vict. c. 114. leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to file affidavits shewing that he had not acquired a foreign domicil. *In the goods of Rippon*, 32 Law J. Rep. (N.S.) Prob. M. & A. 141 ; 3 Swab. & T. 177.

In a suit instituted in the Court of Probate respecting the succession to the personal estate of a deceased, who was domiciled abroad at the time of his death, a judgment of the Court of the domicil is binding as to any question relating to such succession if raised by the same parties in both courts. The Court of Probate has no jurisdiction to inquire whether such a judgment is in conformity with the law of the domicil. *Crispin* v. *Doglioni*, 32 Law J. Rep. (N.S.) Prob. M. & A. 169; 3 Swab. & T. 96.

A, an Englishwoman who had acquired a French domicil, with the intention of resuming her English domicil, left Dunkerque, the place of her residence, and at Calais, with her baggage and her family, embarked on a vessel bound for England. Before the vessel left the harbour, she was obliged by illness to re-land, and never sufficiently recovered her health to be able to leave France, where she died. The Court refused to grant probate, on motion, of a will made by A according to English law, on the ground that, as she never left the territory of France, there was no act sufficient to give effect to her intention of resuming her English domicil. *In the goods of Raffenel*, 32 Law J. Rep. (N.S.) Prob. M. & A. 203; 3 Swab. & T. 49.

(*m*) *Foreign Will.*

Where an executor is appointed by a foreign will, the nature and extent of the office conferred by the appointment are regulated by the law of the testator's domicil, and not by English law, even as to property situate in England. If, by the law of the domicil, the executorship lasts only for a limited period, the Court of Probate cannot, after that period has expired, grant probate to the executor. *Laneuville* v. *Anderson*, 30 Law J. Rep. (N.S.) Prob. M. & A. 25; 2 Swab. & T. 24.

A domiciled Frenchman, by his will, appointed A his *exécuteur testamentaire*, and B his universal legatee. A French Court having decided that A's executorship had expired, and that he had no longer any right to intermeddle with the estate of the testator either in France or England, but that such right belonged exclusively to the representatives of B, the Court of Probate, holding that it was bound by that decision, refused to grant probate to A, and granted administration with the will annexed to the representatives of B. Ibid.

Before probate in common form of a foreign will can be obtained, it is necessary to shew, either that the will has been recognized as valid by a Court of the foreign country, or that it is a valid will according to the law of the foreign country, and that the testator was domiciled in the foreign country. *In the goods of Deshais; in the goods of the Countess De Vigny*, 34 Law J. Rep. (N.S.) Prob. M. & A. 58; 4 Swab. & T. 13.

In order to shew that a foreign will has been recognized as valid by a Court of competent jurisdiction of the foreign country, a notarial certificate is not sufficient. A duly authenticated copy of the act or sentence of the foreign Court recognizing its validity should be produced. Ibid.

If probate is sought of a foreign will, originally written in the English language, as having been recognized as valid by the Court of the foreign country, a re-translation of the translation so recognized in the foreign country should be produced. But if probate is sought of such a will as being valid according to the law of the foreign country, a copy of the original should be produced. Ibid.

(*n*) *Lost and Missing Will.*

An executor by non-appearance to a citation calling upon him to take probate of a copy of a missing will, is barred from afterwards obtaining probate of the original will when found. *Davis* v. *Davis*, 31 Law J. Rep. (N.S.) Prob. M. & A. 216.

In propounding a destroyed will it is necessary to set out its date, if possible, but it is not necessary to set out its contents or to allege its destruction. *Glen* v. *Burgess*, 32 Law J. Rep. (N.S.) Prob. M. & A. 157.

The Court will not grant probate of the contents of a lost will, unless there is very cogent evidence that such a will did exist, and that it was in existence at the time of the death of the testator. *Wharram* v. *Wharram*, 33 Law J. Rep. (N.S.) Prob. M. & A. 75 ; 3 Swab. & A. 301.

The Court granted probate of the draft of a lost will, being satisfied by the evidence produced that it was in existence at the time of the death of the testatrix, and that it had been either suppressed or destroyed by the next-of-kin, who opposed the application for probate, and condemned the next-of-kin in costs. *Podmore* v. *Whatton*, 33 Law J. Rep. (N.S.) Prob. M. & A. 143; 3 Swab. & T. 449.

Probate will not be granted on motion of a draught of a will which has been intentionally destroyed. *In the goods of Body*, 34 Law J. Rep. (N.S.) Prob. M. & A. 55; 4 Swab. & T. 9.

*Semble*—That probate will not be granted of an alleged copy of a will which has been intentionally destroyed since the death of the testator, upon the evidence of the person who is solely interested in establishing it, and who himself destroyed the original. *Moore* v. *Whitehouse*, 34 Law J. Rep. (N.S.) Prob. M. & A. 31 ; 3 Swab. & T. 567.

(*o*) *Inconsistent Wills.*

A testatrix duly executed two inconsistent wills on the same date, and written on different sides of the same sheet of paper. Evidence was admitted to shew that the deceased signed one of them only as her will, and signed the other by mistake. The Court granted probate of the paper signed by the deceased with the intention that it should operate as her will, and not of the other paper. *In the goods of Nosworthy*, 34 Law J. Rep. (N.S.) Prob. M. & A. 145 ; 4 Swab. & T. 44.

(*p*) *Soldiers and Sailors' Wills.*

A will made in Africa, and commencing "In the event of my death while serving in this horrid climate, or any accident happening to me, I leave,"

&c., held not to be conditional on the death of the deceased happening in Africa. *In the goods of Thorne*, 34 Law J. Rep. (N.S.) Prob. M. & A. 131; 4 Swab. & T. 36.

The Court will not grant probate of a testamentary paper as the will of a soldier in actual military service, under the 11th section of 1 Vict. c. 26, upon an affidavit that the testator was in actual military service at the time when the will was executed, but it requires an affidavit setting forth the services on which he was engaged. Ibid.

An officer went with his regiment to Africa, for the purpose of joining a military expedition into the interior. Before the expedition left the British settlement for the interior he signed a testamentary paper. The Court held, that the testator was on actual military service at the time when the paper was signed, and that it was entitled to probate, although not attested by two witnesses. Ibid.

The deceased, who was master of a trading vessel, in the course of a voyage, arrived at Port Adelaide, from whence he wrote, and forwarded by post a letter, some sentences of which were testamentary. The vessel was subsequently lost at sea:—Held, that the deceased was a mariner at sea, and consequently that such a letter, being in the handwriting of the deceased, and testamentary, was entitled to probate. *In the goods of Parker*, 2 Swab. & T. 375.

(q) *Grant of Probate with Reservation.*

A testator appointed "A his sole executrix in England, and B and C executors of his will in India." Probate was granted in England to A, reserving power of making a like grant to B and C, and was accepted by A. An application by A that the grant should be altered by striking out the reservation of power to B and C as having been improperly inserted, was refused upon the ground that such reservation, if improperly inserted, in no way prejudiced A. *In the goods of Pulman*, 33 Law J. Rep. (N.S.) Prob. M. & A. 20; 3 Swab. & T. 269.

(r) *Revocation of Probate.*

The executors of a will, having called in probate of an earlier will, in their declaration propounded the later will, and alleged that the defendant had surreptitiously obtained probate of the earlier will, knowing of the existence of the later; and that such probate ought to be revoked, and the will pronounced invalid. The Court ordered the part of the declaration relating to the earlier will to be struck out, as irrelevant. *Rosbotham* v. *Rosbotham*, 30 Law J. Rep. (N.S.) Prob. M. & A. 38; 2 Swab. & T. 121.

By settlement previous to the marriage of A, the income of certain personalty was settled to her separate use for life, with a power to appoint the principal by will. During her lifetime she invested the savings of the property in stocks and shares in her own name, and died in the lifetime of her husband, having, with his express consent, made a will, disposing of all her property, settled and unsettled, and appointing executors. Her husband died shortly afterwards, without having revoked his consent. After his death, probate of A's will was granted to her executors by a District Registrar, limited to such property as she had by the settlement power to appoint, and had appointed. The Court, with the consent of the personal representative of the husband, revoked the limited probate, and granted general administration with the will annexed of her effects to the executors. *In the goods of Reay*, 31 Law J. Rep. (N.S.) Prob. M. & A. 154.

(s) *Revocation of Executors.*

A testator, by his will, disposed of all his real and personal estate, and appointed B, C and D executors. By a subsequent testamentary paper, which contained no clause of revocation, he disposed of his personal estate only, and appointed B and E executors:—Held, that the appointment of executors in the first testamentary paper was not revoked, and that the executors named in the second will were entitled to probate of both testamentary papers, as together containing the will of the testator, leave being reserved to the other executors named in the first paper to come in and take probate. *In the goods of Leese*, 31 Law J. Rep. (N.S.) Prob. M. & A. 169; 2 Swab. & T. 442.

Testator having, by his will, appointed A and B executors, by a codicil he appointed his wife sole executrix of his will; and it was held, the appointment of the executors by the will was revoked. *In the goods of Lowe*, 33 Law J. Rep. (N.S.) Prob. M. & A. 155; 3 Swab. & T. 478.

(I) PLEADING AND PRACTICE AND EVIDENCE.

Where on an application, acquiesced in by all parties to the cause, to direct an issue in a testamentary suit to be tried at the Assizes, it appeared from the affidavits that the whole property did not amount to 300*l.*, the Court required that it should also appear that the personalty was not under 200*l.*, so as to shew that the county Court had no jurisdiction. *Dunn* v. *Dunn*, 30 Law J. Rep. (N.S.) Prob. M. & A. 40.

Pleas of undue influence, intimidation, duress, and improper control, are bad, unless the names of the persons who exercised such undue influence, &c. are specified. *Harris* v. *Bradbury*, 30 Law J. Rep. (N.S.) Prob. M. & A. 168.

To a declaration propounding a will of A, the plaintiff pleaded that it "was, after the execution thereof, revoked by another will, duly executed by the said A." On demurrer to the plea, for not stating when the alleged revocatory will was made, and not shewing that it was inconsistent with the will propounded,—Held, first, that the plea was bad, on the ground that a will relied upon as revoking a former will should be pleaded with the same circumstantiality as to the time when made, and its due execution, as if it had been propounded. Secondly, that the plea need not set out the will to shew their inconsistency. *Leake* v. *Hurst*, 30 Law J. Rep. (N.S.) Prob. M. & A. 39.

Where at the trial of an issue in a testamentary suit, by agreement between the parties, a verdict is taken by consent, such agreement cannot afterwards, even with the consent of the parties, be made a rule of Court unless that was a term of the agreement. *Evans* v. *Saunders*, 30 Law J. Rep. (N.S.) Prob. M. & A. 184.

Administration may be granted to one creditor of the deceased, though the proceedings for obtaining administration may have been initiated by another creditor; the latter being allowed such costs as were reasonably incurred by him before the former took

up the application. *Andrews* v. *Murphy*, 30 Law J. Rep. (N.S.) Prob. M. & A. 37.

The Court will make it part of an order for the trial of a cause by a special jury, that if the applicant does not take the requisite steps for striking the special jury, the other party may have it tried by a common jury. *Morris* v. *Owen*, 30 Law J. Rep. (N.S.) Prob. M. & A. 213.

A left a will appointing executors, and a paper writing purporting to be a codicil disposing of his property in a different manner. The executors, believing this not to be a genuine codicil, moved for a citation calling upon the legatees under the alleged codicil to propound it, or shew cause why probate of the will only should not be granted. The Court rejected the motion. *In the goods of Benbow*, 31 Law J. Rep. (N.S.) Prob. M. & A. 171; 2 Swab. & T. 488.

In a suit for revocation of probate the defendant is the party who should deliver the issue and move for directions as to the mode of trial. *Brandreth* v. *Brandreth*, 31 Law J. Rep. (N.S.) Prob. M. & A. 153; 2 Swab. & T. 446.

The Court will not direct an issue to be tried at the assizes unless reasons for so doing appear on affidavit. Ibid.

In a testamentary suit fifteen issues were raised, of which one only was a question of fact. The Court ordered the question of fact to be tried by a jury, and the remaining issues by the Court. *Crispin* v. *Doglione*, 31 Law J. Rep. (N.S.) Prob. M. & A. 64; 2 Swab. & T. 493.

Before a person is permitted to contest a will he may be called upon by the propounder to shew his interest; but when two contest a will, neither can call upon the other first to shew his interest. *Hingeston* v. *Tucker, and Her Majesty's Proctor (intervening)*, 31 Law J. Rep. (N.S.) Prob. M. & A. 91; 2 Swab. & T. 596.

A declaration, propounding a will made by a person domiciled abroad, should aver in terms that the will was valid according to the law of the foreign country. *Isherwood* v. *Cheetham*, 31 Law J. Rep. (N.S.) Prob. M. & A. 99; 2 Swab. & T. 607.

A declaration propounding a will averred that a competent tribunal of the State of Ohio, where the deceased died domiciled, by its definitive decree, ordered the said will, being satisfied that it was duly executed according to the law of Ohio, to be received, and admitted the said will to probate, as a good and valid will by the law of the said State, for the purpose of passing personal estate; that, by virtue of the said definitive decree, the said will is entitled to be proved as a good and valid will, for passing personal estate in England:—Held insufficient. Ibid.

In an interest suit, in which a question of legitimacy was raised between a person claiming to be the lawful nephew and next-of-kin of a deceased intestate and the Queen's Proctor, the Court directed the issues joined to be tried by a jury, on the application of the next-of-kin, although the application was opposed by the Queen's Proctor. *The Queen's Proctor* v. *Williams—In the goods of Emsley (widow, deceased)*, 31 Law J. Rep. (N.S.) Prob. M. & A. 86.

When issues of fact are raised between the parties to a suit for a declaration of legitimacy, and either party wishes them to be tried by a jury, the Court will grant a jury, unless complicated questions are involved which a jury cannot properly try. *Bouverie* v. *the Attorney General*, 31 Law J. Rep. (N.S.) Prob. M. & A. 79.

Under a plea of undue influence evidence cannot be given that the execution of a will was obtained by the plaintiff instilling into the mind of the deceased false and delusive notions as to the conduct of the defendants. Such evidence is admissible only under a plea of fraud. *White* v. *White*, 31 Law J. Rep. (N.S.) Prob. M. & A. 215; 2 Swab. & T. 504.

The Court will, at the trial, allow pleadings to be amended by adding a plea on the terms of adjournment, if desired by the other side, and payment of the costs of the day. Ibid.

The defendant in a testamentary suit claimed to be the lawful nephew and one of the next-of-kin of the deceased. Issue was joined upon the questions of the legitimacy of the deceased and of the defendant. Upon the trial of the issues it was held: first, that the declarations by the defendant's mother as to her marriage with his father were inadmissible without previous proof of such marriage; secondly, that declarations by the deceased of her own illegitimacy were admissible. *Her Majesty's Procurator General* v. *Williams*, 31 Law J. Rep. (N.S) Prob. M. & A. 157.

After a will had been duly executed and attested, A, who was a legatee and executor, signed the will to signify his acceptance of the executorship. The Court refused to omit A's name in the probate. *In the goods of Forest*, 31 Law J. Rep. (N.S.) Prob. M. & A. 200; 2 Swab. & T. 334.

The Court will not issue an attachment against a married woman who has no separate property for not obeying an order for the payment of money. *Harris* v. *Bradbury*, 31 Law J. Rep. (N.S.) Prob. M. & A. 86; 2 Swab. & T. 459.

The object of the 12th section of the Confirmation and Probate Act, 1858, is to render unnecessary a second application for probate. The interlocutor of the Commissary is not therefore conclusive evidence of domicil when that question is raised in another court. When probate has been granted in common form, and a contest is discovered after it has been sealed, but before it has left the office, the Court will not allow it to be taken out of the registry. *Hawarden* v. *Dunlop*, 31 Law J. Rep. (N.S.) Prob. M. & A. 17; 2 Swab. & T. 340.

A next-of-kin who has been cognizant of and privy to a suit between the executors and another next-of-kin, is bound by the decision in that suit, although he has not been cited to see proceedings, and has not intervened therein. He cannot therefore re-open the question of the validity of the will, after its validity has been established in such suit. *Ratcliffe* v. *Barnes*, 31 Law J. Rep. (N.S.) Prob. M. & A. 61; 2 Swab. & T. 486.

The certificate of a foreign ambassador under the seal of the Legation is sufficient evidence of the law of the country by which he is accredited. *In the goods of Klingemann*, 32 Law J. Rep. (N.S.) Prob. M. & A. 16; 3 Swab. & T. 18.

The Court of Probate has no power to order the mode of a trial of a cause sent by it to be tried in a county court. *Norris* v. *Allen*, 32 Law J. Rep. (N.S.) Prob. M. & A. 3; 2 Swab. & T. 601.

Plea to a declaration propounding a codicil, that it was not prepared in conformity with the intention of the deceased, and that he, at the time of its execution, was ignorant of its contents:—Held, a bad plea. *Cunliffe* v. *Cross*, 32 Law J. Rep. (N.S.) Prob. M. & A. 68; 3 Swab. & T. 37.

Under a plea that a paper propounded is "not the will of the deceased," evidence of undue execution, or incapacity, is not admissible. The meaning of that plea is, that the deceased did not execute the paper intending that it should operate as his will. Ibid.

Defendants entered a caveat in the goods of I S, and afterwards upon this caveat being warned by plaintiff, entered an appearance, claiming as universal legatees of the universal legatee of I S. Plaintiff then filed a declaration that I S died intestate, leaving plaintiff his lawful widow. Defendants in their plea propounded a will of I S appointing A B sole executrix and universal legatee. Upon motion by plaintiff for an order that defendants should amend their plea by setting forth in it such matter as would entitle them to administration with the will of I S annexed, it was held, that by filing the declaration without objecting to the appearance, plaintiffs had admitted the defendants' title to set up the will. *Inkson* v. *Geeves*, 32 Law J. Rep. (N.S.) Prob. M. & A. 69; 3 Swab. & T. 39.

Leave to withdraw a plea to which there has been a demurrer will not be granted, except upon payment of costs. *Hawke* v. *Hawke*, 32 Law J. Rep. (N.S.) Prob. M. & A. 132.

In order to save expense and delay, the Court will generally allow issues in a testamentary suit to be tried at the assizes. When, however, the suit was for revocation of probate, and there had been great delay in calling in the probate, and the property of the deceased was large, the Court considered those circumstances sufficient ground for refusing an application by the plaintiff, opposed by the defendant, that the issues should be tried at the assizes, but ordered that the defendant if successful should not be allowed more costs than he would have been entitled to if the issues had been tried at the assizes. *Ridgway* v. *Abington*, 32 Law J. Rep. (N.S.) Prob. M. & A. 107.

In a suit, in which the plaintiff alleged that he was the natural son of A, a declaration by a deceased brother of A that the plaintiff was the natural son of A is inadmissible. To let in secondary evidence of a document filed in a foreign court, it should be proved that an unsuccessful application for it has been made to the person who has the legal custody of the document, viz., to the Court. Application to an inferior officer of the court, though he may have the actual custody of it, is not sufficient. *Crispin* v. *Doglioni*, 32 Law J. Rep. (N.S.) Prob. M. & A. 109.

The Court will not allow a plea to be added, after issue has been joined, and before the hearing, without an affidavit shewing the necessity of such a plea. *Twells* v. *Clarke*, 33 Law J. Rep. (N.S.) Prob. M. & A. 49; 3 Swab. & T. 280.

The Court may in its discretion pass by the next-of-kin in appointing a guardian *ad litem* to an infant. *Quick* v. *Quick*, 33 Law J. Rep. (N.S.) Prob. M. & A. 177.

A plaintiff who, through poverty, is unable to prosecute a suit instituted by him should apply for leave to continue the suit *in forma pauperis*. If he does not, and the suit is dismissed for non-prosecution, he will not afterwards be allowed to re-commence it *in forma pauperis*. *Cathrell* v. *Jeffree*, 33 Law J. Rep. (N.S.) Prob. M. & A. 178.

A plea to a declaration propounding a will that the said will "was not the will of the deceased" is bad for ambiguity. *Owen* v. *Davis*, 33 Law J. Rep. (N.S.) Prob. M. & A. 201; Swab. & T. 588.

The plaintiffs, in a declaration in the usual form, propounded a will and two codicils. The will contained the following clause: "Any further arrangements I may wish to make for the disposal of property, I shall express by writing in a book which will be directed to my executors." After her death a book was found containing testamentary directions, part dated before the will, the rest after the date of the codicil:—Held, that the defendant had a right to call upon the plaintiffs to declare whether they intended to propound the book as part of the will. *Marsh* v. *Corry*, 33 Law J. Rep. (N.S.) Prob. M. & A. 112; 3 Swab. & T. 458.

*Semble*—That when necessary the party propounding testamentary papers will be ordered to give particulars as to the papers he intends to set up. Ibid.

Verdict of a jury who had found for a will, although the surviving attesting witness swore that when she subscribed her name the testatrix was dead, upheld upon the evidence. *Cross* v. *Cross (Thomas intervening)*, 33 Law J. Rep. (N.S.) Prob. M. & A. 49; 3 Swab. & T. 292.

In a suit of revocation of probate, the party propounding the will must begin, although the party opposing has declared alleging an intestacy. Ibid.

A next-of-kin who unsuccessfully opposed a will was condemned in the costs of another next-of-kin whom he had cited to see proceedings, and who had appeared and pleaded, but had taken no further part in the proceedings. Ibid.

Where it was doubtful whether the unsuccessful plaintiff in a suit for revocation of probate would be able to pay the cost of an intervener who had propounded the will, the Court ordered that the intervener's costs should be paid out of the estate. Ibid.

Under section 35. of 20 & 21 Vict. c. 77. the Court has a discretion as to ordering issues of fact to be tried by a jury, except where an heir-at-law, party to the proceedings, asks for a jury. In other cases the Court will not direct a trial by jury, though one of the parties asks for a jury, if the case is more fit to be tried by the Court itself. *Quick* v. *Quick*, 33 Law J. Rep. (N.S.) Prob. M. & A. 108; 3 Swab. & T. 460.

The declarations of a testator made after the execution of a will are not admissible as evidence of its contents. *Quick* v. *Quick*, 33 Law J. Rep. (N.S.) Prob. M. & A. 146; 3 Swab. & T. 442.

Upon a motion for the appointment of a receiver, under 20 & 21 Vict. c. 77. s. 71, it must appear upon the affidavit that the heir-at-law has been cited. *Purdey* v. *Field (Hatch intervening)*, 33 Law J. Rep. (N.S.) Prob. M. & A. 73; 3 Swab. & T. 576.

Defendant moved for the postponement of a trial from the Spring to the Summer Assizes on the ground that a material witness for plaintiff, whom defendant wished to cross-examine in court, would be prevented by illness from being present at the

trial. The Court rejected the motion, as it appeared that the witness would probably die before the Summer Assizes, and no advantage would therefore be gained by the postponement. *Quære*—Whether the unavoidable absence at the trial of a witness, whom the applicant does not intend to call, but wishes to cross-examine if called by the other side, is any ground for postponing the trial. *Williams* v. *Henry*, 33 Law J. Rep. (N.S.) Prob. M. & A. 110; 3 Swab. & T. 463.

As a general rule a defendant residing abroad will not be required to give security for costs. *Semble*, however, that when the defendant on the record is substantially plaintiff, he may if resident abroad be required to give security for costs. *Robson* v. *Robson*, 34 Law J. Rep. (N.S.) Prob. M. & A. 6; 3 Swab. & T. 568.

After letters of administration of the effects of A on the presumption of his death had been decreed, but before the grant had been sealed, a person of the same name as A, and resident abroad, entered a *caveat*, and in the subsequent contentious proceedings in which he was made defendant, opposed the application for administration on the ground that he was the alleged deceased,—the Court refused to order him to give security for costs. Ibid.

An intervener may plead after issue joined by leave of the Court. *Jones* v. *Williams*, 34 Law J. Rep. (N.S.) Prob. M. & A. 102; 4 Swab. & T. 19.

A plea that a will was procured by undue influence is bad, unless the name of some person exercising the undue influence is stated in it. A plea alleging that a will was procured by the undue influence of "A and others" is good, but the other side is entitled on summons to particulars of "the others." *West* v. *West*, 34 Law J. Rep. (N.S.) Prob. M. & A. 146; 4 Swab. & T. 22.

It is no stay of proceedings in a testamentary suit commenced by the next-of-kin in this court, that the defendant, the alleged executor of a will, has filed a petition in a commissary court in Scotland, to obtain confirmation of the same instrument. *Hawarden* v. *Dunlop*, 2 Swab. & T. 150.

When an alleged executor is cited by the next-of-kin to prove a will, and has appeared, he cannot try the question of the domicil of the alleged testator before propounding the will. Ibid.

Where a will is expressed to take effect during absence on a particular voyage, and the writer returns to England, the Court cannot admit parol evidence to shew the writer's intention of adhering to that will during a subsequent absence. *In the goods of Winn*, 2 Swab. & T. 147.

A testator devised as follows: "I give and devise unto my wife all that my messuage or dwelling-house, where I now live, during the term of her natural life; and, immediately after the death of my said wife, I give and devise unto my grandson T C, son of the late R C, all that my estate where I now live, and all that other estate thereto belonging called the W estate, for his own use during his natural life, with remainder to the eldest son of the body of the said E C lawfully begotten severally and successively in tail male of the name of C. And for want of such lawful issue of that name either by my said grandson T C, or my son J C, then I give and devise the said estate where I now live and the W estate amongst my daughters and their children's share and share alike, to hold unto them, his, her or their heirs for ever, as tenants in common." T C suffered a recovery, and died without issue. In ejectment the plaintiff claimed as grandson of a daughter of the testator, the defendant claiming under a conveyance in fee by T C subsequent to the recovery. In the year 1823, the Court of Exchequer held that T C, the grandson, could make a good title in fee to a purchaser. About the same period the Court of King's Bench, on a case from Chancery, certified that T C was tenant in tail, and that certificate was confirmed by the Lord Chancellor:—Held, in the Exchequer Chamber, that, under these circumstances, the construction put upon the will, however doubtful, could only be overruled by the House of Lords. *Barrow* v. *Total*, 7 Hurls & N. 962.

(K) Costs.

The plaintiffs propounded a will made in W, a foreign country. The defendant, the next-of-kin, pleaded that the testator, when he made his will, was a domiciled Scotchman, and that the will was not executed in conformity with the law of Scotland. The plaintiffs replied, first, that the testator was not domiciled in Scotland, but in W, and that the will was executed in conformity with the laws of W; secondly, that the will was executed so as to be valid according to the law of Scotland, if the testator was a domiciled Scotchman. Issue was joined; but before the cause came on for trial, a Scotch Court of Appeal, for the first time, decided that the will of a domiciled Scotchman affecting personalty, made in a foreign country and in accordance with its laws, is valid in Scotland. The defendant, as soon as he became cognizant of this decision, gave notice that he should not further contest the will, and at the hearing offered no opposition:—Held, that though the defendant, if he had raised simply the question of law, might have been entitled to costs out of the estate, yet that, as he had raised also the question of domicil, and without reason, he was not entitled to such costs. *Onslow* v. *Cannon*, 30 Law J. Rep. (N.S.) Prob. M. & A. 165; 2 Swab. & T. 136.

In deciding whether the costs of the unsuccessful party should be paid out of the estate or not, the Court will be guided by the opinion of the Judge before whom the issues were tried. When the opposition is groundless the unsuccessful opponent of a will, who has pleaded the incapacity of the testator, will be condemned in costs, although he may have acted *bona fide*. *West* v. *Goodrick*, 31 Law J. Rep. (N.S.) Prob. M. & A. 39.

Where a party has been ordered to join in demurrer within a certain time, and has not complied with the order, the Court will, upon motion, give judgment for the party demurring, with costs. *Wells* v. *Wells*, 31 Law J. Rep. (N.S.) Prob. M. & A. 112; 2 Swab. & T. 607.

Where a paper duly executed as a will is not clearly on the face of it testamentary, the burden of proof lies on the party propounding it; and the Court must judge from its form, nature, contents and appearance whether it is testamentary. *Thorncroft* v. *Lashmar*, 31 Law J. Rep. (N.S.) Prob. M. & A. 150; 2 Swab. & T. 479.

Where litigation is rendered necessary by the state in which the deceased left his papers, the costs

of it, though unsuccessful, will be allowed out of the estate. Ibid.

The following document was duly executed in compliance with the Wills Act: "To G L, I hereby offer you the situation of collector and overseer of my property at a salary of 3*l.* 3*s.* per week, with house-rent to the amount of 25*l.* a year, and all rates and taxes. I hereby further wish that the said G L shall continue in the aforesaid office, and with the same salary as aforesaid after my decease, and same allowances." The Court held that it was not testamentary, but allowed the costs of the propounder out of the estate. Ibid.

In opposition to a will propounded by the executor, the next-of-kin pleaded that the will was not duly executed. At the trial, one of the attesting witnesses was called by the executor, and proved due execution, but his evidence was contradicted by the other attesting witness, who was called by the next-of-kin. A jury having found that the will was duly executed, the Court decreed probate, but refused to make any order as to costs. *Ferrey* v. *King*, 31 Law J. Rep. (N.S.) Prob. M. & A. 120.

The widow of a deceased propounded a will, by which she was appointed sole executrix and universal legatee. One of the next-of-kin opposed on the ground *(inter alia)* of incapacity, and upon that issue the Court pronounced against the will, but, under the special circumstances of the case, declined to condemn the widow in costs:—Held, that the next-of-kin, although not entitled to administration, was entitled to his costs out of the estate. *Critchell* v. *Critchell*, 32 Law J. Rep. (N.S.) Prob. M. & A. 108; 3 Swab. & T. 41.

The omission to annex or to mention in the affidavit of scripts the instructions for a will is no ground for allowing out of the estate the costs of an unsuccessful opposition to the will, if such opposition is not founded on the absence of instructions. *Foxwell* v. *Poole*, 32 Law J. Rep. (N.S.) Prob. M. & A. 8; 3 Swab. & T. 5.

The next-of-kin pleaded in opposition to a will, first, undue execution; secondly, incapacity; thirdly, undue influence; fourthly, not the will of the deceased; and at the trial called witnesses in support of the pleas, but failed upon all the issues, and the will was pronounced for. The Court being of opinion that the improper conduct of the residuary legatee had given the next-of-kin reasonable ground for contesting the will, ordered that their costs should be paid out of the estate. *Mitchell* v. *Gard*, 32 Law J. Rep. (N.S.) Prob. M. & A. 7; 3 Swab. & T. 275.

Where next-of-kin unsuccessfully oppose a will on the ground of undue execution and incapacity, if there is reasonable ground for their opposition, they will not be condemned in costs, even though they call witnesses in support of their plea. *Summerell* v. *Clements*, 32 Law J. Rep. (N.S.) Prob. M. & A. 33; 3 Swab. & T. 35.

An attachment will not be granted against a married woman for disobedience of an order for payment of costs, if she has no separate property. But the onus of establishing that fact lies upon her; and if she does not appear upon a motion for an attachment of which she has had notice, the Court will grant the attachment. *Parker* v. *Hick*, 33 Law J. Rep. (N.S.) Prob. M. & A. 154; 3 Swab. & T. 436.

The unsuccessful opponent of a will will not be condemned in costs if there was reasonable ground for his disputing the will, but he will not be entitled to his costs out of the estate unless the litigation was justified by the act of the testator or by the misconduct of the person out of whose pocket such costs would come, if paid out of the estate. *Williams* v. *Henry*, 33 Law J. Rep. (N.S.) Prob. M. & A. 110; 3 Swab. & T. 471.

A next-of-kin who unsuccessfully applied for revocation of the probate of a will was condemned in costs, although there was strong evidence of the incapacity of the testator, on the ground that he had allowed an unreasonable time to elapse between the death of the testator and the institution of the suit, and had charged the widow of the testator and the drawer of the will with conspiring to obtain the will when the testator was incompetent. *Clayton* v. *Davis*, 33 Law J. Rep. (N.S.) Prob. M. & A. 28; 3 Swab. & T. 290.

Where a will was propounded by a married woman, and her husband had not been joined with her as a party to the suit, the Court having pronounced against the will, condemned the wife in the costs. *Clarkson* v. *Waterhouse*, 2 Swab. & T. 378.

Where the issues raised in a suit for proving a will in solemn form have been directed to be tried by the Judge of a County Court, and are found by him against the will, upon a certified copy of his decree being filed in the Principal Registry, the Judge of the Court of Probate will pronounce against the will, and decide any questions as to costs. *Thomas* v. *Crowther*, 2 Swab. & T. 501.

Where an order has been made for payment of costs, the Court will not grant an attachment for non-payment of them without an affidavit of personal service of the original order on the party to be attached. Ibid.

### (L) Probate Duty.

Probate duty is payable in respect of the purchase-money of real estate on a contract for its purchase, made before, but completed after, the death of the testator. *The Attorney General* v. *Brunning* (House of Lords), 30 Law J. Rep. (N.S.) Exch. 379; 8 H.L. Cas. 243.

By the 5 & 6 Vict. c. 79. s. 23. (which is in substance a re-enactment of the 55 Geo. 3. c. 184. s. 51.) the Commissioners of Stamps and Taxes are required to return a proportion of probate or administration duty when an executor or administrator proves that he has "paid debts due and owing from the deceased and payable by law out of his or her personal or movable estate":—Held, that the expression "debts payable by law out of personal estate" means such debts as in themselves, and in their own nature and character, are payable out of the personal estate, and has no relation to any provision a testator may make in his will for their payment. Therefore, where a testator devised his real and personal estate to trustees and executors, upon trust for sale, and out of the moneys arising therefrom to pay his debts and legacies and invest the residue, and the debts were afterwards paid out of the personal estate, the real estate remaining unsold,—it was held that the executors were entitled to a return of probate duty. *Percival* v. *the Queen*, 33 Law J. Rep. (N.S. Exch. 289; 3 Hurls. & C. 217.

S having died intestate, M, the solicitor to the Treasury, on behalf of the Crown, took out administration to the effects. Isabel, S's sole next-of-kin, died intestate in 1823. Ellis, the husband of Isabel, died intestate in 1830. Their children proved their title to S's property, and P, by their authority and for their use, took out administration, at the same time, in January 1855, both to Isabel and to Ellis's estates. The Court of Chancery charged M with interest on S's money in his hands:—Held, by the Court of Exchequer Chamber, that probate duty was payable in respect of S's property as part of Isabel's estate, and also as part of Ellis's estate, and that the accretions by way of interest up to the time of taking out administration were to be added to the principal sum in calculating the amount on which probate duty was payable. *The Attorney General* v. *Partington* (Ex. Ch.), 33 Law J. Rep. (N.S.) Exch. 281; 3 Hurls. & C. 193; and in the Court below, 1 Hurls. & C. 457.

## WITNESS.

[See EVIDENCE.]

(A) COMPETENCY.
(B) PRIVILEGE OF NOT ANSWERING.
(C) DEPOSITION OF PARTY, UNDER 1 WILL. 4. c. 22.
(D) COMMISSION TO EXAMINE.
(E) COMPELLING ATTENDANCE OF.

### (A) COMPETENCY.

Upon a proceeding under 9 Geo. 4. c. 61. s. 21. against an alehouse-keeper, &c., for unlawfully and knowingly permitting divers persons of notoriously bad character to assemble and meet together in his house and premises against the tenor of his licence, such alehouse-keeper is not a competent witness, and cannot give evidence in his own behalf. *Parker* v. *Green*, 31 Law J. Rep. (N.S.) M.C. 133; 2 Best & S. 299.

A witness, a party in the cause, about to be sworn, was objected to on the ground of want of religious belief. The Judge caused her to be sworn on the *voir dire*, and she was examined by the opposing counsel, and stated that she did not believe in the obligation of an oath any more than in that of her word, nor did she believe in a future state of rewards and punishments; but that she was morally bound, by the solemn declaration she had taken, to speak the truth. The Judge thereupon refused to admit her to be examined in the cause:—Held, that the witness was properly rejected; that there was nothing irregular in the course pursued; and that the witness being sworn on the *voir dire* did not prevent her subsequent rejection. *Maden* v. *Catanach*, 31 Law J. Rep. (N.S.) Exch. 118; 7 Hurls. & N. 360.

Upon the hearing of an information, under 5 Geo. 4. c. 83. s. 3, against a man for neglecting to maintain his wife, whereby she becomes chargeable, the wife is not a competent witness against her husband. *Reeve* v. *Wood*, 34 Law J. Rep. (N.S.) M.C. 15; 5 Best & S. 364.

### (B) PRIVILEGE OF NOT ANSWERING.

In order to entitle a witness to the privilege of not answering a question, as tending to criminate him, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. But, if the fact of the witness being in danger be at once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, and not a danger of an imaginary character, having reference to some barely possible contingency. *R.* v. *Boyes*, 30 Law J. Rep. (N.S.) Q.B. 301; 1 Best & S. 311.

On the trial of an information, laid by the Attorney General by order of the House of Commons, against the defendant, for bribery at a parliamentary election, a person, to whom it was charged that the defendant had given a bribe, was called as a witness, and refused to answer any question connected with the defendant, on the ground that the answer would tend to criminate him; a pardon under the Great Seal was then handed to the witness, but he still refused to answer, on which the presiding Judge compelled him to answer, and on his evidence the defendant was convicted:—Held, that the pardon took away the privilege of the witness so far as any risk of prosecution at the suit of the Crown was concerned; and that, though the witness might still be liable to an impeachment by the House of Commons notwithstanding the pardon, by reason of the 12 & 13 Will. 3. c. 2, an impeachment was so unlikely that the witness could not be said to be in any real danger, and he was rightly compelled to answer. Ibid.

### (C) DEPOSITION OF PARTY, UNDER 1 WILL. 4. c. 22.

If a plaintiff seeks to have his deposition taken as a witness on his own behalf, under 1 Will. 4. c. 22, on the ground that he is about to leave the country, he must himself make an affidavit that the application is *bona fide*, and that the voyage he is about to take is one of necessity; and he must also give security for costs. *Fischer* v. *Hahn*, 32 Law J. Rep. (N.S.) C.P. 209; 13 Com. B. Rep. N.S. 659.

An order to examine a witness under the 1 Will. 4. c. 22. may be made before the defendant has entered an appearance. Ibid.

### (D) COMMISSION TO EXAMINE.

In an action of slander, the defendant having obtained an order for the examination of two witnesses (whose names were given) in Australia,—the Court, upon a motion to rescind the order, imposed as a term that the defendant should state what it was that he expected the witnesses to prove. *Barry* v. *Barclay*, 15 Com. B. Rep. N.S. 849.

### (E) COMPELLING ATTENDANCE OF.

The 17 & 18 Vict. c. 34. is not available to compel the attendance of a person in Ireland as a witness before one of the Masters of this Court upon a compulsory reference under the Common Law

Procedure Act, 1854. *O'Flanagan* v. *Geoghegan*, 16 Com. B. Rep. N.S. 636.

## WORK AND LABOUR.

A contract to make a set of artificial teeth to fit the mouth of the employer is a contract for the sale of a chattel, and therefore within the 17th section of the Statute of Frauds (29 Car. 2. c. 3); and a count for work, labour, and materials is not sustainable. *Lee* v. *Griffin*, 30 Law J. Rep. (N.S.) Q.B. 252 ; 1 Best & S. 272.

The defendant employed the plaintiffs to find a purchaser or mortgagee of an estate. Thereupon the plaintiffs went down to the estate, valued it, put it in their books, advertised it in their circulars and in newspapers, and took some journeys, and had communications about it, and ultimately, while negotiating with one N upon the matter, the plaintiffs and the defendant agreed that a letter should be written by the plaintiffs to N, and that if such letter induced N to become purchaser or mortgagee the plaintiffs should be paid 100*l*. N ultimately became mortgagee, but denied that he was influenced in any way by the letter:—Held, that the plaintiffs could not recover on a *quantum meruit* on the common counts for work and labour, &c., with particulars claiming commission as agreed. *Semble*—That they could not recover at all. *Green* v. *Mules*, 30 Law J. Rep. (N.S.) C.P. 343.

## WORKS AND PUBLIC BUILDINGS.

The Commissioners of Works and Public Buildings took certain lands vested in charity trustees, and by reason of difficulties in the title paid the purchase-money into court, and it was subsequently reinvested in the purchase of other lands under an order made for that purpose, and the costs were ordered to be paid according to the act:—Held, upon the construction of the 49th section of the 9 & 10 Vict. c. 39, that the costs to be paid by the Commissioners were the costs of the original purchase and of the re-investment in other lands. *Ex parte the Vicar and Churchwardens of St. Sepulchre's, in re the Westminster Bridge Act*, 1859, 32 Law J. Rep. (N.S.) Chanc. 463.

# ADDENDA.

*The following Cases have been accidentally omitted under their respective titles.*

## ACTION.

### *Notice of Action.*

The 33rd section of the 24 & 25 Vict. c. 99. (the Act for Consolidating the Law against Offences relating to the Coin) requires a month's notice of action to be given before bringing an action against any person for anything done in pursuance of that act. The defendant gave the plaintiff into custody on the charge of uttering counterfeit coin, which by section 31. of that statute it was lawful for the defendant to have done, provided the plaintiff had been found committing such offence:—Held, that the defendant was entitled under the statute to notice of action, if he honestly intended to put the law in force, and really believed that the plaintiff had committed the offence with which he charged him, although there was no reasonable cause for such belief. *Hermann* v. *Seneschal*, 32 Law J. Rep. (N.S.) C.P. 43; 13 Com. B. Rep. N.S. 392.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

### *Conditional Acceptance.*

An acceptance in the following form: "Accepted, payable on giving up bill of lading for 76 bags of clover-seed, per Amazon, at the L and W Bank," is a conditional acceptance as against the acceptor, binding the holder of the bill, upon presenting it for payment, to give up the bill of lading, but not binding him to present on the very day the bill falls due. *Smith* v. *Vertue*, 30 Law J. Rep. (N.S.) C.P. 56; 9 Com. B. Rep. N.S. 214.

### *Consideration.*

A promissory note given in consideration of the payee's forbearing to prosecute a charge against the maker, of obtaining money by false pretences, is illegal, and cannot be enforced. *Clubb* v. *Hutson*, 18 Com. B. Rep. N.S. 414.

### *Liability of Indorser of Bill payable abroad.*

The amount for which the indorser of a bill, drawn and indorsed in England and payable abroad, is liable, in case of dishonour by non-payment, is only the re-exchange (that is, the value of the foreign coin expressed in English money at the rate of exchange on the day of dishonour), with interest and expenses, and the holder has not the option of recovering from such indorser either the sum which he gave for the bill in England or the re-exchange. *Suse* v. *Pompe*, 31 Law J. Rep. (N.S.) C.P. 75; 8 Com. B. Rep. N.S. 538.

Evidence of a custom among merchants, entitling the holder to such option, being inconsistent with the obligation of the indorser, which is so implied in the bill, cannot be admitted. Ibid.

## COMPANY.

[The incorporation, regulation, and winding-up of trading companies and other associations, provided for by the "The Companies' Act, 1862," 25 & 26 Vict. c. 89.—Joint-stock companies carrying on business in foreign countries enabled to have official seals to be used in such countries, by 27 Vict. c. 19.]

### *Joint-Stock Company.*

While half the call on the original allotment of shares in a joint-stock company, limited, was due and unpaid, R, a shareholder, executed a transfer of his shares, but the company refused to register it. He then paid the half-call due, and again tendered the transfer to be registered. The directors again refused to receive it, and the secretary informed R that some days before he had so paid the half-call, the directors had made a fresh call, payable on a day named a few months after, but he did not state at what place or to whom the call was to be paid. By the deed of association of the company it was provided, that a call should be deemed to be made when the resolution of the board of directors authorizing such call should be passed; and notice was to be given to shareholders of the time and place of payment, and of the persons to whom a call was to be paid; and, further, that the directors might decline to register any transfer of shares made by any shareholder who was indebted to them:—Held, that, after the half-call had been paid, it was the duty of the directors to have registered the transfer, and that the new call made by them did not, under the circumstances of the case, make R indebted to the company, so as to justify their continued refusal to enter the transferee's name on the register as the holder of

the shares. *R.* v. *the Inns of Court Hotel Co.*, 32 Law J. Rep. (N.S.) Q.B. 369.

Where, upon the voluntary winding-up of a joint-stock company, registered, with limited liability, under the 19 & 20 Vict. c. 47, the liquidators sue a contributory of the company for calls, he may, under the 17th section of the 21 & 22 Vict. c. 60, plead as set-off a debt due to him from the company. *The Garnett and Moseley Gold-Mining Co.* v. *Sutton*, 32 Law J. Rep. (N.S.) Q.B. 47; 3 Best & S. 321.

If a joint-stock company, registered under the statute 7 & 8 Vict. c. 110, while it is in debt obtains registration as a company with limited liability under the statute 19 & 20 Vict. c. 47, and proceedings are afterwards taken to wind it up, the liquidators appointed under the last-mentioned act may make a call upon the old shareholders for a sum per share exceeding the amount of the sum remaining unpaid on such share, and for any sums per share that may be requisite to discharge the old debts. *The Garnett and Moseley Mining Co.* v. *Sutton* (Ex. Ch.), 34 Law J. Rep. (N.S.) Q.B. 118; 6 Best & S. 326, 327.

## DIVORCE.

### *Nullity of Marriage.*

Delay in instituting a suit for nullity of marriage on the ground of impotence is not an absolute bar to the suit, but renders it necessary that the evidence to support the suit should be of the clearest and most satisfactory kind. Where, therefore, a woman who had married in 1834, lived with her husband till 1838, then separated from him, in 1853 caused him to be sued for her debts, obtained from him an allowance, which was continued till October, 1858, and in November, 1858, instituted a suit for nullity of marriage on the ground of impotence, it was held, that she was bound to give unequivocal proof of the truth of the allegation in the petition, and the Lords not being satisfied that the evidence was of that character, the decree of the Court below, dismissing the petition, was confirmed. *Castleden* v. *Castleden*, 9 H.L. Cas. 186.

## DOWER.

### *Forfeiture of.*

The wife forfeits her claim to dower by adultery although she was forced to leave her husband by reason of his cruelty to such an extent as to make cohabitation with him unsafe, and to entitle her to judicial separation; and although she was always ready to return to him but for such cruelty. *Woodward* v. *Dowse*, 31 Law J. Rep. (N.S.) C.P. 70; 10 Com. B. Rep. N.S. 722.

## EVIDENCE.

### *Damages.*

The defendants contracted, in writing, with the plaintiff, to make and deliver 7,000 knapsack slings, at 3*s.* 9*d.* a set, to be delivered in certain quantities every month. The agreed price having been paid to the defendants, but the slings not having been delivered in time, the plaintiff brought an action for the breach of contract:—Held (*Martin, B., dissenting*), that evidence for the plaintiff was inadmissible to shew that part of the agreed price was given in consideration of the delivery within the specified times, and that the market price was 2*s.* 10*d.* a set. *Brady* v. *Oastler*, 33 Law J. Rep. (N.S.) Exch. 300; 3 Hurls. & C. 112.

## FRAUDS, STATUTE OF.

### *Promise to Answer for Debt or Default of another.*

The daughter of the defendant had been committed for trial on a charge of misdemeanor. At the request of the defendant, the plaintiff became bail for her appearance, the defendant having previously promised to indemnify him against all liability in respect of so becoming bail, and from all costs, damages and expenses in respect of the same. The defendant's daughter did not appear to take her trial, and the plaintiff was consequently put to certain expenses, as well as having his recognizances estreated:—Held, upon the authority of *Green* v. *Cresswell*, that the case was one within section 4. of 29 Car. 2. c. 3. (the Statute of Frauds), and therefore that the plaintiff could not recover in an action against the defendant, inasmuch as there was no agreement in writing, or any note or memorandum thereof. *Cripps* v. *Hartnoll*, 31 Law J. Rep. (N.S.) Q.B. 150; 2 Best & S. 697.

*Quære*—Whether to bring a case within the section, the debt or default must be towards the promisee. Ibid.

Where B promised verbally to indemnify A against all liability, if A would become bail for the appearance of C to answer a charge of misdemeanor, and A in consequence became bail for C; the agreement need not be in writing under the Statute of Frauds, as the promise was a mere promise to indemnify, and not a promise to answer for the debt or default of another, since no debt or legal duty was owing from C to A in consequence of his having become bail. *Cripps* v. *Hartnoll* (Ex. Ch.), 32 Law J. Rep. (N.S.) Q.B. 381; 4 Best & S. 414.

M having obtained in a county court a warrant of commitment against H in default of payment of the sum of 34*l.*, H was arrested upon this warrant by the plaintiff. M at the same time gave instructions to the plaintiff to release H on payment of 17*l.* The defendant thereupon verbally promised the plaintiff, that if he would release H, he would pay him 17*l.* or re-deliver H into his custody on the following Saturday. The plaintiff accordingly released H, but the defendant neither paid the 17*l.* nor re-delivered H in accordance with his undertaking:—Held, that for this default the plaintiff might recover, for that the promise was not one "to answer for the debt, default or miscarriage of another person" within the meaning of the 4th section of the Statute of Frauds. *Reader* v. *Kingham*, 32 Law J. Rep. (N.S.) C.P. 108; 13 Com. B. Rep. N.S. 344.

### *Memorandum in Writing.*

The purchaser of goods wrote a letter to the seller, in which, after referring to all the essential terms of the contract, he stated that he had never received and had declined to have the goods, because they had been damaged by the carrier before they

reached him :—Held, that the letter, notwithstanding it contained a repudiation, was a sufficient memorandum of the contract to satisfy the 17th section of the Statute of Frauds. *Bailey* v. *Sweeting*, 30 Law J. Rep. (N.S.) C.P. 150; 9 Com. B. Rep. N.S. 843.

## INSURANCE.

A policy of insurance against death or injury by accident, declared that the capital, &c., of the company should be deemed liable to make payment of such sum by way of compensation as should appear just and reasonable, and in proportion to the injury received, such sum to be ascertained, in case of difference, in the manner provided by the conditions indorsed upon the policy, provided that the said policy and the insurance thereby made should be subject to the several regulations and conditions printed on the back thereof, &c., in the same manner as if such regulations and conditions were repeated and incorporated in the said policy. (The second condition was to the effect that in case of difference of opinion as to the amount of compensation, the question should be referred to the arbitration of &c. The fifth was, that before payment of the sum insured proof satisfactory to the directors should be furnished of the death, &c. The sixth was, that every policy granted by the defendants was granted upon the terms and conditions in the deed of settlement upon which the company was formed.) The deed of settlement provided that, before payment of the sum insured, proof satisfactory to the directors should be furnished, together with such further evidence, if any, as the directors should think necessary to establish the claim:—Held, that a reference to arbitration in the manner prescribed was a condition precedent to bringing an action on the policy. Held also, that the further evidence spoken of in the deed of settlement must mean such evidence as the directors might *reasonably*, and not such as they might capriciously, require. *Braunstein* v. *the Accidental Death Insur. Co.*, 31 Law J. Rep. (N.S.) 17; 1 Best & S. 782.

## LANDLORD AND TENANT.

A landlord by distraining for rent affirms the continuance of the tenancy up to the day when the rent so distrained for became due. *Cotesworth* v. *Spokes*, 30 Law J. Rep. (N.S.) C.P. 220; 10 Com. B. Rep. N.S. 103.

A tenant, under a lease at a yearly rent of 80*l.*, payable quarterly, with a clause for re-entry if the rent should be in arrear for twenty-one days, was in arrear 60*l.* for three quarters at Michaelmas; for these arrears his landlord, on the 2nd of October, took a distress, which, on the 16th of October, realized 27*l.* 6*s.*, leaving due 32*l.* 14*s.*, there being no sufficient distress upon the premises. On the 2nd of November the landlord (under the Common Law Procedure Act, 1852, s. 210.) served a writ of ejectment:—Held, that the landlord had affirmed the continuance of the tenancy up to Michaelmas, and that as half a year's rent was not in arrear at the time the writ was served, he could not recover. Ibid.

## LIMITATIONS, STATUTE OF.

A being in possession of a house and land as tenant at will, was told by the landlord that he must go out. Upon his refusing to do so, a writ of ejectment was served upon him, but he subsequently obtained verbal permission to retain the house and a portion of the land for the life of himself and his wife:—Held, that, inasmuch as what had been done amounted to an actual entry, and as a new tenancy at will was created, the period of twenty-one years was to be reckoned from that time, and not from the original creation of the tenancy at will. *Locke* v. *Matthews*, 32 Law J. Rep. (N.S.) C.P. 98; 13 Co . B. Rep. N.S. 753.

## NAVAL STORES.

Under section 18. of 39 & 40 Geo. 3. c. 89, a person convicted of having in his possession Naval or Ordnance stores marked in the manner specified in the act, may be sentenced to imprisonment with hard labour, without the infliction of a fine. *Ex parte Willmott*, 30 Law J. Rep. (N.S.) M.C. 161.

*Semble*—That, by section 21, an appeal lies to the Quarter Sessions against such a conviction; but held that where an offender has been committed to prison for such an offence, and subsequently enters into a recognizance to prosecute his appeal, this Court will not discharge him from custody, as the appeal, while pending, does not operate as a suspension of the execution. Ibid.

# TABLE OF CASES

REFERRED TO IN THE PRECEDING

## ANALYTICAL DIGESTED INDEX.

## 1860—1865.

[*In the following Table the asterisk* (*) *signifies that the case occurs twice in the same page.*]

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